CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

C.A. No.: 500-09-029521-218
S.C.M. No.: 500-06-001075-205

COURT OF APPEAL

BARRY NASHEN, domiciled at

APPELLANT – Applicant

v.

STATION MONT TREMBLANT SOCIÉTÉ EN COMMANDITE, legal person having its head office at 1000, chemin des Voyageurs, Mont-Tremblant, District of Terrebonne, Province of Quebec, J8E 1T1

and

ALTERRA MOUNTAIN COMPANY, legal person having its head office at 3501 Wazee Street, Denver, Colorado, 80216, U.S.A

RESPONDENTS – Defendants

NOTICE OF APPEAL
(Article 352 C.C.P.)
Appellant
Dated May 21, 2021

1. The Appellant appeals from a judgment of the Superior Court, District of Montreal, rendered by the Honourable Chantal Corriveau (the "Judge *a Quo*") on April 19, 2021 (the "Judgment *a Quo*"), which is attached hereto as **Schedule 1**, together with the *Avis de Jugement* dated April 23, 2021;

2. In his *Amended Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff* (the "Application"), the Appellant alleged that the "Tonik Pass" he purchased for the 2019-2020 ski year came with a calendar (filed in first instance as Exhibit P-4, hereinafter the "**Calendar**") and that this Calendar formed part of his contract with the Respondents. Accordingly, the Respondents had a contractual obligation to give him access to the ski hills on the specific dates indicated in said Calendar;

3. It is not contested that, as a result of the pandemic, the Mont-Tremblant resort was shut down as of March 15, 2020 and that the Respondents could not give its customers access to their resort for the remainder of the 2019-2020 Calendar, due to no fault of their own;

4. However, the Appellant alleged and argued that he is entitled to a reduction of his obligations pursuant to s. 272(c) of the *Consumer Protection Act* (the "C.P.A.") because the Respondents did not fully perform the service stipulated in the contract for the remaining 27 "fixed days" indicated in the Calendar as of the premature closure. The Appellant submits that by not partially refunding consumers, the Respondents did not comply with sections 16 and 40-42 C.P.A.;

5. Given that section 16 C.P.A. is a no-fault regime and that the C.P.A. is imperative and of public order, the Appellant did not have to prove the Respondents' fault in order for them to incur liability. The Respondents are liable because the performance did not conform to the terms of the contract, including the dates advertised in the Calendar;

6. The Judge *a Quo* did not agree and dismissed the Appellant's Application, finding that article 575(2) C.C.P. was not satisfied. The Judge *a Quo* concluded that the 3 other criteria of article 575 C.C.P. were met;

7. The Appellant respectfully submits that the Judge *a Quo* erred in her analysis, notably of sections 16 and 41 C.P.A.;

8. The main legal issues raised in this appeal are about restitution and the application of public order provisions of the C.P.A., and more precisely whether the Respondents owe a partial refund to all consumers who purchased the Tonik Pass and who did not receive access to the resort during specific dates from March 15 to April 19, 2020, despite the Respondents expressly undertaking to give access to give access "*en tout temps durant la saison 2019-2020*", as declared in the Calendar;

9. Essentially, the Appellant's position is that the Respondents cannot be paid for the unexecuted portion of the contract, regardless of fault.

I. <u>Facts and Proceedings</u>

10. On April 16, 2019, the Appellant purchased the 2019-2020 Tonik Pass from the Respondents for $567.25 inclusive of taxes (Exhibit P-6);

11. The Respondents advertised the 2019-2020 Tonik Pass as providing skiers with

113 “fixed days” on the snow “to *be used anytime during the season*” (the Appellant filed a screen capture of the www.tremblant.ca website from December 21, 2019 containing these declarations as Exhibit P-7). The Appellant also filed as Exhibit-2 promotional materials on the Respondents’ website where they advertise that Mont-Tremblant has “1164 snowguns”, which confirms that the Respondents supplement natural snow with artificial snow when necessary and that their resort will be accessible in the months of March and April;

12. The Appellant alleged that he purchased this specific Tonik Pass because it offered these “fixed days” for skiing and because some of the best skiing is often in the months of March and April (the Appellant alleged that he is aware of this because he has been skiing at Mont-Tremblant for the past 20 years). The Appellant further alleged that this year, in particular, he intended on skiing twice a week - or more - during the Spring skiing season (March and April 2020), due to the fact that he went into semi-retirement after selling 80% of his business effective February 1, 2020. He wanted to use some of his extra free time to ski at Mont-Tremblant;

13. When he purchased his Tonik Pass, the Respondents also provided the Appellant with the Calendar showing that the Tonik Pass actually offers 119 “fixed days” (see Exhibit P-4: *Passe Tonik Calendrier 2019-2020*);

14. Additionally, on December 22, 2019, the Appellant paid the Respondents $93.55 to purchase the “*Tonik Forfait de privilèges*” (in English the “*Privilege Bundle*”), which is an exclusive offer to Tonik Pass holders (it is an “add-on” to the Tonik Pass) which includes certain pre-paid items added to his Tonik Pass, such as 20 coffees or hot chocolates valid at certain Mont-Tremblant cafeterias;

15. As of March 15, 2020, the Respondents were no longer able to provide the Appellant with access to their resort on the specific days included in the Calendar. As of this date, there were 27 “fixed days” remaining on the Tonik Pass Calendar, days which the Appellant prepaid for but was unable to use;

16. Also, as of March 15, 2020, the Appellant had only used 7 of the 20 coffees or hot chocolates he had prepaid for with his purchase of the “*Tonik Forfait de privilèges*” (Exhibit P-9);

17. Prior to instituting proceedings, the Appellant attempted to request restitution or at least a partial reimbursement from the Respondents in the amount of $128.71

(representing 22.69% of the 119 “fixed days”), but the Respondents refused. Instead of restitution or a partial reimbursement, the Respondents offered certain Tonik Pass holders a credit of $50.00 towards a purchase of the 2020-2021 Tonik Pass, but only if they purchased the pass before a specific date. For the Appellant, this offer was inadequate and not what is provided for by law;

18. The Appellant also requested a refund of the unused portion of the “*Tonik Forfait de privilèges*” add-on, but the Respondents refused to reimburse him. The Respondents would later extend the unused portion to the 2020-2021 ski season;

19. On June 8, 2020, the Appellant filed his original Application, and then filed an amended Application on September 18, 2020. His Application is supported by 14 exhibits filed in first instance. For the most part, the facts giving rise to his cause of action are not contested. The hearing in first instance lasted half a day (March 23, 2021);

20. The Respondents filed two affidavits and certain documents as relevant evidence, which the Appellant consented to. Neither party was examined;

II. Errors of law

A. The Judge *a Quo* erred in interpreting and applying ss. 16 and 40-42 C.P.A

21. The Appellant is entitled to a reduction of his obligations pursuant to s. 272(c) C.P.A. because the Respondents did not perform the service stipulated in the contract for the remaining 27 “fixed days” as of the early closure on March 15, 2020. The Appellant submits that by not partially refunding consumers, the Respondents did not comply with sections 16 and 40-42 C.P.A. which stipulate:

16. The principal obligation of the merchant is to deliver the goods or to perform the service stipulated in the contract. In a contract involving sequential fulfilment, the merchant is presumed to be performing his principal obligation when he begins to perform it in accordance with the contract.	**16.** L’obligation principale du commerçant consiste dans la livraison du bien ou la prestation du service prévus dans le contrat. Dans un contrat à exécution successive, le commerçant est présumé exécuter son obligation principale lorsqu’il commence à accomplir cette obligation conformément au contrat.
40. The goods or services provided must conform to the description made of them in the contract.	**40.** Un bien ou un service fourni doit être conforme à la description qui en est faite dans le contrat.

41. The goods or services provided must conform to the statements or advertisements regarding them made by the merchant or the manufacturer. The statements or advertisements are binding on that merchant or that manufacturer.	**41.** Un bien ou un service fourni doit être conforme à une déclaration ou à un message publicitaire faits à son sujet par le commerçant ou le fabricant. Une déclaration ou un message publicitaire lie ce commerçant ou ce fabricant.
42. A written or verbal statement by the representative of a merchant or of a manufacturer respecting goods or services is binding on that merchant or manufacturer.	**42.** Une déclaration écrite ou verbale faite par le représentant d'un commerçant ou d'un fabricant à propos d'un bien ou d'un service lie ce commerçant ou ce fabricant.

22. It is worth reproducing the following paragraphs of the Application which cite the Respondents' declarations in dispute:

> 6. For the 2020-2021 version of the Tonik Pass, the Defendants advertise and sell the Tonik Pass by providing skiers with a calendar and promising them "117 fixed days on the snow" (in French: "*117 jours de glisse fixes et 3 jours flottants* ***pour utilisation en tout temps****, même durant la période des fêtes*"), Exhibit P-3;
>
> 7. For the 2019-2020 version of the Tonik Pass, the Defendants advertised and sold the Tonik Pass as including "113 fixed days on the snow" and provided the Applicant and Class members with the 2019-2020 calendar showing 119 "fixed days", Applicant disclosing the calendar as **Exhibit P-4**;

23. There can be no doubt that the Respondents undertook to provide access for the days listed in the Calendar "*en tout temps*", which, as a consequence of their declarations, can only be qualified as an obligation of result. During the authorization hearing, there was a debate as to the intensity of the Respondents' obligation, which is not addressed in the Judgment *a Quo*. The Appellant's position is that giving consumers access to the resort on the specific days identified in the Tonik Pass Calendar is an obligation of result;

24. The Judge *a Quo* analysed the Appellant's cause of action (paras. 56-80) and concluded that the Respondents did not violate sections 16 or 40-42 C.P.A. Her judgment is not supported by any jurisprudence or doctrine concerning these provisions;

25. Instead, the Judge *a Quo* accepted the Respondents' argument that the only way for consumers to be reimbursed – even in the case of non-performance of services – is if they had paid an extra premium for insurance (para. 61);

26. It is respectfully submitted that the Judge *a Quo*'s analysis of these provisions was simply incorrect and not compatible with the spirit of the C.P.A. It is also contrary to the well-established jurisprudence and doctrine concerning the provisions reproduced above;

27. It appears that the error stems at the beginning of her analysis, where the Judge *a Quo* rejects the notion that the Calendar forms an integral part of the contract:

> [59] Ainsi, la proposition du demandeur qui repose sur une garantie d'accès en produisant un calendrier de jours désignés ne peut être retenue. Le calendrier ne confère pas une garantie d'accès. **De plus, le calendrier ne constitue pas et ne remplace le contrat** de service acquit par M. Nashen. L'argument du demandeur que les défenderesses ont failli à l'obligation de livrer le service tel que prévu dans la publicité du contrat n'est pas soutenable. La violation alléguée de l'article 41 LPC ne peut être retenue.

28. Judges and doctrinal authors have consistently concluded that the statements and advertisements made by merchants are binding as if they were part of the contract. For example, in authorizing a class action against Bell Canada in *Abicidan c. Bell Canada*, 2017 QCCS 1198, Justice Donald Bisson, J.S.C. writes:

> [17] Comme le mentionne la doctrine[1], l'article 41 LPC constitue une garantie de conformité selon laquelle un bien ou **un service fourni par le commerçant doit être conforme à une déclaration** ou à un message publicitaire faits à son sujet; ces déclarations et messages publicitaires engagent le commerçant, **comme s'ils faisaient partie du contrat**.

29. If we apply the legal principle above, it becomes clear that the Judge *a Quo* erred in concluding that "le calendrier ne constitue pas et ne remplace le contrat de service acquit par M. Nashen" (par. 59);

30. Moreover, the Calendar does provide a "garantie d'accès" for the 117 days, which access is precisely what the Appellant paid for and what the Respondents advertised/declared. There is no other logical interpretation that can be given to what the Respondents declare on their Calendar, just beneath the legend showing the days that are included in the Tonik Pass: "*Valide en tout temps durant la saison 2019-2020*";

31. As for section 16 C.P.A., the jurisprudence and the doctrine confirm that it is a "no fault" regime. In *Droit de la consommation*, 6e éd. (p. 412), Nicole L'Heureux writes:

[1] N. L'Heureux et M. Lacoursière, *Droit de la consommation*, 6e édition, Éditions Yvon Blais, 2011, aux pars. 78, 109, 615 et 634.

> … La Loi est impérative et d’ordre public. Le client n’a pas à prouver la faute de l’agent pour engager sa responsabilité. **Il est responsable du seul fait que la prestation n’est pas conforme aux stipulations du contrat**.
>
> [references omitted].

32. Therefore, once the Judge *a Quo* agreed that there was a “non prestation de service par les défenderesses” (para. 74), she could not have exonerated them on the basis that the closure was a result of a government decree or because they complied with regulatory standards:

> [74] La non prestation de service par les défenderesses ne résulte pas d’un abus de droit par lequel on pourrait soutenir que les défenderesses ont choisi de ne pas livrer leur obligation. L’analyse de la légalité de la clause de non responsabilité ne peut donc se faire en vase clos, comme si les défenderesses avaient agi par caprices ou pour faire fi de leurs obligations contractuelles. La fermeture de la Montagne découle directement et entièrement de la crise sanitaire, et des décrets gouvernementaux précités.

33. Section 16 C.P.A. must be analyzed objectively, without considering the reasons for the non-performance or the whether the merchant had good intentions;

34. Once the Judge *a Quo* concluded that the Respondents did not perform certain services, the Appellant had met his burden under section 16 C.P.A. and is entitled to seek one of the remedies provided for in s. 272 (in this case a reduction of his obligation pursuant to para. (c) and punitive damages);

35. Additionally, the Judge *a Quo* erred in law by accepting the Respondents argument that class members are not entitled to a refund just because it says so in the contract:

> [68] Selon le contrat des services offerts, le consommateur était informé qu’il n’y aurait aucun remboursement pour quelques raisons que ce soit.
>
> [69] Ainsi, le demandeur est mal fondé de réclamer une indemnité basée sur l’interruption de la saison de ski avant le 19 avril 2020 puisque le contrat qui lie les parties ne le permet pas.

36. The reasoning above omits to consider sections 261 and 262 C.P.A.:

261. No person may derogate from this Act by private agreement.	**261.** On ne peut déroger à la présente loi par une convention particulière.
262. No consumer may waive the rights granted to him by this Act unless otherwise provided herein.	**262.** À moins qu’il n’en soit prévu autrement dans la présente loi, le consommateur ne peut renoncer à un

	droit que lui confère la présente loi.

37. If the Judgement *a Quo* stands, it will set a dangerous precedent as it enables merchants to keep consumers' money for services paid for but not fully performed, simply by including a clause in the contract to this effect. It would also send the wrong message to consumers that they must purchase insurance to be covered, even when the non-performance was entirely unrelated to the consumer and out of his/her control;

38. Whether or not the Appellant had the option to purchase insurance should have never been considered and the Judge *a Quo* placed too much emphasis on the issue of insurance (paras. 14, 17, 50, 51, 61, 64 and 67);

39. In Quebec, the C.P.A. is the consumer's insurance policy and there is no requirement to purchase insurance for the merchant's non-performance – regardless of the reason – given the wording of section 16 al. 1 C.P.A.;

40. Once it is clear that the Appellant's cause of action based on sections 16 and 41 is serious and defendable, the only question remaining is the remedy. As this Court recently confirmed, whether or not s. 272 CPA applies is demonstrated at trial, not at authorization (*Apple Canada inc. c. Badaoui*, 2021 QCCA 432, par. 59);

41. Here again, the Judge *a Quo* applied too strict a burden and prematurely concluded that the remedy sought by the Appellant was ill-founded: "*Présenter une compensation calculée sur une règle de trois qui prend en compte le nombre de jours où la montagne était fermée (entre le 15 mars et le 19 avril 2020) divisés par 113 pour établir la proportion de remboursement demandé est tout à fait manifestement mal fondée et insoutenable*" (par. 58);

42. It is certainly defendable for the Appellant to request a reduction of his obligations given that, as a result of the health situation, the Defendants could not offer the 27 "fixed days" which they declared were "*Valide en tout temps durant la saison 2019-2020*" and therefore did not comply with sections 40-42 C.P.A.;

43. The Appellant seeks a partial reimbursement in the amount of $149.94 per class member; it is well established that the quantum is a merits issue, as is the claim for punitive damages, that is once a breach of the C.P.A. has been demonstrated;

44. Lastly, the Appellant respectfully submits that it was unfair for the Judge *a Quo* to

reproach him, on several occasions, for not filing the contract (paras. 44, 57, 60), because he never signed the contract and was never given copies of the documents which, in any event, the Respondents filed under art. 574 C.C.P. by consent (i.e. Respondents' Exhibits MT-1 to MT-5);

45. What is more, is that at para. 19 of his Affidavit filed as Exhibit MT-6, Jean-François Gour incorrectly declared that "The Tonik Membership Waiver listed as Exhibit MT-5 is identical to the version that the Applicant signed on December 21, 2017", whereas the Appellant never signed Exhibit MT-5 and denies agreeing to all the terms of documents which he was never given copies of. The Judge *a Quo* addressed this debate at footnote 10 of the Judgment: "Pièce MT-5, le document intitulé : « Mise en garde, acceptation des risques, exonération de responsabilité, renonciation aux réclamations et accord d'indemnisation », accepté par le demandeur selon les défenderesses, pièce MT-4";

46. This Court has, on numerous occasions, emphasized that the evidence filed by a respondent to contest the authorization application does not change the role of the authorizing judge, who may decide a pure question of law and interpret the law to determine whether the proposed class action is frivolous, but who cannot, in order to do so, weigh the evidence as if there had been a contradictory debate, or presume that the evidence filed by the respondent is true when it is contested or merely questionable (*Durand c. Subway Franchise Systems of Canada*, 2020 QCCA 1647, para. 55) – which was precisely the case here.

III. Conclusions

47. For these reasons, may it please the Court to:

I. **ALLOW** the appeal;

II. **SET ASIDE** the judgment in first instance;

III. **GRANT** the Appellant's *Amended Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff* according to its conclusions;

IV. **REFER** the file to the Chief Justice of the Superior Court to determine the district in which the class action should be brought and to designate the judge who will manage the case;

V. **CONDEMN** the Respondents to pay the Appellant the legal costs in first instance and on appeal.

This Notice of Appeal has been notified to **(i)** STATION MONT TREMBLANT SOCIÉTÉ EN COMMANDITE, **(ii)** ALTERRA MOUNTAIN COMPANY, Mtre Anne Merminod and Mtre Karine Chênevert (BORDEN LADNER GERVAIS LLP) and to the Office of the Superior Court of Quebec, District of Montreal.

This May 21, 2021 in Montreal

(s) LPC Avocat Inc.

LPC AVOCAT INC.
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CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

C.A. No.:
S.C.M. No.: 500-06-001075-205

COURT OF APPEAL

BARRY NASHEN, domiciled at 725 Upper Belmont Avenue, Westmount, District of Montreal, Province of Quebec, H3Y 1K1

APPELLANT – Applicant

v.

STATION MONT TREMBLANT SOCIÉTÉ EN COMMANDITE, legal person having its head office at 1000, chemin des Voyageurs, Mont-Tremblant, District of Terrebonne, Province of Quebec, J8E 1T1

and

ALTERRA MOUNTAIN COMPANY, legal person having its head office at 3501 Wazee Street, Denver, Colorado, 80216, U.S.A

RESPONDENTS – Defendants

LIST OF SCHEDULES IN SUPPORT OF NOTICE OF APPEAL
APPELLANT
May 21, 2021

SCHEDULE 1: Notice of Judgment dated April 29, 2021 and Judgment by the Honourable Chantal Corriveau of the Superior Court, District of Montreal, rendered April 19, 2021.

This May 21, 2021 in Montreal

(s) LPC Avocat Inc.

LPC AVOCAT INC.
Per: Me Joey Zukran
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RESPONDENTS – Defendants

<u>NOTICE OF APPEAL</u>
(Article 352 C.C.P.)
Appellant
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ORIGINAL

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Within 10 days after notification, the respondent, the intervenors and the impleaded parties must file a representation statement giving the name and contact information of the lawyer representing them or, if they are not represented, a statement indicating as much. If an application for leave to appeal is attached to the notice of appeal, the intervenors and the impleaded parties are only required to file such a statement within 10 days after the judgment granting leave or after the date the judge takes note of the filing of the notice of appeal. (Article 358, para. 2 C.C.P.).

The parties shall notify their proceedings (including briefs and memoranda) to the appellant and to the other parties who have filed a representation statement by counsel (or a non-representation statement). (Article 25, para. 1 of the Civil Practice Regulation)

If a party fails to file a representation statement by counsel (or non-representation statement), it shall be precluded from filing any other pleading in the file. The appeal shall be conducted in the absence of such party. The Clerk is not obliged to notify any notice to such party. If the statement is filed after the expiry of the time limit, the Clerk may accept the filing subject to conditions that the Clerk may determine.
(Article 30 of the Civil Practice Regulation)