

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000932-182

DATE: July 26, 2021

PRESIDING THE HONOURABLE THOMAS M. DAVIS, J.S.C.

QING WANG

Representative Plaintiff

v.

C.S.T. CONSULTANTS INC.

and

CANADIAN SCHOLARSHIP TRUST FOUNDATION

and

**KALEIDO FOUNDATION (personally and in continuance of proceedings for
UNIVERSITAS FOUNDATION OF CANADA)**

and

**KALEIDO GROWTH INC. (personally and in continuance of proceedings for
UNIVERSITAS MANAGEMENT INC.)**

and

HERITAGE EDUCATION FUNDS INC.

and

HERITAGE EDUCATIONAL FOUNDATION

and

CHILDREN'S EDUCATION FUNDS INC.

and

CHILDREN'S EDUCATIONAL FOUNDATION OF CANADA

and

**KNOWLEDGE FIRST FINANCIAL INC. (personally and in continuance of
proceedings for HERITAGE EDUCATION
FUNDS INC.)**

and
KNOWLEDGE FIRST FOUNDATION
and
GLOBAL RESP CORPORATION
and
GLOBAL EDUCATIONAL TRUST FOUNDATION
Defendants

JUDGMENT

OVERVIEW

[1] The Court must resolve two elements of the present matter following the authorization of the Class Action. The first and most important is the content of the notice to class members under article 579 C.C.P. Defendants posit that the notice should claim the following special wording:

9) AVERTISSEMENT : L'AVOCAT DU GROUPE A VENDU DES REEE

L'avocat du groupe, Me Joey Zukran de LPC Avocats Inc. était représentant des ventes inscrit pour C.S.T. Consultants Inc. entre février 2010 et octobre 2012. À ce titre, il a vendu 121 REEE de C.S.T. à 84 personnes. Cela ne l'empêche pas d'agir dans la présente action collective. Néanmoins, un membre du groupe a le droit de s'opposer à ce qu'il agisse dans le dossier.

9) DISCLAIMER: CLASS COUNSEL SOLD RESP HIMSELF

Class Counsel, Mtre. Joey Zukran of LPC Avocats Inc. was a Registered Sales Representative for C.S.T. Consultants Inc. between February 2010 and October 2012. In that capacity, he sold 121 C.S.T. RESP plans to 84 people. This does not prohibit him for acting in the present class action. Nevertheless, a class member has the right to object to his acting in this file.

[2] Class counsel vehemently opposes this wording being included in the notice, although he does not deny the information that it contains.

[3] Class counsel, in its application for approval of the notices, also requested the following order:

ORDER the Defendants to preserve in digital form all information concerning the Class and Subclass Members in their possession or in the possession of their agents, including, but not limited to, their names and contact information, the plans subscribed to or the plans terminated or paused, as the case may be, and the amount of the enrollment fees paid by Class and Subclass Members, and to send

this information to the Court in a confidential envelope, under seal, within thirty (30) days of the judgment to be rendered herein;

1. **THE NOTICES**

1.1 CONTEXT

[4] On March 31, 2021, Justice Sheehan authorized a class action for the following class:

Class:

All persons residing in Quebec who, at any time since July 19th, 2013, signed a contract with any of the Defendants in which they were a subscriber and/or contributor (either primary or joint) for a Registered Education Savings Plan (“RESP”), and who were charged a fee (referred to as “Enrolment Fee,” “Sales Charge” and/or “Membership Fee”), including the commissions of the distributor and its salesmen, exceeding \$200.00 per plan;

(hereinafter referred to as the “Class”)

Subclass:

All persons residing in Quebec: (1) who at any time since July 19th, 2013, signed a contract with any of the Defendants in which they were a subscriber and/or contributor (either primary or joint) for an RESP; (2) who cancelled their RESP after that date; and (3) lost more than 20% of their contributions on account of Enrolment Fees, Sales Charges or Membership Fees;

(hereinafter referred to as the “Subclass”)

[5] This, however, is not the first similar class action that has been the object of a judgment of this Court. In *Segalovich v. CST Consultants Inc. (CSTI)*,¹ Justice Riordan dismissed the authorization application, being of the view that the Plaintiff’s action was prescribed. The dismissal of the authorization application was maintained by the Court of Appeal;² hence a new authorization application, the one granted by Justice Sheehan.

[6] Prior to deciding on the merits, Justice Riordan had to render judgment on an Application to Disqualify Class Counsel, Mtre Joey Zukran. The principal reason for the disqualification was his previous association with Defendant C.S.T. Consultants Inc. & Canadian Scholarship Trust Foundation, where he had acted as an independent sales representative between February 2010 and October 2012, having sold the number of plans referred to in the proposed wording.

¹ 2018 QCCS 6122.

² *Segalovich c. CST Consultants inc.*, 2019 QCCA 2144.

[7] Justice Riordan dismissed the application, but raised some concerns:

[27] Here, CST is again raising the spectre of the perception of the Class members, and the public in general, with respect to allowing a lawyer to impugn a product that he himself vaunted and sold to Class members several years ago. Admittedly, it is not an ideal situation for Mtre. Zukran.

[28] Without making legal proof of the fact, Mtre. Zukran alleges through his attorney's written argument that "(i)t was only after his legal training at McGill University's Faculty of Law *l'Ecole du Barreau du Quebec* and at that he learned that the enrollment fees charged to Quebec consumers by all of the Defendants' were, as his client (Mr. Segalovich) and he claim, illegal and abusive". That may well be the case, but the fact remains that his past role in the sale of RESP plans for CST could raise an eyebrow or two, particularly among Class members.

[32] Nevertheless, the Court recognizes that there is no guaranty that at some point a number of Class members won't object to his acting in the file but, if that occurs, they will have recourses open to them. Not only could they opt out of the Class, but they also could petition the Court at any point to have Mtre. Zukran removed as counsel. The Court prefers to leave this matter in their hands.³

[8] Those concerns did not suffice to have him remove Mtre Zukran:

[57] Although we earlier held that it is not an impediment to act if counsel has a certain financial interest in the outcome of the case qua class member, any interest, financial or otherwise, must not be such that it could reduce counsel's ability to represent the interest of the class members with the proper objectivity, emotional distance and judgment. It goes without saying, for example, that counsel must not be engaging in a vendetta against the defendant, or be so personally involved that he would be tempted to put his personal interests ahead of those of the class. In short, there must be no conflict between his interests and those of the class members.

[58] This said, the Court sees nothing in the present file at this stage that would bring Mtre. Zukran close to the line. There is no allegation or indication that there is anything personal in the adversarial role he will be playing, or that he might bear a grudge of any sort against CST. It is highly unlikely that his judgment and his ability to negotiate in good faith with CST's counsel would be affected by the fact that he earned commissions in the past from selling its products or that he might be entitled to some compensation if the present file goes his way.

[59] The result is that the Court sees nothing in those "overriding values", that would be an impediment to Mtre. Zukran's continuing to act.

[Underlining in original]

³ 500-06-000803-169, April 18, 2017.

1.2 ISSUES IN DISPUTE

[9] Article 579 C.C.Q. reads:

<p>579. Lorsque l'action collective est autorisée, un avis est publié ou notifié aux membres, indiquant:</p> <p>1° la description du groupe et, le cas échéant, des sous-groupes;</p> <p>2° les principales questions qui seront traitées collectivement et les conclusions recherchées qui s'y rattachent;</p> <p>3° le nom du représentant, les coordonnées de son avocat et le district dans lequel l'action collective sera exercée;</p> <p>4° le droit d'un membre de demander à intervenir à l'action collective;</p> <p>5° le droit d'un membre de s'exclure du groupe, les formalités à suivre et le délai pour s'exclure;</p> <p>6° le fait qu'un membre qui n'est pas un représentant ou un intervenant ne peut être appelé à payer les frais de justice de l'action collective;</p> <p>7° tout autre renseignement que le tribunal juge utile dont, entre autres, l'adresse du site Internet pour accéder au registre central des actions collectives.</p> <p>Le tribunal détermine la date, la forme et le mode de la publication en tenant compte de la nature de l'action, de la composition du groupe et de la situation géographique de ses membres; le cas échéant, l'avis indique, en les désignant nommément ou en les décrivant, ceux des membres qui seront notifiés</p>	<p>579. When a class action is authorized, a notice is published or notified to the class members</p> <p>(1) describing the class and any subclass;</p> <p>(2) setting out the principal issues to be dealt with collectively and the conclusions sought in relation to those issues;</p> <p>(3) stating the representative plaintiff's name, the contact information of the representative plaintiff's lawyer and the district in which the class action is to proceed;</p> <p>(4) stating that class members have the right to seek intervenor status in the class action;</p> <p>(5) stating that class members have the right to opt out of the class and specifying the procedure and time limit for doing so;</p> <p>(6) stating that no class member other than the representative plaintiff or an intervenor may be required to pay legal costs arising from the class action; and</p> <p>(7) providing any additional information the court considers useful, including the address of the website for the central registry of class actions.</p> <p>The court determines the date, form and method of publication of the notice, having regard to the nature of the class action, the composition of the class and the geographical location of its members. The notice identifies, by name or a description, any class members who are</p>
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individuellement. Il peut, s'il l'estime opportun, autoriser la publication d'un avis abrégé.	to receive individual notification. If the court sees fit, it may authorize the publication of an abbreviated notice.
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[10] There is but one question for the Court: Is the information on Mtre Zukran's past association with C.S.T. useful?

[11] This said, Mtre Zukran takes the view that the content of the proposed disclaimer is illegal, as a class member does not have the right to object to class counsel continuing to represent the class.

1.3 ANALYSIS

[12] As the Court has stated, Mtre Zukran posits that the proposed disclaimer is not useful. He adds that the words: "Nevertheless, a class member has the right to object to his acting in this file" do not accurately reflect the state of the law and therefore should not be included in the notice to the members.

[13] With the utmost respect, the Court does not fully agree with the notion proposed by Justice Riordan that a member of the class could petition the Court at any point to have Mtre Zukran removed as counsel. Without first replacing the designated representative of the class, i.e., being substituted for Mr. Wang, at first bluff, this does not appear to be within the purview of an individual class member. This affirmation flows from the judgment of the Court of Appeal in *Société des loteries du Québec c. Brochu*, where the Court stated:

[21] En conclusion, si on ne peut qualifier formellement les membres de parties à l'instance, leur statut de demandeurs en est bien près et il est inexact, soit dit avec égards, de les considérer comme des tiers ou de simples témoins par rapport à l'action collective menée par leur représentant.⁴

[14] In addition, the right of a simple member to intervene in the action is limited by article 586 C.C.P.

[15] This said, the issue can be decided without ruling on the right of a member to ask for Mtre Zukran's removal, because the Court concludes that the information relation to Mtre Zukran's past association with C.S.T. is not useful for the notices at this juncture. The description of the class as determined by Justice Sheehan begins the class period at July 19th, 2013. Mtre Zukran had long since terminated his association with C.S.T. and the evidence in the record does not permit a conclusion that he would be in a potentially conflictual situation with any class members. Only C.S.T. clients who signed a contract on or after July 19th, 2013 are members of the class.

⁴ 2006 QCCA 1117; See also *Masson c. Telus Mobilité*, 2021 QCCA 726, para 18.

[16] Furthermore, if Justice Riordan saw no grounds to disqualify Mtre Zukran in 2017, there is even less reason to draw attention to his previous association to C.S.T. now.

[17] The off-shoot of this determination by the Court is that the proposed notices will be revised to remove the references to Mtre Zukran's past activities on behalf of C.S.T. The Court has made certain other minor changes that it considered appropriate and the approved notices and newspaper advertisements are attached hereto.

[18] The parties propose the method of publication or communication of the notices to Class members, as follows:

- a) by the Defendants sending the abbreviated notice in French (Annex A-1) or in English (Annex A-3) by email to each Class Member to his or her last known email address, containing a hyperlink to the long form notice in French (Annex A-2) or in English (Annex A-4), the choice of language based on their current language of communication, within thirty (30) days of the present judgment; and
- b) by publication of the short form French newspaper notice (Exhibit B-1) on a Saturday, to appear in the first 10 pages of the "NEWS" section of the Journal de Montréal and the Journal de Québec newspapers, covering at least 1/4 page, within thirty (30) days of the present judgment; and
- c) by publication of the short form English newspaper notice (Exhibit B-2) on a Saturday, to appear in the first 10 pages of the "NEWS" section of the Montreal Gazette newspaper, covering at least 1/4 page, within thirty (30) days of the present judgment;

[19] The Court considers that this communication plan is appropriate, save for the fact that it considers a delay of 45 days for the publication and communication of the notices to be more realistic given the time of year and the need for the Defendants to collate certain information.

[20] As to the opt-out deadline, the Court will set it for September 30, 2021, given the delay accorded to the Defendants for the communication of the required email notices and for the publication of the notices the designated newspapers.

2. THE REQUESTED ORDER

[21] Plaintiff relies on the judgment of Justice André Roy in *Union des consommateurs c. Air Canada*, to make this request. Justice Roy stated the following:

[40] Toutefois, il ressort de la demande de l'Union des consommateurs qu'il s'agit de conserver les renseignements demandés aux fins de recouvrement collectif et individuel. Or, nous n'en sommes pas là. Le recours vient à peine d'être autorisé par la Cour d'appel, les avis aux membres n'ont pas été diffusés et les membres qui désireraient s'exclure n'ont pas eu l'occasion de le faire. En ce sens, la demande de l'Union des consommateurs de transmettre ces renseignements

aux procureurs du groupe apparaît prématurée puisque les personnes qui ne voudraient pas être représentées par eux n'ont pas eu l'opportunité d'exprimer cette volonté en s'excluant.

[41] Cela dit, le Tribunal est d'avis que son rôle de protecteur des membres du groupe et l'article 1045 C.p.c. lui accordent des pouvoirs suffisamment larges pour ordonner à Air Canada de conserver sur support informatique et pli confidentiel la totalité des renseignements présentement en sa possession qui concernent les membres du groupe, leurs noms et coordonnées, les titres de transport achetés, le prix payé de même que la ventilation de ce prix et de faire parvenir au Tribunal cette information dans un délai de trente (30) jours du jugement.⁵

[Footnote omitted]

[22] With respect, the Court believes that the approach of Justice Dominique Bélanger, then of this Court, in *Jacques c. Ultramar ltée* is more appropriate given the circumstances of the present matter. She stated:

[26] L'état du droit au Québec serait donc le suivant :

1. Il n'existe aucune obligation explicite de préserver la preuve dans un dossier litigieux, pas plus qu'il n'existe d'obligation de produire à l'adversaire une liste de documents pertinents au litige.
2. L'obligation implicite de préserver la preuve existe et découle d'une obligation générale de bonne foi; en conséquence, cette obligation couvrirait les cas les plus graves de spoliation seulement.
3. La maxime omnia praesumuntur contra spoliatorem (toutes choses sont présumées contre le spoliateur) a trouvé une application fort limitée jusqu'à maintenant.
4. L'obligation implicite de conservation de la preuve, basée sur la bonne foi, a comme conséquence que lorsqu'une partie se départit par erreur ou de bonne foi d'une preuve, aucune inférence négative ne peut en découler.
5. La bonne foi se présume et apporter la preuve de la mauvaise foi constitue un lourd fardeau.
6. La conséquence à la spoliation est une inférence négative et l'inférence négative n'a pas conduit, jusqu'à maintenant, au rejet d'un recours ou d'une défense, après une audition au fond.
7. En l'absence d'une obligation formelle de conserver la preuve et en présence d'une obligation implicite de ce faire, si une personne désire obtenir une ordonnance formelle de conserver la preuve, c'est au moyen d'une ordonnance

⁵ 2015 QCCS 753.

d'injonction ou d'une demande de sauvegarde qu'elle doit procéder et selon les critères spécifiques prévus par ces recours.⁶

[Footnote omitted; underlining in original]

[23] Defendants have a duty of good faith and flowing from that a duty to preserve the evidence in their possession.

[24] The words of Justice Lussier in *DES Studio inc. c. Shuchat* also deserve mention:

[38] Le tribunal peut, au procès, tirer une inférence négative de cette destruction et peut même y trouver une justification pour attribuer des dommages.⁷

[Footnotes omitted]

[25] Hence, it is also in the interest of the Defendants to conserve the evidence in their possession.

[26] Two more things merit brief consideration. Firstly, Plaintiff's application is not supported by a sworn statement, so there are no factual allegations to support his demand that the evidence be preserved and communicated to the Court. The refusal of said application at the present time might be subject to review if Plaintiff was to provide evidence that the preservation of relevant evidence was in jeopardy.

[27] In addition, in the proposed case protocol, the parties have agreed on the following:

July 16, 2020 for the Plaintiff to communicate his final list of documents sought...

September 15, 2021 for the Defendants to communicate the documents to which there is no objection...

Date for hearing to be scheduled on objections, and the Defendants to provide there list and grounds of objections 14 days before the hearing and no later than September 15, 2021...

[28] Given this process, it would not be proportional to require Defendants to assemble and communicate numerous documents to the Court before this adjudication process has been completed.

POUR CES MOTIFS, LE TRIBUNAL : **WHEREFORE, THE COURT:**

⁶ 2011 QCCS 6020.

⁷ 2019 QCCS 3752.

[29] **APPROUVE** la forme et le contenu des avis aux membres, en français et en anglais, joints en annexe A et en annexe B; **APPROVES** the form and content of the notices to members, in French and English, attached hereto as Annex A and Annex B;

[30] **ORDONNE** la publication d'un avis aux membres du groupe, incluant les souscripteurs principaux et les co-souscripteurs, conformément à l'article 579 C.p.c., aux frais des défenderesses, comme suit : **ORDERS** the publication of a notice to the Class Members, including both primary and joint subscribers, in accordance with article 579 C.C.P., at the Defendants' cost, as follows:

a) par l'envoi par les défenderesses de l'avis abrégé en français (annexe A-1) ou en anglais (annexe A-3) par courriel à chaque Membre du Groupe à sa dernière adresse courriel connue, contenant un hyperlien vers l'avis détaillé en français (Annexe A-2) ou en anglais (Annexe A-4), le choix de la langue étant basé sur leur langue de communication actuelle, dans les 45 jours du présent jugement; et a) by the Defendants sending the abbreviated notice in French (Annex A-1) or in English (Annex A-3) by email to each Class Member to his or her last known email address, containing a hyperlink to the long form notice in French (Annex A-2) or in English (Annex A-4), the choice of language based on their current language of communication, within 45 days of the present judgment; and

b) par la publication de l'avis abrégé (annexe B-1) dans un journal français, un samedi, dans les 10 premières pages de la section « NOUVELLES » du Journal de Montréal et du Journal de Québec, couvrant au moins 1/4 de page, dans les 45 jours du présent jugement; et b) by publication of the short form French newspaper notice (Exhibit B-1) on a Saturday, to appear in the first 10 pages of the "NEWS" section of the Journal de Montréal and the Journal de Québec newspapers, covering at least 1/4 page, within 45 days of the present judgment; and

c) par la publication de l'avis abrégé en anglais (annexe B-2), un samedi, dans les 10 premières pages de la section « NEWS » du Montreal Gazette, couvrant au moins 1/4 de page, dans les 45 jours du présent jugement. c) by publication of the short form English newspaper notice (Exhibit B-2) on a Saturday, to appear in the first 10 pages of the "NEWS" section of the Montreal Gazette newspaper, covering at least 1/4 page, within 45 days of the present judgment;

[31] **ORDONNE** aux avocats du groupe d'afficher les avis long et court sur leur site Web bilingue www.lpclex.com/fr/resp jusqu'à ce qu'un jugement final soit rendu **ORDERS** Class Counsel to post the long form and short form notices on its bilingual website www.lpclex.com/resp until a final judgment is rendered in the present file, as

dans le présent dossier, ainsi que sur le Registre des actions collectives du Québec; well as on Quebec's Registry of Class Actions;

[32] **FIXE** le délai d'exclusion au 30 septembre 2021, date à laquelle les membres du groupe qui n'ont pas exercé leurs moyens d'exclusion seront liés par tout jugement à intervenir; **FIXES** the delay of exclusion on September 30, 2021, date upon which the members of the Class that have not exercised their means of exclusion will be bound by any judgment to be rendered herein;

[33] **REJETTE** la demande du demandeur que les défenderesses soient ordonnées de conserver sous forme numérique toutes les informations concernant les membres du Groupe et du Sous-groupe en leur possession ou en la possession de leurs agents, incluant, mais sans s'y limiter, leurs noms et coordonnées, les plans souscrits ou les plans résiliés ou mis en pause, selon le cas, et le montant des frais d'adhésion payés par les membres du Groupe et du Sous-groupe, et de transmettre ces informations au Tribunal dans une enveloppe confidentielle, sous scellés, dans les trente (30) jours du présent jugement; **DISMISSES** Plaintiff's application that the Defendants be ordered to preserve in digital form all information concerning the Class and Subclass Members in their possession or in the possession of their agents, including, but not limited to, their names and contact information, the plans subscribed to or the plans terminated or paused, as the case may be, and the amount of the enrollment fees paid by Class and Subclass Members, and to send this information to the Court in a confidential envelope, under seal, within thirty (30) days of the present judgment;

[28] **LE TOUT** sans frais de justice, sauf quant aux frais de publication et de diffusion des avis. **THE WHOLE** without legal costs, except for the publication and dissemination fees.

THOMAS M. DAVIS, J.S.C.

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Hearing date: July 21, 2021

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