Unofficial English Translation of the Judgment of the Court

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| A.B. c. Clercs de Saint-Viateur du Canada | 2023 QCCA 527 |
|  COURT OF APPEAL |
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| CANADA |
| PROVINCE OF QUEBEC |
| REGISTRY OF | MONTREAL |
| No.: | 500-09-030160-220 |
| (500-06-000890-174) |
|  |
| DATE: | April 24, 2023 |
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| CORAM: | THE HONOURABLE | MARK SCHRAGER, J.A.PATRICK HEALY, J.A.CHRISTINE BAUDOUIN, J.A. |
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| B.F. |
| APPELLANT – plaintiff/representative |
| v. |
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| LES CLERCS DE SAINT-VIATEUR DU CANADA |
| RESPONDENT - defendant/plaintiff in warranty |
| and |
| COLLÈGE BOURGET |
| FONDS D’ENTRAIDE DE L’ANCIEN SÉMINAIRE DE JOLIETTE |
| CENTRE INTÉGRÉ UNIVERSITAIRE DE SANTÉ ET DE SERVICES SOCIAUX DE LA CAPITALE-NATIONALE |
| RESPONDENTS – defendants |
| and |
| LES MISSIONS SAINT-VIATEUR |
| FONDS LOUIS-QUERBES |
| RESPONDENTS – impleaded parties |
| and |
| INTACT INSURANCE COMPANY |
| RESPONDENT – third party intervenor/defendant in warranty  |
| and |
| TRAVELERS CANADA |
| ROYAL AND SUN ALLIANCE |
| IMPLEADED PARTIES – defendants in warranty |
| and |
| FONDS D’AIDE AUX ACTIONS COLLECTIVES |
| IMPLEADED PARTY – Impleaded party  |
| and |
| JEAN-PHILIPPE GROLEAU |
| *AMICUS CURIAE*  |
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| JUDGMENT |
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| **WARNING**: Order restricting publication: On August 25, 2022, the Honourable Robert Mainville made an order directing that any information that could identify the dissenting class member shall not be published in any document or broadcast or transmitted in any way.  |

With leave from a judge of this Court, the appellant appeals from a judgment of the Superior Court, District of Montreal (the Honourable Thomas M. Davis), rendered on
July 4, 2022, dismissing his application to approve a settlement and professional fee agreement entered into in the context of a class action instituted on behalf of certain victims of sexual assaults committed in Quebec since 1935 by members of the respondent religious community or employees of various institutions under its control.

1. For the reasons of Schrager J.A., Healy and Baudouin JJ.A. concurring, **THE COURT**:
2. **ALLOWS** the appeal;
3. **REVERSES** the trial judgment;
4. **GRANTS** the application to approve the settlement agreement, transaction, and release between the parties signed on January 26 and 28, 2022 (the “Agreement”).
5. **APPROVES** the Agreement, including the schedules in their entirety, except as to the professional fees of counsel calculated on the basis of 25% of the settlement fund in section 8 of the Agreement;
6. **FORMALLY RECOGNIZES** class counsel’s offer to reduce their fees to 20% of the settlement fund;
7. **SETS** the amount of the professional fees at $5,600,000 (plus disbursements of $8,661.10 and the applicable taxes);
8. **FORMALLY RECOGNIZES** class counsel’s undertaking to reimburse $99,136.09 to the impleaded party Fonds d’aide aux actions collectives;
9. **GRANTS** the *amicus curiae*’s motion for directives and **DECLARES** that the professional fees and expenses of the *amicus curiae* shall be paid by the class members out of the settlement fund;
10. **DECLARES** that the Superior Court retains jurisdiction over all other future issues in the file;
11. **THE WHOLE** without legal costs.

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|  | MARK SCHRAGER, J.A. |
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|  | PATRICK HEALY, J.A. |
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|  | CHRISTINE BAUDOUIN, J.A. |
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| Mtre Justin Wee |
| Mtre Alain Arsenault |
| Mtre Virginia Dufresne-Lemire |
| ARSENAULT DUFRESNE WEE AVOCATS |
| Mtre. Robert Kugler |
| Mtre Pierre Boivin |
| Mtre Jérémie Longpré |
| KUGLER KANDESTIN |
| For the appellant B.F. |
|  |
| Mtre Jean-Philippe Groleau |
| Mtre Guillaume Xavier Charlebois |
| DAVIES WARD PHILIPPS & VINEBERG |
| *Amicus curiae* |
|  |
| Mtre François-David Paré |
| Mtre Dominic Dupoy |
| NORTON ROSE FULBRIGHT CANADA |
| Mtre Francesco Calandriello |
| Mtre Michael Malka |
| CUCCINIELLO CALANDRIELLO AVOCATS |
| For the respondent Les Clercs de Saint-Viateur du Canada |
|  |
| Mtre Camille Lefebvre |
| Mtre Emmanuel Laurin-Légaré |
| DE GRANDPRÉ CHAIT |
| For the respondent Collège Bourget |
|  |
| Mtre François-David Paré |
| NORTON ROSE FULBRIGHT CANADA |
| For the respondents Fonds d’entraide de l’ancien séminaire de Joliette, Les missions Saint-Viateur, and Fonds Louis-Querbes |
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| Mtre Marie-Nancy Paquet |
| LAVERY DE BILLY |
| For the respondent Centre intégré universitaire de santé et de services sociaux de la Capitale-Nationale |
|  |
| Mtre Elisabeth Neelin |
| LANGLOIS AVOCATS |
| For the respondent Intact Insurance Company |
|  |
| Mtre Gabriel Archambault |
| CLYDE & CO CANADA |
| For the impleaded party Travelers Canada |
|  |
| Mtre Jean-Pierre Casavant, Ad. E. |
| Mtre Guillaume Carrier |
| CASAVANT BÉDARD |
| For the impleaded party Royal and Sun Alliance |
|  |
| Mtre Nathalie Guilbert |
| Mtre Frikia Belogbi |
| FONDS D’AIDE AUX ACTIONS COLLECTIVES |
| For the impleaded party Fonds d’aide aux actions collectives |
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| Date of hearing: | March 7, 2023 |

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| REASONS OF SCHRAGER, J.A. |
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With leave from a judge of this Court,[[1]](#footnote-1) the appellant appeals from a judgment of the Superior Court, District of Montreal (the Honourable Thomas M. Davis), rendered on July 4, 2022,[[2]](#footnote-2) dismissing his application for approval of a settlement and professional fee agreement entered into in the context of a class action instituted on behalf of certain victims of sexual assaults committed in Quebec since 1935 by members of the Clercs de Saint-Viateur du Canada religious community (“**CSV**”) or employees of various institutions under its control.

In this appeal, the Court must determine if the judge erred in refusing to approve the agreement because the professional fees ($8,048,250) set out therein for class counsel, that is, 25% of the settlement fund ($28,000,000) plus taxes, are unreasonable. The Court must also determine which party must pay the professional fees of the *amicus curiae* appointed in the appeal.

In 2017, the appellant filed an application for authorization to institute a class action against CSV. On April 25, 2019, the application was granted by a judge of the Superior Court.[[3]](#footnote-3) In the circumstances, the appellant appointed Mtre Virginie Dufresne-Lemire from the firm Dufresne Wee avocats, now Arsenault Dufresne Wee avocats (“**ADW**”), to act on his behalf and for the class members. The professional fee agreement signed by the appellant stipulated the following, *inter alia*:

* The appellant agreed that [translation] “25% of the total amount received either through a settlement or following a judgment” would be withheld from the amounts collected by Mtre Dufresne-Lemire for him and for the class members.
* In the event the mandate was revoked before the end of the proceedings, the appellant undertook to compensate Mtre Dufresne-Lemire [translation] “for the time spent on the file ... at the hourly rate of $250 for each lawyer’s time, plus incurred disbursements and applicable taxes”.

At the time, Mtre Dufresne-Lemire and her associate, Mtre Justin Wee, had just three years and one year of experience, respectively. This meant they had to seek assistance from other lawyers, including Mtres Alain Arsenault and Julie Plante.

1. After four years of litigation, numerous settlement conferences and many days of negotiations, the parties reached a settlement, transaction, and release agreement (hereinafter the “**Agreement**”),which was signed on January 26 and 28, 2022.
2. On February 11, 2022, after the publication of the notice to class members (art. 590 CCP), which had been approved by the Superior Court judge, the appellant filed an application to approve the Agreement.
3. The Agreement contained, *inter alia*, the following terms and conditions:
* A settlement fund for collective recovery of claims will be established (1) in the amount of $28,000,000 [translation] “in capital, interest, the additional indemnity, costs and all applicable taxes” to be paid by CSV and the “parties involved” (Collège Bourget, CIUSSS de la Capitale-Nationale,[[4]](#footnote-4) Fonds d’entraide de l’ancien Séminaire de Joliette, Les Missions Saint-Viateur, Fonds Louis-Querbes, Travelers, and Royal and Sun Alliance); and (2) the amount CSV will receive from the tax authorities, if any, as reimbursement of the GST and QST on the statement of professional fees of class counsel.
* The settlement fund will be used to: (1) indemnify the members whose claims are accepted at the end of the adjudication process; (2) to pay the judicial and extrajudicial professional fees of class counsel; and (3) to pay and/or reimburse the disbursements, costs, and other expenses incurred in the class action, as well as any [translation] “amounts arising from an action in subrogation to the members’ rights”, if any.
* A statement of professional fees of class counsel addressed to CSV in the amount of $8,048,250 (representing 25% of $28,000,000, plus taxes), covering the professional fees, or [translation] “any other amount authorized by the Court”, will be sent within 10 days after the judgment approving the Agreement has acquired the force of *res judicata*, [translation] “subject to the approval of the Court”.
* The appellant gave the defendants, [translation] “personally and on behalf of the Class members ... and their successors, heirs, and assigns, full and final release ...”.
* Class counsel will be solely responsible for developing and determining the terms and conditions of the adjudication process, subject to the terms and conditions set out in Schedule 3 of the Agreement. The adjudication process will be presided by the Honourable Claude Champagne, a retired Superior Court judge. Only a limited number of persons will have access to the claimants’ names, if necessary. The defendants are not entitled to take part in the determination of individual compensation by the adjudicator or to contest it.
* The adjudicator will assign each member whose claim is accepted to one of the three categories of compensation set out in Schedule 8 of the Agreement:
* Category A: Base compensation equivalent to $X and used as the basis for calculating extraordinary compensation categories;
* Category B: Extraordinary compensation 1 equivalent to $1.5X, that is, compensation 50% higher than base compensation;
* Category C: Extraordinary compensation 2 equivalent to $2X, that is, double the base compensation, up to a maximum of $200,000.
1. The Agreement also provides for changes to the definition of the class and of the subclasses.

After being informed of the Agreement, a class member (the “**dissenting member**”) contacted class counsel and asked for the justification for the professional fees claimed, which he felt were too high. Counsel answered him, but he was dissatisfied with their explanation and decided to contest the application for approval of the Agreement. The Fonds d’aide aux actions collectives (“**FAAC**”) does not contest the Agreement and defers to the Court to determine the professional fees of class counsel.

The hearing of the application for approval of the Agreement was held on February 17, 2022, before Davis J. On that date, over 378 class members had asked to be registered in the class action. Only one, the dissenting member, objected to the application for approval of the Agreement. At the hearing, he testified as to why he was contesting the professional fees claimed and asked the judge to suspend his deliberations [translation] “to obtain more information about the work performed by counsel ... in this case”. The judge dismissed that application and took the case under advisement.

He rendered judgment on July 4, 2022. He dismissed the application for approval of the Agreement on the ground that the professional fees of the class members’ counsel were unreasonable.

1. On August 25, 2022, a judge of this Court granted leave to appeal.[[5]](#footnote-5)

Noting that the respondents did not intend to take part in a debate on the quantum of professional fees and that the dissenting member could not [translation] “effectively take part in the appeal without the assistance of a lawyer”, the Court of Appeal judge concluded that the appointment of an *amicus curiae* was necessary to counterbalance the submissions of the parties. It was impossible to obtain the dissenting member’s agreement on the choice of a lawyer to act as *amicus curiae*, because the dissenting member believed that any member of the Bar would be in a conflict of interest since the matter involved professional fees. The Court of Appeal judge therefore authorized the appellant to chose from a list of three lawyers, whose names were provided to the Court beforehand.[[6]](#footnote-6)

# JUDGMENT UNDER APPEAL

The judge reviewed the criteria developed by the courts to assess whether a class action transaction should be approved. Overall, he accepted that these factors (length of the dispute; inclusive nature and advantages of the Agreement; counsel’s experience; testimony of class members, other than the dissenting member; counsel’s dedication to class members; and the absence of collusion between the parties) weighed in favour of approving the Agreement.

The judge then examined the application for approval of class counsel’s professional fees. With respect to the dissenting member’s objection, the judge noted that his dissatisfaction appeared to stem, at least in part, from his misconception that counsel had not listened to his questions and concerns. In addition, the dissenting member [translation] “does not understand that it is common practice in class actions to sign professional fee agreements that must ultimately be submitted to the Court”.[[7]](#footnote-7) The dissenting member’s dissatisfaction, however, cannot prevail over the collective interest of class members.[[8]](#footnote-8)

The judge recalled that the professional fee agreement is presumed valid and can be set aside only if it is established that it is not fair and reasonable. Relying on *Servites de Marie*,[[9]](#footnote-9) in which the Superior Court approved professional fees representing 30% of the settlement fund, the judge acknowledged that a law firm that takes on a class action to compensate sexual assault victims [translation] “embarks on a journey full of uncertainty”.[[10]](#footnote-10) The judge noted that certain aspects of the two cases were comparable, namely the number of hours the lawyers spent on the file. He concluded, however, that the two cases must be distinguished with respect to the value of the hours worked in relation to the amount claimed under the professional fee agreement.[[11]](#footnote-11) In this case, counsel spent 3,479 hours on the file and estimate that there is at least 800 hours of work left to do. According to the judge’s estimate, that work represents approximately $1,509,686 in professional fees, using the hourly rate formula (and the hourly rates disclosed by counsel).[[12]](#footnote-12) The judge admitted, however, that he was concerned by the way those rates were communicated to him:

[translation]

[53]   On April 12, [the Court] received an Excel spreadsheet of each lawyer’s hours and a description of the tasks performed. The Court does not question the hours or the description. However, that document does not indicate each lawyer’s hourly rate. Class counsel confirmed that they forgot to include them when asked by the Court but provided them afterwards.

[54]   This new information led the Court to write to counsel again, given the written observations of the dissenting member concerning the hourly rate that Mtre Dufresne-Lemire had represented to him:

[translation]

Maitre Dufresne-Lemire

I would like to give you the opportunity to comment on the attached document. Specifically, I am confused by [dissenting member]’s claim that you told him your hourly rate was $200, whereas Mtre Wee told me this morning that it is $400? Have the rates provided to me been in effect since the file began?

[55]   The lawyer explained that her hourly rate for individual files can be $200 but that it can be higher for files based on a percentage fee.

[56]   Her email does not mention her colleagues’ rates.

[57]   The way the hourly rates were represented to him and the lawyer’s email raises questions. ...

According to the judge, [translation] “[o]ne may be left with the impression that the rates disclosed [were] established for this case”,[[13]](#footnote-13) especially since the appellant provided no information [translation] “on any discussion he may have had with the lawyers on the expected professional fees or on the hourly rates”.[[14]](#footnote-14) In the circumstances, therefore, it is impossible to know what professional fees were proposed when the file began. The judge noted, however, that the hourly rates in the professional fee agreement ($250) in the event of a revocation of the mandate were quite different than those provided to him.[[15]](#footnote-15) Sections 99 and 100 du *Code of Professional Conduct of Lawyers*[[16]](#footnote-16) (“***Code of Professional Conduct***”) impose a duty to inform on lawyers with respect to the amount of their fees. The judge added that that duty remains important even when there is a percentage agreement.

In any event, the judge considered that even using the hourly rates that were provided to him, the multiplier (approximately 4.64) between the professional fees estimated using the hourly rate formula ($1,509,686) and the professional fees claimed ($7,000,000) is very high and well above the norm, which is a multiplier of between 2 and 3. The judge assessed the reasonableness of the professional fees claimed in light of the factors listed in s. 102 of the *Code of Professional Conduct.* He accepted that the principal lawyers on the file, Mtre Dufresne-Lemire and Mtre Wee, did not have a lot of experience. In addition, a large part of their work involved talking to the victims, which was certainly difficult from an emotional perspective, but not from a legal perspective. The main legal challenge concerned the issue of prescription because the Supreme Court had not yet rendered *J.J.*[[17]](#footnote-17) when the application for authorization to institute the class action was filed*.* The Court of Appeal, however, had already ruled that a class action was the appropriate vehicle for this type of case. Despite this, the judge acknowledged that [translation] “there could be challenges in terms of the administration of proof and the damages suffered”.[[18]](#footnote-18) He also conceded that counsel had assumed an enormous risk in taking on the case, particularly in view of the respondents’ ability to pay if found guilty and the uncertainty of the applicable law before *J.J.* Ultimately, however, the judge considered that the case [translation] “represented a medium degree of difficulty and overall risk when the application for authorization was filed”.[[19]](#footnote-19) The professional fees claimed included [translation] “a foreseeable premium where the risk was very high”.[[20]](#footnote-20) Indeed, [translation] “at an hourly rate of $250, their investment in the file represented $869,772 up to that point, or $1,069,772 with the 800 additional hours, and their claim would result in a premium of almost $6,000,000.[[21]](#footnote-21) Even accepting the hourly rates suggested by the lawyers, the premium would be more than $5,000,000. The judge concluded that such professional fees were excessive, and above all, contrary to the interests of class members.

The judge determined that this conclusion was an insurmountable obstacle to the application for approval of the Agreement, which provided in clause 28 that if the Court refused to approve the entire Agreement, it would be [translation] “henceforth considered null and void and without effect”.[[22]](#footnote-22) He stated, however, that he was confident [translation] “that the parties will meet to agree on reasonable fees and submit them to the Court, thus allowing class members to receive the amounts to which they are entitled”.[[23]](#footnote-23)

# ISSUES

1. The issues can be stated as follows:

(a) Did the judge err in finding that he could not approve the Agreement?

(b) Did the judge err in finding that the professional fees claimed for class counsel are unreasonable? Should the Court determine the professional fees?

(c) Who must pay the professional fees of the *amicus curiae*?

# DISCUSSION

## (a) Did the judge err in finding that he could not approve the Agreement?

1. Overall, the parties agree that the judge committed a reviewable error in finding that he had to reject the Agreement because he considered the professional fees of class counsel unreasonable.
2. Pursuant to art. 590 CCP, a transaction concluded in the context of a class action is valid only if approved by the court.

Before approving a transaction, the judge must be convinced that it is [translation] “fair, reasonable and in the best interest of the class members”.[[24]](#footnote-24) As part of the analysis, he or she must [translation] “bear in mind the main principles and objectives underlying class actions and weigh the advantages and disadvantages of the settlement, as well as the reciprocal concessions, risks of a trial, and costs to be incurred”.[[25]](#footnote-25) In practice, the assessment of the fairness and reasonableness of the transaction revolves around the following criteria imported from U.S. law:

* The likelihood that the action will succeed;
* The extent and nature of the evidence to be adduced;
* The terms and conditions of the transaction;
* The recommendations of counsel and their degree of experience;
* The anticipated cost and duration of litigation;
* The recommendations of neutral third parties, if any;
* The nature and number of objections to the transaction; and
* The good faith of the parties and the absence of collusion.[[26]](#footnote-26)

In principle, the judge must approve the agreement as is or refuse to ratify it. Since the transaction is indivisible, he or she may not approve it in part or amend it.[[27]](#footnote-27) What happens when the agreement the parties are seeking to have approved as a transaction includes a clause fixing the professional fees of class counsel?

1. Article 593 CCP provides as follows:

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| **593.** The court may award the representative plaintiff an indemnity for disbursements and an amount to cover legal costs and the lawyer’s professional fee. Both are payable out of the amount recovered collectively or before payment of individual claims. | **593.** Le tribunal peut accorder une indemnité au représentant pour le paiement de ses débours de même qu’un montant pour le paiement des frais de justice et des honoraires de son avocat, le tout payable à même le montant du recouvrement collectif ou avant le paiement des réclamations individuelles. |
| In the interests of the class members, the court assesses whether the fee charged by the representative plaintiff’s lawyer is reasonable; if the fee is not reasonable, the court may determine it. | Il s’assure, en tenant compte de l’intérêt des membres du groupe, que les honoraires de l’avocat du représentant sont raisonnables; autrement, il peut les fixer au montant qu’il indique. |
| Regardless of whether the Class Action Assistance Fund provided assistance to the representative plaintiff, the court hears the Fund before ruling on the legal costs and the fee. The court considers whether or not the Fund guaranteed payment of all or any portion of the legal costs or the fee. | Il entend, avant de se prononcer sur les frais de justice et les honoraires, le Fonds d’aide aux actions collectives que celui-ci ait ou non attribué une aide au représentant. Le tribunal prend en compte le fait que le Fonds ait garanti le paiement de tout ou partie des frais de justice ou des honoraires. |
|  | [Emphasis added.] |

1. Thus, art. 593 CCP establishes that [translation] “no fee agreement concluded between the class representative and counsel – nor any fee agreement concluded between the class representative, counsel and the opposing parties in a transaction submitted for approval – binds the judge”.[[28]](#footnote-28) To the extent that the parties provide that the approval of the agreement depends on the approval of the professional fees agreed to, that is, that they [translation] “could not be severed” from the agreement, a refusal to approve the professional fees necessarily entails the rejection of the agreement as a whole.[[29]](#footnote-29) Conversely, when the approval of the agreement is not conditional on the approval of the professional fees claimed, the judge may approve the agreement[[30]](#footnote-30) and amend the quantum of the professional fees if he or she considers the amount claimed to be unreasonable.[[31]](#footnote-31)
2. In this case, the judge found that in view of clause 28 of the Agreement, his refusal to approve the professional fees claimed unavoidably entailed the rejection of the Agreement. This conclusion was incorrect and must be reviewed on appeal. Like the appellant, the respondents, and the *amicus curiae*, I am of the view that the Agreement, when correctly interpreted, allowed the judge to approve the settlement while amending the quantum of professional fees.
3. Clause 28 of the Agreement states:

[translation]

If the Court refuses to approve this Settlement Agreement as a whole, the parties agree that it will be considered null and void as a whole, and that the parties will be returned to the same legal situation they were in before entering the Agreement; they will not be entitled to invoke the Settlement Agreement in the dispute that will then continue between them.

This provision is completed by clause 31, which states that [translation] “the Settlement Agreement, including its preamble and schedules, is indivisible and constitutes a transaction within the meaning of articles 2631 *et seq*. of the *Civil Code of Québec”*. Together, clauses 28 and 31 confirm in unequivocal terms that the Agreement is a “whole” that cannot be amended or approved in part. On a mere reading of clauses 28 and 31, it may therefore be tempting to conclude, as the judge did, that approval of the quantum of the professional fees set by the parties is necessary for approval of the Agreement. Clauses 28 and 31 must, however, be read in conjunction with the other provisions of the Agreement (see art. 1427 CCQ).

1. In this case, a careful reading of the other provisions of the Agreement is a bar to the judge’s conclusion. Clause 8 of the Agreement indeed *expressly* provides that the judge can change the quantum of professional fees claimed:

[translation]

A statement of the Professional Fees of counsel for the Plaintiff and the class members addressed to the Defendant CSV in the amount of $8,048,250, representing 25% of the amount of $28,000,000 set out in paragraph 3 of this Settlement Agreement, plus applicable taxes, the whole as set out in the Fee Agreement signed by Plaintiff, covering the Professional Fees or any other amount authorized by the Court, will be sent by counsel for the Plaintiff and the class members within ten (10) days after the judgment approving the Settlement Agreement has acquired the force of *res judicata*, subject to the approval of the Court.

[Emphasis added.]

1. Along the same lines, clause 9 states:

Within ten (10) working days of receipt of the amount set out in paragraphs 3 and 6 of this Settlement Agreement, counsel for the Plaintiff and the class members will withdraw from their trust account the amount of Professional Fees approved by the court, as set out in clause 8 of this Settlement Agreement.

[Emphasis added.]

1. These provisions clearly recognize the judge’s power to determine the amount of professional fees. In this case, the judge could therefore amend the quantum of professional fees determined by the parties while respecting the Agreement [translation] “as a whole”. He did not have to reject the Agreement if he considered that the professional fees claimed were excessive. Insofar as the judge determined that the Agreement was otherwise fair and in the interests of the class members, which no one — not even the dissenting member — questions, he should have approved it while revising the amount of the professional fees. In finding as he did, he committed an error which must be corrected by the Court.
2. Given the interpretation of the Agreement that I propose, it is not necessary to respond to the FAAC’s submissions that, insofar as clause 28 of the Agreement prevents homologation of the settlement unless the professional fees of counsel are approved, it is against public order.
3.

## (b) Did the judge err in finding that the professional fees claimed are unreasonable? Should the Court determine the professional fees?

### The parties’ submissions

1. I will summarize the parties’ submissions in detail, as they exhaustively describe the elements to be considered when assessing the amount of professional fees to be paid.
2. The appellant submits that the judge erred in law and made palpable and overriding errors in concluding that the professional fees claimed were unreasonable. He recalled that the professional fee agreement is presumed valid. In addition, a percentage agreement providing for a percentage of 15% to 33% is generally considered fair and reasonable. According to him, convincing evidence [translation] “that the professional fee agreement was not entered into in the interests of the class members” is required to rebut these presumptions. It is in every class member’s interest to ensure that counsel works diligently to achieve the best possible result. What is of interest to him or her is the result obtained *for him of her*, and that the percentage of professional fees applicable *to his or her indemnity* is reasonable and in line with the percentage applied to the indemnities of other class members. Thus, if the percentage set out in the fee agreement is between 15% and 33% and counsel worked diligently to achieve the result obtained, the professional fees should be approved. In this case, the professional fees claimed should have been approved. Indeed, the percentage (25%) set out in the fee agreement is within the established range and received the approval of the appellant and of several other class members. The FAAC did not oppose it either. In addition, the judge acknowledged that counsel had accepted an enormous risk, worked hard, shown exemplary dedication to the class members, and negotiated an excellent agreement that allowed them to receive a significant indemnity. Accordingly, he should have concluded that the professional fees claimed were reasonable. Nevertheless, as a gesture of good faith, class counsel offered to reduce their fees from 25% to 20% of recovery, plus disbursements and taxes.
3. The appellant submits that the judge erred in applying the lodestar method (or “multiplier method”) to conclude that the professional fees claimed were excessive, as they were 4.64 times higher than those that would have been due under an hourly rate agreement. According to the appellant, the judge’s reasoning, based on a rigid application of this method, calls into question the very validity of a percentage agreement. This is, however, the most appropriate form of remuneration in class actions. Moreover, by ruling that the professional fees should not exceed the amount obtained by multiplying the number of hours worked at regular hourly rates by an arbitrary factor of 3, the judge *de facto* legislated an upper limit for lawyers’ professional fees. The appellant stresses the dangers of such a precedent. In his view, the judgment under appeal [translation] “so distorts percentage agreements that it may discourage firms from undertaking class actions on behalf of plaintiffs, ultimately undermining the social objectives of this procedural vehicle”. The appellant also argues that the systematic application of the multiplier method is not in the interests of class members, since it favours inefficiency, even incompetence, instead of encouraging lawyers to work strategically and efficiently. The systematic application of this method also distorts the assessment of the fairness and reasonableness of professional fees, by elevating the time lawyers spend on the case to the status of a [translation”] “super factor”. Section 102 of the *Code of Professional Conduct*, however, stipulates that professional fees are fair and reasonable if they are warranted *by the circumstances*. The multiplier method is in fact of limited usefulness, especially when compared to the responsibility assumed by the lawyers and the result obtained. For these reasons, the appellant asks the Court to declare that the professional fees claimed are reasonable, but to take note that counsel nevertheless accept to reduce their fees to 20% of the settlement fund.

The respondents and the FAAC do not take a position on the reasonableness of the professional fees claimed. The respondents argue, however, that the Court has the power to determine the professional fees without having to return the case before the Superior Court. They emphasize that it is in the interests of class members that the Agreement be approved as soon as possible, and that a decision by the Court [translation] “would avoid the uncertainty related to a possible obligation for the parties to give a new notice to the class members pursuant to article 590 CCP”. The FAAC argues that the Court should approve the professional fees as voluntarily reduced by the class members’ counsel, subject to the undertaking by class members to reimburse $99,136.09 to the FAAC, an undertaking [translation] “which must be acknowledged”.

The *amicus curiae* acknowledges that lawyers acting for the plaintiff in a class action generally assume a significant risk that justifies a substantial premium. He also points out that the court’s power to determine professional fees is subject to an important precondition, namely a finding that the professional fees claimed are not reasonable, that is, that their quantum does not fall within the [translation] “acceptable possible outcomes”. In this respect, the professional fee agreements that have typically been recognized by the courts can serve as a guide. The Court should be wary of overturning case law [translation] “that has recognized the validity of percentage fee agreements, even when they give rise to compensation that might be deemed excessive by some members of the public”. The application of the multiplier method as a control measure is not a panacea. It may, however, prove useful in determining whether fees are excessive in a given case, provided it does not [translation] “turn into an upper limit”. The introduction of an [translation] “upper limit multiplier” would have the effect of invalidating percentage fee agreements and replacing them with multiplier agreements. That said, the *amicus curiae* believes that a multiplier of 2 or less should be reserved for cases that are certain to succeed quickly, or where the fees are unnecessary, exaggerated, or disproportionate when compared to what the class members will obtain from the proceeding. On the other hand, a multiplier greater than 2 will generally be needed to create a real incentive to take on a class action. A multiplier of 2.5 or 3 should therefore be close to the norm or even a lower limit in many cases. The *amicus curiae* also notes that a fee agreement providing for a percentage of 25% is not in itself unreasonable – on the contrary, this rate corresponds to a well-established norm. However, he rejects the appellant’s contention that the reasonableness of the fees should be assessed based on the amount of fees each class member is required to pay out of his or her indemnity. What matters, in his view, is the reasonableness of the fees to be paid collectively.

 In this case, the *amicus curiae* is of the view that the judge was correct in using the multiplier method to control the reasonableness of the professional fees. In his opinion, however, the judge erred in suggesting that a multiplier of 4.64 was in itself excessive. Such a multiplier is not in itself unreasonable, especially in the context of a class action such as this one, where the victims will benefit from a generous claims procedure and where the lawyers assumed a tremendous risk, showed great dedication, and did remarkable work. The *amicus curiae,* however, is of the view that the applicable multiplier in this case is not actually 4.64. As the judge noted, the hourly rates disclosed by class members’ counsel appear to have been established based on the file. This is particularly true for Mtre Dufresne-Lemire, who is claiming an hourly rate of $400 in this file, whereas her usual hourly rate is $200, and the fee agreement provides for an hourly rate of $250 if the mandate is revoked. The *amicus curiae* shares the judge’s concerns on this matter and considers that the appellant was mistaken in asserting that the hourly rates billed to other clients in different files are irrelevant. According to him, the hourly rate applied using the multiplier method should not be reserved for class action files, otherwise the calculation and the very notion of a multiplier are distorted. Indeed, it would be tantamount to the risk involved being recognized twice (once in the hourly rate and again in the multiplier). The “usual” hourly rate of the lawyer should be the basis for the calculation as it allows the lawyer’s actual opportunity cost to be taken into account and is determined by market considerations. In this case, the application of a multiplier of 4.64 to Mtre Dufresne-Lemire’s hourly rate of $400 equates to a factor of 7.4 with respect to an hourly rate of $250 and of 9.3 with respect to an hourly rate of $200. If the Court assumes that the hourly rates of the other lawyers were also increased based on the file, [translation] “it must conclude that the professional fees claimed on appeal (20% rather than 25%) yield a multiplier of between 5.9 and 7.4.” The Court can make that presumption because class members’ counsel did not indicate if Mtre Dufresne-Lemire’s hourly rate was the only one to have been increased, even though it was incumbent upon them to [translation] “be transparent on this issue”. In the circumstances, the *amicus curiae* suggests that the Court apply a multiplier of 4.64 to the professional fees of $754,843, for a total amount of $3,502,472. Another option would be to apply that multiplier to an hourly rate of $250 for each lawyer’s time ($889,991.50) and an hourly rate of $75 for the other employees ($77,049) for a total of $4,129,560.56.

### Analysis

The fee agreement reached by the representative binds the members of the class action. Its enforcement, however, remains subject to court approval.[[32]](#footnote-32) Pursuant to the second paragraph of art. 593 CCP, the judge is indeed entrusted with the role of ensuring that the fee charged is reasonable, and if not, it authorizes the judge to “determine it”.

The professional fee agreement benefits from a presumption of validity and can be set aside only if applying it would not be fair and reasonable for the class members [translation] “in the context of the transaction being reviewed”.[[33]](#footnote-33) However, pursuant to art. 593 CCP, no professional fee agreement binds the judge.[[34]](#footnote-34) Thus, although it is true that the judge must give certain weight to the parties’ expressed will, he or she must nevertheless ensure that the professional fees claimed are *actually* fair and reasonable.[[35]](#footnote-35) Thus, the judge must not hesitate, if necessary, to [translation] “revise the amount of these fees to reflect their true value, arbitrate them, and reduce them when they are pointless, exaggerated, or disproportionate to the gain expected by the group from the action”. The judge has a complex task because he or she must [translation] “find the ideal equilibrium in the remuneration by giving the lawyers the necessary and sufficient amount to encourage them to take on the next case, while bearing in mind that the class members must be the first to benefit from the amounts paid by the defendants”.[[36]](#footnote-36)

The *Code of Civil Procedure* does not identify criteria for determining the fairness or reasonableness of professional fees. Section 102 of the *Code of Professional Conduct* provides useful guidelines in this respect. It states:[[37]](#footnote-37)

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| **102.** The fees are fair and reasonable if they are warranted by the circumstances and proportionate to the professional services rendered. In determining his fees, the lawyer must in particular take the following factors into account: | **102.** Les honoraires sont justes et raisonnables s’ils sont justifiés par les circonstances et proportionnés aux services professionnels rendus. L’avocat tient notamment compte des facteurs suivants pour la fixation de ses honoraires: |
| (1)  experience; | 1°  l’expérience; |
| (2)  the time and effort required and devoted to the matter; | 2°  le temps et l’effort requis et consacrés à l’affaire; |
| (3)  the difficulty of the matter; | 3°  la difficulté de l’affaire; |
| (4)  the importance of the matter to the client; | 4°  l’importance de l’affaire pour le client; |
| (5)  the responsibility assumed; | 5°  la responsabilité assumée; |
| (6)  the performance of unusual professional services or professional services requiring special skills or exceptional speed; | 6°  la prestation de services professionnels inhabituels ou exigeant une compétence particulière ou une célérité exceptionnelle; |
| (7)  the result obtained; | 7°  le résultat obtenu; |
| (8)  the fees prescribed by statute or regulation; and | 8°  les honoraires prévus par la loi ou les règlements; |
| (9)  the disbursements, fees, commissions, rebates, costs or other benefits that are or will be paid by a third party with respect to the mandate the client gave him. | 9°  les débours, honoraires, commissions, ristournes, frais ou autres avantages qui sont ou seront payés par un tiers relativement au mandat que lui a confié le client. |

This Court’s case law confirms that these factors are relevant to the analysis required by art. 593 CCP.[[38]](#footnote-38) Clearly, the respective weight given them may vary according to the circumstances. It is also understood that this list of factors is not exhaustive, as indicated by the use of the term “in particular” (“*notamment*”) in s. 102 of the *Code of Professional Conduct.*

It is generally accepted that an assessment of the fairness and reasonableness of the professional fees requires the judge to also consider the risk incurred by the lawyers. In the context of a percentage fee agreement, the Superior Court has recognized that this factor could even take precedence over the amount of time counsel devoted to a file.[[39]](#footnote-39) In every case, the risk must be assessed at the time counsel received the mandate from the representative, not at the time of the application for approval.[[40]](#footnote-40)

The judge ruling on an application for the approval of professional fees must also consider the effect of the agreement on the image of the profession. He or she must ensure that the agreement is not “likely to give to the profession a profit-seeking or commercial character” (*Code of Professional Conduct*, s. 7).[[41]](#footnote-41) The objectives of the class action must also be taken into account. As Professor Pierre-Claude Lafond noted, [translation] “[t]he contribution to access to justice and the deterrence of reprehensible behaviour can justify substantial fees insofar as this type of action generates benefits for citizens that would otherwise be unattainable”.[[42]](#footnote-42) That said, the judge must:

[translation]

… “take steps to preserve the integrity and credibility of class actions, in the eyes of the class members and in the eyes of public observers”. …Class actions must not become [translation] “merely a source of enrichment for class counsel”.[[43]](#footnote-43)

[References omitted.]

1. I would add, however, that judges should resist the temptation to always seek to reduce the amount of professional fees provided for in fee agreements, at the risk of provoking a practice among lawyers of asking for more, knowing that the court will certainly reduce the agreed amount.
2. Percentage agreements are very common in class actions. This type of agreement has considerable advantages, namely in that it promotes [translation] “access to justice for citizens who would not otherwise be able to afford it”.[[44]](#footnote-44) There is no question here of reviewing the validity and usefulness of this method of remuneration. Lawyers must be encouraged to accept class action mandates with the knowledge that any risk they accept will be compensated. In this regard, lawyers are entitled to expect that their fee agreements will be respected.

The appellant and the *amicus curiae* are also correct in asserting that the “range” of percentages deemed reasonable by the courts is normally between 15% and 33% (or even 20% to 33.33%) of the settlement fund.[[45]](#footnote-45) However, that is not automatic. As the Court noted in *Skarstedt*, [translation] “a judge must determine the reasonableness of the fees in each claim in order to approve them”.[[46]](#footnote-46) Thus, judges have decreased the percentage set by the parties when it appeared exaggerated in relation to the work performed by the lawyers, the relatively modest settlement amount of the dispute, and the professional fees that would have been charged under the hourly rate model.[[47]](#footnote-47) The possibility of providing for progressive percentages that increase as the file progresses may be fair depending on the work devoted to the file. However, such a formula can deter lawyers from settling early in the process, even when a quick settlement is in the best interests of class members. Percentages can also be regressive once a certain settlement amount has been reached, but this too can have a deterrent effect on lawyers’ efforts. In short, every case is different. There is no magic formula that will guarantee in every situation that the fee will ultimately be reasonable. Above all, the analysis must not be limited to verifying that the professional fee agreement provides for a percentage below a generally applied range.[[48]](#footnote-48)

The lodestar method or multiplier method consists of calculating the number of hours worked, multiplying that by the hourly rate and a multiplier that takes into account the risk run by the lawyers.[[49]](#footnote-49) It is a method of remuneration, but also a means of controlling the reasonableness of the professional fees often applied in class actions.

The multiplier method has certain inconveniences and its share of detractors. In *Pellemans*, Prévost J.S.C. noted that it:

[translation]

does little to promote the efficiency of counsel’s work because the multiplier only increases the value of the time indicated by counsel for the case. In addition, since the multiplier applicable to a case is assessed at the time of the settlement or judgment, it is more likely to underestimate the “risk” assumed by counsel at the time the mandate is received.[[50]](#footnote-50)

This was also what the appellant argues in his written submissions.

1. The Court had the following to say about the multiplier:

[translation]

[66] The general principles and analytical framework relevant to whether professional fees are fair and reasonable flows from the consideration of these factors. In this context, fee agreements enjoy a presumption of validity and will only be set aside if applying them would not be fair and reasonable for the class members in the context of the transaction being reviewed. As for the multiplier model, it is a tool for evaluating whether fees are reasonable.[[51]](#footnote-51)

[Emphasis added; references omitted.]

1. The use of the multiplier to analyze the reasonableness of the professional fees appears to be well established in the case law of the Superior Court. However, I agree with the submissions of the appellant and the *amicus curiae* that a mechanical application of this method and the use of rigid [translation] “upper limits” should be avoided. The assessment of the reasonableness of the professional fees should not be reduced to a simple mathematical operation. Thus, although the norm adopted by the Superior Court for multipliers varies between 2 and 3, that does not mean that a multiplier superior to that norm *necessarily* requires a reduction of the fee.[[52]](#footnote-52) For example, in *Pellemans*, Prévost J.S.C. approved a percentage agreement corresponding to a multiplier of 4.58.
2. The way the multiplier is applied must be closely examined. In this case, I question the way the judge applied this method because he seemed to place undue importance on the time the lawyers devoted to the case, despite the other factors that come into play when assessing the reasonableness of professional fees. The value of the services rendered is not the same as the time devoted to the file.
3. As mentioned above, a fee agreement benefits from a presumption of validity. Such a presumption implies that the analysis of the reasonableness of the fees determined in a percentage agreement should start with the application of criteria other than the time devoted to the matter by the lawyers. Experience teaches us that the amount of professional fees payable pursuant to a percentage agreement will often, if not always, exceed the amount of professional fees calculated based on the time spent on the matter multiplied by the applicable hourly rate(s). As a result, if the analysis is based on the hours worked, there is always a risk that the amount of professional fees to be paid will appear excessive or unreasonable. Thus, to start the analysis by considering the factors of time and hourly rate is circular or tautological reasoning. If the agreement to calculate the professional fees on a percentage basis rather than according to the time spent on the file is set aside, the conclusion that the professional fees are unreasonable is almost inevitable. To avoid this pitfall, the analysis should start with an assessment of all the other criteria set out in the *Code of Professional Conduct* and of the risk assumed by counsel. If the conclusion is reached that the amount (not the percentage) of fees payable is reasonable, the analysis can stop at the judge’s discretion. However, if the amount of professional fees seems unreasonable, it is then appropriate to consider the hours spent on the case and apply a multiplier to adjust it so that it becomes reasonable.
4. Simply counting the number of hours spent on the case multiplied by the applicable hourly rates and applying a multiplier of 2, 3, 4, or even 5 is, in my opinion, arbitrary, at least to some degree. The risk assumed at the outset of the case is not neatly translated into a number, namely the multiplier. The factors do not take into account the interest rates a lawyer may have to pay while financing the class action. Although the method measures opportunity cost, it does not assess the risk the lawyer accepts in other class actions paid on a percentage basis. In other words, sound risk management means accepting several mandates knowing that some cases will probably be lost, leaving the lawyer without any remuneration. Moreover, the time devoted to the case in these types of matters is often secondary in the analysis of the reasonableness of professional fees.[[53]](#footnote-53) The risk assumed and the result obtained should normally take precedence, bearing in mind that the weight to be given to each factor may vary from case to case, depending on the circumstances.
5. My opinion should not be interpreted as condoning the payment of substantial professional fees resulting from a percentage agreement where the work of counsel consisted mainly of copying and pasting a class action instituted in another jurisdiction, filing an application for authorization, and simply waiting for the outcome of the dispute in the other jurisdiction. In such a scenario, the application of the *Code of Professional Conduct* factors should indicate that a large fee statement is unreasonable. The application of the multiplier thereafter to indicate what can be considered reasonable in the circumstances would be a proper exercise of the court’s discretion.
6. Furthermore, an analysis based on the multiplier favours counsel who have a relatively high hourly rate and disfavours a lawyer who helps the disadvantaged by charging a lower hourly rate, which seems to be the case for the appellant’s counsel. As stated by the appellant and recognized by some judges:

[translation]

[163] The multiplier approach to assessing professional fees has its limitations, however.

...

[168] As the Court previously stated in *Servites de Marie*, applied without discernment, an analysis using a multiplier can lead to rewarding inefficiency, inexperience or, even worse, incompetence. Poorly drafted procedures, administrative inefficiencies, or ignorance of the law can in themselves lead to challenges by defendants. In the case at bar, we need only think of the delays and costs that would have been incurred if the school service centers and the AGQ’s actions in warranty in the F. case had not been separated, if all class members B to G or #1 to #5 had had to provide all the required medical records, or if more class members had been examined for discovery. Yet, the higher the number of hours, the lower the multiplier.

[169]     In addition, the rapid resolution of a case will benefit class members but will necessarily increase the multiplier. In a case like this one, where many class members are in their sixties, any delay in the settlement is devastating.[[54]](#footnote-54)

1. The approach I favour does not contradict what the Court has said about the multiplier. In *Skarstedt*,[[55]](#footnote-55) the Court described the multiplier as a means of [translation] “corroborating” the conclusion reached by considering the other criteria. In *Banque Amex*, cited above, the Court stated that the multiplier [translation] “is a tool for evaluating whether fees are reasonable”. I am merely proposing a sound and logical way of using that tool.
2. In this case, the Agreement provides for professional fees of $7,000,000 (plus disbursements and applicable taxes), which is 25% of the $28,000,000 settlement fund. The judge found such professional fees to be unreasonable. He determined that it was an insurmountable obstacle to the approval of the Agreement, refused to approve it, and omitted to determine the amount of the professional fees.

Review of the professional fees falls within the trial judge’s discretionary power and accordingly calls for great deference on the part of the Court of Appeal.[[56]](#footnote-56) The Court may intervene only if the parties establish that the judge exercised that discretion abusively or unreasonably.[[57]](#footnote-57)

1. As explained above, the judge made a palpable and overriding error in refusing to approve the Agreement and determine the amount of the professional fees, particularly in light of the wording of clause 8 of the Agreement and article 593 CCP. Although I question the manner in which the judge applied the multiplier method, and thus the exercise of his discretion in concluding that the amount of the fees was unreasonable, it is not necessary to overturn his conclusion in this regard in light of the conclusion I propose below. The judge did not indicate what amount of professional fees would be reasonable. He made no such determination. No deference is owed to the judge for the Court’s determination of the amount of professional fees under $7,000,000 that should be paid to the appellant’s counsel. The Court has full latitude to determine the amount of reasonable professional fees under $7,000,000.
2. The judge recognized the expertise of counsel (which was acquired in part during the proceedings)[[58]](#footnote-58) in the representation of sexual assault victims. He also recognized their [translation] “great dedication” to the class members,[[59]](#footnote-59) that they did [translation] “remarkable work”,[[60]](#footnote-60) and that they obtained a favourable settlement for the class members. He found that counsel had devoted a considerable amount of time to the file, that is, 3,479 hours, and that they would have to devote at least another 800 hours to it.[[61]](#footnote-61) He took into account the risk assumed by counsel, but concluded that the professional fees claimed included a [translation] “risk premium” that was too high for the level of responsibility and risk applicable in this case, which was of [translation] “average difficulty and overall risk”.[[62]](#footnote-62) The judge’s determination that the level of risk assumed was average is surprising, insofar as he wrote at para. 73 of his judgment that [translation] “counsel have assumed an enormous risk in taking this case”.[[63]](#footnote-63)
3. Given the judge’s findings on the criteria for assessing professional fees other than the time spent on the file by counsel, the Court concludes that the amount of professional fees now claimed by the class members’ counsel, that is, 20% of the settlement fund, is reasonable.
4. At trial, all of the parties agreed to the amount of professional fees set out in the agreement, that is, $7,000,000 (25% of the settlement fund), or did not contest it. Only the dissenting member contested the professional fees claimed. The judge wrote the following about the dissenting member:

[translation]

[40] With respect, the dissenting member does not understand that it is common practice in class actions to sign professional fee agreements that must ultimately be submitted to the Court.[[64]](#footnote-64)

Since a majority of class members agreed at trial with professional fees representing 25% of the settlement fund, it can be assumed that they agree with professional fees corresponding to 20% of the settlement fund.

1. Since the judge did not determine the amount of the professional fees, the Court has no other choice than to do so. Returning the file to the Superior Court to rule on this issue when this Court has the necessary evidence to decide it would not be in the best interests of justice.[[65]](#footnote-65) Litigants are entitled to expect courts to do what is required for the efficient resolution of disputes. Furthermore, the parties agree that the Court should determine the amount of the professional fees.
2. Professional fees representing a percentage of 20% ($5,600,000 (plus taxes)) are reasonable in light of all of the factors noted by the judge himself and listed above.
3. The application of the multiplier method confirms the reasonableness of the professional fees now claimed by class members’ counsel. Applying an hourly rate of $250 (which was the rate indicated in the professional fee agreement if the mandate was revoked) to the hours of work completed (3,479) and to remaining hours (800), the amount of professional fees would be $1,069,750. The $5,600,000 of professional fees claimed on appeal is a $4,530,250 premium, which is less than the $5M or $6M the judge considered excessive. The professional fees claimed ($5,600,000) correspond to a multiplier of 5.23 of the estimated fees ($1,069,750) according to the formula set out above. If instead a multiplier of 4.5 is applied to the estimated professional fees, which *Pellemans* determined was a valid multiplier,[[66]](#footnote-66)the amount of professional fees would be $4,813,875. If the multiplier of 4.64 suggested by the appellant and the *amicus curiae* is applied, the professional fees would be $4,963,640.
4. However, using an hourly rate of $400, which was the hourly rate of the appellant’s counsel in 2022 accepted by the judge,[[67]](#footnote-67) the 4279 hours are worth $1,711,600. For professional fees of $5,600,000, the multiplier would be 3.27. This confirms their reasonableness for the proponents of this method.
5. I therefore propose that the Court formally recognize the offer of counsel for the appellant to reduce their professional fees to 20% of the settlement fund. Accordingly, the amount of professional fees awarded will be $5,600,000 plus taxes and disbursements.
6. Appellant’s counsel will however be required to pay $99,136.09 out of those professional fees to the impleaded party FAAC.

## (c) The professional fees of the amicus curiae.

1. I propose that the professional fees of the *amicus curiae* be paid by the class members and therefore deducted from the amount of the settlement fund.
2. The Agreement strictly limits the respondents’ financial liability. Indeed, it provides that the respondents cannot be held liable for the payment of *any amount other* than $28,000,000 and the amount of the reimbursement of any taxes on class counsel’s statement of professional fees. According to the very wording of the Agreement, under no circumstances will the respondents pay the professional fees of the *amicus curiae*. Moreover, since the respondents did not take a position on the quantum of professional fees, they did not benefit from the services rendered by the *amicus curiae*.
3. Moreover, it would be illusory to condemn the dissenting class member to pay the professional fees of the *amicus curiae*, and there is no reason that the FAAC should pay those costs.
4. In addition, legal costs do not include professional fees (art. 339 CCP). Therefore, the *amicus curiae*’s claim in this regard cannot succeed.
5. At trial, the class members (other than the dissenting class member) agreed with the amount of professional fees set at 25% of the settlement fund provided in the Agreement. On appeal, class members’ counsel accepted to reduce their professional fees to 20% of the settlement fund. I suggest that the revised quantum of professional fees be approved. The reduction of the percentage of professional fees from 25% to 20% of the settlement fund represents savings of $1,400.000 for the class members. In the circumstances of this case, it is fair that the class members pay the professional fees of the *amicus curiae*.[[68]](#footnote-68) In any event, and in principle, lawyers’ statements of professional fees are paid out of the settlement fund, but I am not proposing any rigid rule that an *amicus curiae* should always be paid out of the fund, as one can imagine cases where it would be appropriate for these costs to be shared by all parties involved.

\* \* \*

1. In the exceptional circumstances of this case, where none of the parties disputes the professional fees of the appellant’s counsel, each party, other than the *amicus curiae*, must bear its own costs. The *amicus curiae*’s disbursements will be paid by the class members, as will his professional fees.
2. For all these reasons, I would reverse the trial judgment and allow the appeal with the following conclusions: grant the application for approval of the Agreement and approve the Agreement, including the schedules in their entirety, with the exception of counsel’s professional fees determined on the basis of 25% of the settlement fund set out in clause 8 of the Agreement; formally recognize class counsel’s offer to reduce their professional fees to 20% of the settlement fund amount, and pursuant to the second paragraph of article 593 CCP and clause 8 of the Agreement, determine the amount of professional fees at $5,600,000 (plus disbursements of $8,661.10 and applicable taxes); formally recognize counsel’s undertaking to reimburse $99,136.09 to the impleaded party FAAC; declare that the fees and disbursements of the *amicus curiae* will be paid by the class members out of the settlement fund; and declare that that the Superior Court retains jurisdiction over all other future aspects of the file; the whole without legal costs.

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| MARK SCHRAGER, J.A. |

1. *A.B. c. Clercs de Saint-Viateur du Canada*, 2022 QCCA 1224, Mainville, J.A. [↑](#footnote-ref-1)
2. *A.B. c. Clercs de Saint-Viateur du Canada*, 2022 QCCS 2484 [judgment under appeal]. [↑](#footnote-ref-2)
3. *A.B. c. Clercs de Saint-Viateur du Canada*, 2019 QCCS 1521. [↑](#footnote-ref-3)
4. The share of the CIUSSS de la Capitale-Nationale is limited to the amount set out in Schedule 4 of the Agreement. [↑](#footnote-ref-4)
5. *A.B. c. Clercs de Saint-Viateur du Canada*, 2022 QCCA 1224. [↑](#footnote-ref-5)
6. *A.B. c. Clercs de Saint-Viateur du Canada*, 2022 QCCA 1300. [↑](#footnote-ref-6)
7. Judgment under appeal, *supra* note 2 at para. 40. [↑](#footnote-ref-7)
8. *Ibid.* at para. 42. [↑](#footnote-ref-8)
9. *Y. c. Servites de Marie de Québec*, 2021 QCCS 2712 [*Servites de Marie*]. [↑](#footnote-ref-9)
10. Judgment under appeal, *supra* note 2 at para. 46. [↑](#footnote-ref-10)
11. Judgment under appeal, *supra* note 2 at para. 49. [↑](#footnote-ref-11)
12. *Ibid.* at para*.* 51. [↑](#footnote-ref-12)
13. *Ibid.* at para. 57. [↑](#footnote-ref-13)
14. *Ibid.* at para. 58. [↑](#footnote-ref-14)
15. *Ibid.* at para. 60. [↑](#footnote-ref-15)
16. *Code of Professional Conduct of Lawyers*, CQLR, c. B-1, r. 3.1. [↑](#footnote-ref-16)
17. *L’Oratoire Saint-Joseph du Mont-Royal c. J.J.*, 2019 SCC 35 [*J.J.*]. [↑](#footnote-ref-17)
18. Judgment under appeal, *supra* note 2 at para. 72. [↑](#footnote-ref-18)
19. *Ibid.* at para. 75. [↑](#footnote-ref-19)
20. *Ibid.* at para. 76. [↑](#footnote-ref-20)
21. *Ibid.* at para. 78. [↑](#footnote-ref-21)
22. *Ibid.* at para. 80. [↑](#footnote-ref-22)
23. Judgment under appeal, *supra* note 2 at para. 81. [↑](#footnote-ref-23)
24. *Option Consommateurs c. Banque Amex du Canada*, 2018 QCCA 305 at para. 83 [*Banque Amex*]. [↑](#footnote-ref-24)
25. *Association québécoise de lutte contre la pollution atmosphérique c. Groupe Volkswagen du Canada inc.*, 2022 QCCS 2186 at para. 43, leave to appeal *de bene esse* refused, 2022 QCCA 1305 (11 October 2022) [*Volkswagen*]. [↑](#footnote-ref-25)
26. *Option Consommateurs c. Banque Amex du Canada*, 2017 QCCS 200 at para. 43, aff’d *Banque Amex, supra* note 24; *Pellemans c. Lacroix,* 2011 QCCS 1345at para. 20 [*Pellemans*]. [↑](#footnote-ref-26)
27. *Banque Amex, supra* note 24 at para. 76; *Options Consommateurs c. Merck Frosst Canada ltée*, 2016 QCCS 5075 at para. 30; *Option Consommateurs c. Infineon Technologie, a.g.*, 2014 QCCS 4949 at para. 48; *Johnson c. Bayer inc*., 2008 QCCS 4957 at para. 5. [↑](#footnote-ref-27)
28. *Banque Amex*, *supra* note 24 at para. 61. [↑](#footnote-ref-28)
29. *Ibid*. at para. 74. [↑](#footnote-ref-29)
30. The practice of including lawyers’ professional fees in the settlement agreement also raises ethical issues. This practice should therefore be avoided. On that subject, see the comments of St-Pierre J., for a unanimous court, in *Banque Amex*, *supra* note 24 at para. 74. [↑](#footnote-ref-30)
31. See e.g., *Allen c. Centre intégré universitaire de santé et de services sociaux de la Capitale-Nationale*, 2018 QCCS 5313 at paras. 116–118. See also *Abicidan c. Ikea Canada*, 2021 QCCS 3258 at paras. 23, 56, and 66 (the judge deferred his decision on fees while allowing the agreement). [↑](#footnote-ref-31)
32. *Pellemans*, *supra* note 26 at para. 48. [↑](#footnote-ref-32)
33. *Banque Amex*, *supra* note 24 at para. 66. [↑](#footnote-ref-33)
34. *Ibid.* at para. 67, citing *Skarstedt c. Corporation Nortel Networks*, 2011 QCCA 767 [*Skarstedt*]. [↑](#footnote-ref-34)
35. *Ibid.* at para*.* 62, citing *Apple Canada Inc. c. St-Germain*, 2010 QCCA 1376 at para. 36. [↑](#footnote-ref-35)
36. Catherine Piché, *L’action collective : ses succès et ses défis*, (Montreal: Thémis, 2019) at 227. [↑](#footnote-ref-36)
37. See also art. 2134 CCQ; *Act respecting the Barreau du Québec*, CQLR c. B-1, s. 126. [↑](#footnote-ref-37)
38. *Banque Amex*, *supra* note 24 at para. 66. [↑](#footnote-ref-38)
39. *Pellemans*, *supra* note 26 at para. 76. [↑](#footnote-ref-39)
40. *Skarstedt*, *supra* note 34 at para. 16; *Pellemans*, *supra* note 26 at para. 52. [↑](#footnote-ref-40)
41. *Francoeur c. Belzil*, 2004 CanLII 76585 at para. 33 (C.A.). [↑](#footnote-ref-41)
42. Pierre-Claude Lafond, *Libres propos sur la pratique de l’action collective,* (Montreal: Yvon Blais, 2020) at 274. [↑](#footnote-ref-42)
43. *Option Consommateurs c. Meubles Léon ltée*, 2022 QCCS 193 at para. 88 [*Meubles Léon*]. [↑](#footnote-ref-43)
44. *Marcotte c. Banque de Montréal*, 2015 QCCS 1915 at para. 5. [↑](#footnote-ref-44)
45. See e.g., *Normandin c. Bureau en Gros (Staples Canada)*, 2022 QCCS 3367 at para. 35; *Association des jeunes victimes de l’église c. Harvey*, 2022 QCCS 1956 at para. 56; *Meubles Léon*, *supra* note 43 at para. 93; *Bouchard c. Audi Canada inc*., 2021 QCCS 10 at para. 44; *Salazar Pasaje c. BMW Canada inc*., 2021 QCCS 2512 at para. 58, leave to appeal refused, 2021 QCCA 1107 (8 July 2021); *Pellemans*, *supra* note 26 at paras. 53 and 57. [↑](#footnote-ref-45)
46. *Skarstedt*, *supra* note 34 at para. 31. [↑](#footnote-ref-46)
47. *Volkswagen*, *supra* note 25 at paras. 95–101. [↑](#footnote-ref-47)
48. *Rahmani c. Groupe Adonis inc*., 2021 QCCS 2616 at paras. 60–61. [↑](#footnote-ref-48)
49. Piché, *supra* note 36 at 236. [↑](#footnote-ref-49)
50. *Pellemans*, *supra* note 26 at para. 65. See also Lafond, *supra* note 42 at 288–289. [↑](#footnote-ref-50)
51. *Banque Amex*, *supra* note24 at para. 66. [↑](#footnote-ref-51)
52. *Pellemans*, *supra* note 26 (professional fees of $11,000,000 approved versus professional fees of $2,400,000 using the hourly rate formula). [↑](#footnote-ref-52)
53. *Pellemans*, *supra* note 26 at para. 76. [↑](#footnote-ref-53)
54. *F. c. Frères du Sacré-Coeur*, 2021 QCCS 3621 at paras.163, 168 and 169; see also *Pellemans*, *supra* note 26 at para. 65. [↑](#footnote-ref-54)
55. *Skarstedt*, *supra* note 34 at para. 35. [↑](#footnote-ref-55)
56. *BGA inc. c. Banque de Montréal*, 2022 QCCA 140 at paras. 4–5; *Banque Amex*, *supra* note 24 at paras. 8–9 and 63; *Skarstedt*, *supra* note 34 at para. 34. [↑](#footnote-ref-56)
57. *Banque Amex*, *supra* note 24 at para. 86. [↑](#footnote-ref-57)
58. Judgment under appeal, *supra* note 2 at paras. 36 and 77. [↑](#footnote-ref-58)
59. *Ibid.* at para. 36. [↑](#footnote-ref-59)
60. *Ibid.* at para*.* 77. [↑](#footnote-ref-60)
61. *Ibid.* at paras*.* 50–51. [↑](#footnote-ref-61)
62. *Ibid.* at para*.* 75. [↑](#footnote-ref-62)
63. *Ibid.* at para. 73. [↑](#footnote-ref-63)
64. Judgment under appeal, *supra* note 2 at para. 40. [↑](#footnote-ref-64)
65. Article 9 CCP. [↑](#footnote-ref-65)
66. *Pellemans*, *supra* note 26 at para. 121. [↑](#footnote-ref-66)
67. Judgment under appeal, *supra* note 2 at para. 77. [↑](#footnote-ref-67)
68. At the hearing, the *amicus curiae* told that Court that as at February 28, 2023, the time spent on the file amounted to a bill of approximately $60,000 [↑](#footnote-ref-68)