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Introduction

Consumer collective redress is broadly available in Canada, allowing for compensation in damages for widespread economic or physical injuries caused by defective goods or services, or by unfair business practices. Through the procedural mechanism of the opt-out class action, consumers across the country can access local courts to obtain redress against domestic or foreign defendants. This possibility also gives consumers negotiating power to reach out of court settlements with defendants. This general uniformity in policy regarding consumer collective redress is mitigated, however, by the fact that civil procedure, and substantive private law, are within provincial legislative competence. As a result, the precise legal landscape for consumer collective redress varies throughout the country and gives rise to some important distinctions depending on where such redress is sought.

This contribution will present a general overview of consumer collective redress in Canada. It will also provide some indications of the diversity of procedural approaches that can be found across the country. The first part will set out the particular legislative context that impacts the way in which consumer collective redress operates in Canada. The second part will then focus more specifically on consumer collective redress mechanisms. It will include an examination of the main features of the class action process, including notice and opt-outs, costs and funding, representation and the supervisory role of the judge as well as a more

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detailed presentation of the process for instituting class proceedings. A final part will address the additional considerations involved when redress is sought in a transborder context, that is, where consumer claims from more than one jurisdiction are aggregated into a single class action.

Overall, the opportunities for consumer collective redress in Canada are undeniable. Such claims continue to be brought almost exclusively by way of class actions for which damages are commonly awarded, through a judgment or a court-approved settlement, thereby benefitting aggrieved consumers directly.[1] The diversity of procedural regimes across the country remains an irritant, as do the long delays associated with class proceedings. Still, from an outsider's perspective, the Canadian landscape may reasonably be considered to provide significant access to justice to consumers.

I. Canadian Legal Context

Canada is a federal state where legislative competence is distributed between the central federal government and the provincial (and territorial) governments.[2] Generally all questions of private law and of civil procedure are exercised by the provinces. As a result, consumer law and consumer redress are determined under provincial law. This autonomy means that there is no uniformity across Canada regarding either the substantive law governing consumer relations or the procedural regimes for consumer redress. There are pockets of federal law that affect consumers, however, as federal law governs related areas such as competition, deceptive marketing practices, labelling, dangerous products, drugs,[3] etc. However, contract and tort law are largely within provincial jurisdiction. Given this legislative context, this article will provide a general overview of consumer redress in Canada, focusing on the class action mechanism, and using specific examples of provincial legislation as illustrations. This approach should not eclipse the fact that the resolution of specific claims must always be determined in accordance with the particular legal regime in place in each province.[4]

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1 Mass tort claims have also started to gain traction in Canada and are likely to be considered as an emerging alternative to class actions, as have direct-to-consumer settlements.

2 The powers of the federal and provincial governments are determined under the Canadian Constitution, whereas the territorial governments exercise powers devolved from the federal government. The powers delegated to the Territories are largely congruent with those granted to the Provinces under the Constitution. A more detailed description is available at <https://www.canada.ca/en/intergovernmental-affairs/services/federation/distribution-legislative-powers.html>.

3 The latter categories focus on health and safety of consumers rather than on protection of economic interests.

4 The final part of this article will examine consumer redress in the transborder context,

A further particularity of the Canadian legal landscape is the fact that one of the provinces — Quebec — fits predominantly within the civil law tradition, at least with respect to its substantive law. As such, all of its private law, including the law of contract, delict, property, etc., is codified within the Civil Code of Quebec.[5] The other Canadian provinces are instead governed by the common law tradition, and their private law is found in a combination of statutes and court judgments. With regards to procedural law, there is more commonality across the provinces, which all fit within a common law tradition in terms of the judicial and procedural systems as well as the role of judges and lawyers. Quebec remains somewhat distinct because it has a Code of Civil Procedure, and its hierarchy of sources, even within the procedural realm, follows an approach closest to the civil law.[6]

The main focus of consumer legislation in Canada is concerned with contract (or transactional) issues, including the regulation of certain types of consumer contracts,[7] and with the prevention of unfair business practices as they affect consumers. Although the consumer protection legislation in each province varies, it usually provides some combination of regulation of contract terms generally and in specific types of services, thereby limiting merchants' ability to unilaterally impose terms that may be considered unduly advantageous to them. For example, all provinces have legislated in the area of gift cards, usually prohibiting expiry dates. Many provinces increasingly exclude negative option billing. Four provinces prohibit pre-dispute mandatory arbitration clauses in any consumer contract.[8] The federal government has adopted a code obliging telecom companies to provide for number portability and unlocked cell phones as well as limiting penalties that can be charged on cancellation of a telecom contract.[9] Another common approach is to require disclosure of specific elements of the contract, particularly with credit agreements but also in the field of telecom services. Quebec has the most generous regime which allows a consumer to seek redress if a contract (or a contract

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which includes both interprovincial and international dimensions.

5 The current Civil Code of Quebec came into force in 1994, and replaced the Civil Code of Lower Canada, adopted in 1866.

6 See Rosalie Jukier, "The Impact of Legal Traditions on Quebec Procedural Law: Lessons from Quebec's New Code of Civil Procedure," *Canadian Bar Review*, Vol. 93 (2015), p. 1; Daniel Jutras, "Culture et droit processuel : le cas du Québec," *McGill Law Journal*, Vol. 54 (2009), p. 273.

7 The most commonly regulated contracts are those for residential tenancies, credit, insurance, telecommunications, itinerant sales and travel. An overview of the Quebec regime is available at <https://www.opc.gouv.qc.ca/en/home/>.

8 These are Alberta, Saskatchewan, Ontario and Quebec.

9 Details on the Wireless Code are available at <https://crtc.gc.ca/eng/phone/mobile/code.htm>.

clause) is unduly exploitative, regardless of the type of contract involved.[10] In the majority of these cases, the remedy available allows for rescission of the contract and damages.

While consumer protection legislation also commonly prohibits certain unfair or deceptive business practices,[11] redress claims typically depend on a transaction having been effected by consumers as a result of the practice. Otherwise, violations of these rules can give rise to penalties imposed by government bodies charged with enforcing the rules.[12] For example, the Quebec Consumer Protection Office can take legal action against a merchant in order to stop an illegal behaviour or to have a fine imposed against it.[13]

As noted above, consumer legislation is mainly adopted to modify the general law of contract as it would otherwise apply, without excluding consumers' recourse to that general law in seeking redress.[14] In other words, consumer protection legislation exists in parallel with other areas of private law and the rights and redress it affords are typically conceived of as derogating from the general law. The application of this legislation is not reserved to distinct judicial institutions but rather occurs within the general system of civil justice. There are no specialized consumer courts in any Canadian province. Still, all Canadian provinces provide for a regime of collective redress — the class action — that is particularly well-suited to consumer claims.[15]

II. Collective Redress Framework in Canada

Collective redress regimes, usually referred to as "class actions" in Canada, are available across the country. The class action as a procedural device is available to those who have suffered a common harm or wrong and wish to bring an action on behalf of others with similar or identical interests, the whole in view of *efficiently*

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[10] See *Consumer Protection Act*, CQLR c P-40.1, Art. 8.

[11] In this area, there is often both provincial and federal legislation that can provide the source for the consumer claim, since federal competition legislation also addresses deceptive marketing practices.

[12] In many cases the agency does not have the authority to impose the fine or penalty itself but must take judicial proceedings requesting that a court declare the violation and impose the penalty.

[13] See <https://www.opc.gouv.qc.ca/en/opc/>.

[14] Even in Quebec, the specific regime of consumer protection is provided for in a statute and not within the Civil Code of Quebec, although the latter also includes some provisions relating to consumer contracts.

[15] All of the provinces also provide a small claims' procedures within their general court system, which is often considered to be particularly well-suited to consumer claims given that these are often of lower value.

redressing the widespread harm or injury.[16] As a successor of the English common law's representative action,[17] it has thrived in North America since its introduction in the United States in 1938, and substantial revision in 1966.[18] In Canada, Quebec was the first Canadian province to adopt a class action system in 1979.[19]

Access to justice for those people who have suffered a common wrong or injury but do not have the means to seek redress is the fundamental idea supporting class actions in Canada.[20] In the *Dutton* case, the Supreme Court of Canada outlined the three quintessential public policy objectives and purposes that underlie the modern class action.[21] The first objective encompasses efficiency and judicial economy. The argument here is that aggregation of individual claims that have a similar factual and legal basis serves the purpose of judicial economy.[22] Furthermore, the class action procedure arguably allows for judicial resources to be used more efficiently since the dispute is litigated only once instead of multiple times.[23] In addition, and again arguably, this procedural device may be advantageous for both parties and the judicial system since the total cost of litigation is — at least in theory — reduced.[24] What the argument fails to recognize, however, is how tremendously expensive and time-consuming class actions are.

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16 The Ontario Law Reform Commission, Ministry of the Attorney General, *Report on Class Actions*, Vol. 1 (1982), p. 15. See also Warren K. Winkler, Paul M. Perell, Jasminka Kalajdzic and Alison Warner, *The Law of Class Actions in Canada* (2014), p. 1.

17 See *e.g.*, Stephen C. Yeazell, *From Medieval Group Litigation to Modern Class Action* (1987); Shaun Finn, "In a Class All Its Own: The Advent of the Modern Class Action and Its Changing Legal and Social Mission," *Canandian Class Action Review*, Vol. 2 (2005), p. 333.

18 *Federal Rules of Civil Procedure*, Rule 23, promulgated at 383 U.S. 1029 (1966). See also: Robert G. Bone, "Walking the Class Action Maze: Toward a More Functional Rule 23," *University of Michigan Journal of Law Reform*, Vol. 46 (2013), p. 1097; Arthur R. Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "'Class Action Problem'," *Harvard Law Review*, Vol. 92 (1979), p. 664.

19 *An Act respecting the Class Action*, R.S.Q., c. R.2-1. See also Janet Walker and Garry D. Watson, *Class Actions in Canada* (2014), p. 33; Catherine Piché, "The Cultural Analysis of Class Action Law," *Journal of Civil Law Studies*, Vol. 2 (2009), p. 44.

20 *Dell Computer Corp. v. Union des consommateurs*, [2007] S.C.J. No. 34, [2007] 2 S.C.R. 801, para. 106 (S.C.C.), citing *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666, para. 16 (S.C.C.). All judgments and legislation referred to in this paper are available free of charge at <www.canlii.org>.

21 *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46, [2001] 2 SCR 534. See also *Vivendi Canada Inc. v Dell'Aniello*, 2014 SCC 1, para. 1, [2014] 1 SCR 3: "This procedural vehicle has several objectives, including facilitating access to justice, modifying harmful behavior and conserving judicial resources."

22 *Dutton*, *supra* note 21, para. 27.

23 *Ibid.*

24 OLRC Report, *supra* note 16, p. 118.

As a second objective, the Supreme Court of Canada recognizes that the class action procedure allows for great access to justice, especially for these individuals whose claims are not worth pursuing economically on an individual basis.[25] Access to justice is understood by class action academics to mean access to a form of compensation.[26] The third public policy objective of class actions, as recognized in *Dutton*, is that class actions aim to deter actual and potential wrongdoers from inflicting "small amounts of damage on a larger number of people".[27] This third objective recognizes that companies may fear potential or ongoing class action lawsuits, and are likely to adjust their behavior accordingly to prevent the eventuality of being sued collectively.

As will be further detailed below, there are many other advantages to resorting to collective redress in Canada, including: the judicial case management by one single judge,[28] the extensive powers given to class action judges to protect the interests of class members, the fact that class members are immune to having to pay those costs associated with losing a class action ("adverse costs"), the broad notice programs that serve to inform class members of those fundamental stages of the proceedings, and the consolidation of claims and binding effect of judgment and/or settlement.[29]

Today, all the Canadian provinces, with the exception of Prince Edward Island,[30] have a class action system.[31] In Quebec, for instance, a representative

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[25] *Dutton*, *supra* note 21, para. 28; OLRC Report, *supra* note 16, p. 119.

[26] See *e.g*, Catherine Piché, "Class Action Value," *Theoretical Inquiries in Law*, Vol. 19, No. 1 (2018), pp. 273-275; Frank Iacobucci, "What is Access to Justice in the Context of Class Actions ?," in Jasminka Kaladjzic ed., *Accessing Justice — Appraising Class Actions Ten Years After Dutton, Hollick & Rumley* (2011), p. 20 ("I define access to justice generally to include [...] to obtain an appropriate restorative result where warranted").

[27] *Dutton*, *supra* note 21, para. 29.

[28] The judge will case manage the case through certification, and until the common issues trial or the approval of a proposed class settlement.

[29] Winkler *et al.*, *supra* note 16, pp. 4-5.

[30] In Prince Edward Island and the Canadian territories, class proceedings may be brought in accordance with the local rules of court. See *Dutton*, *supra* note 21, para. 27, [2001] 2 SCR 534.

[31] See *Class Proceedings Act*, S.A. 2003, c. C-16 (Alberta); *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (British Columbia); *The Class Proceedings Act*, C.C.S.M. c. C. 130 (Manitoba); *Class Proceedings Act*, R.S.N.B. 2011, c. 125 (New Brunswick); *Class Actions Act*, S.N.L. 2001, c. C-18-1 (Newfoundland and Labrador); *Class Proceedings Act*, S.N.S. 2007, c. 28 (Nova Scotia); *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (hereinafter "Ont. C.P.A."); *Code of Civil Procedure*, C.Q.L.R. c. C-25.01, Arts. 574 *et sq.* (Quebec) (hereinafter, "C.C.P."); *The Class Actions Act*, S.S. 2001, c. C-12.01 (Saskatchewan). See also Walker and Watson, *supra* note 19, p. 33.

plaintiff may bring a case before the court on behalf of other class members who find themselves in a similar situation.[32] Similarly, the Canadian province of Ontario's *Class Proceedings Act* provides that one or more members of a class of persons may commence an action or application in the Superior Court on behalf of the members of the class.[33] Moreover, the Federal Court of Canada amended its Rules in 2002 to include provisions for class proceedings within the Court's jurisdiction (in respect of federal matters such as maritime law and taxation law, among others).[34]

As will be further detailed below, all of the class action regimes in Canada follow a similar approach which is to allow the aggregation of claims based on common issues against a single defendant, alleged to have acted toward members of the class in a manner that gives rise to liability to all of them. The class is typically led by a self-appointed representative plaintiff who brings the claim on behalf of a class. In all provinces there is a preliminary step to such actions, usually referred to as "certification", where a court is required to assess whether the claim satisfies the conditions set out in the legislation. Once a class is certified, it can proceed in that form to trial and judgment, or settlement at any point. By contrast with American class actions, there is no requirement of predominance or superiority of common issues over individual issues in Canadian class actions. Courts in Ontario have, however, recognized the weighing of common issues in relation to individual issues as part of the preferability analysis, but have also rejected a predominance requirement applicable at that stage.[35]

When examining collective redress for consumer claims, it is essential to note that such actions are not limited to any particular type of claim or specific groups of people in the Canadian context.[36] While many such claims can be based on rights provided by consumer protection legislation, they may also arise from general contract law, sale of goods legislation, competition law and any other law that provides claims to address economic losses, including environmental law. Collective redress can also be used by consumers claiming personal injury for de-

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[32] See Arts. 571 to 604 of C.C.P., *supra* note 31. According to Art. 571(2) C.C.P., the definition of "class member" extends beyond natural people, including legal entities established for a private interest, partnerships and associations, or other groups who may not have juridical personality.

[33] S. 2(1) Ont. C.P.A., *supra* note 31.

[34] *Federal Court Rules*, SOR/98-106, enacted pursuant to *Federal Courts Act*, R.S.C. 1985, c. F-7.

[35] Courts in Ontario have recognized the weighing of common issues in relation to individual issues as part of the preferability analysis, but have also rejected a predominance requirement applicable at that stage. See Winkler *et al.*, *supra* note 16, p. 133.

[36] *Bou Malhab c. Diffusion Métromédia CMR Inc.*, [2011] 1 S.C.R. 214, para. 52 (S.C.C.), citing *St. Lawrence Cement Inc. v. Barrette*, [2008] 3 S.C.R. 392, para. 111 (S.C.C.).

fective products, including food, medical devices or medicines. More recently, consumers have also brought claims for collective redress for alleged breaches of privacy rights in the social media context.[37] Companies can be targeted industry-wide,[38] which renders them more vulnerable and susceptible to settle early on in the proceedings, in the face of financial and reputational pressures.

The unique form that collective redress may take in Canada is advantageous, as it also means that the procedural rules governing collective redress are not specifically designed to address consumer claims. Nevertheless, courts are usually attuned to the particularities of consumer claims, including the expected vulnerability of consumers and the prevalence of small-value claims, in their application of collective redress regimes to consumer claims.

A potential obstacle to consumer class actions, and to individual actions as well, is the common inclusion of arbitral clauses in consumer contracts, particularly in the online context. If arbitral clauses in consumer contracts are binding, they will exclude recourse to all actions, including class actions, before national courts by forcing consumers to arbitrate their claims, typically on an individual basis only. Currently in Canada, four provinces expressly prohibit pre-dispute mandatory arbitration clauses under their consumer protection legislation.[39] Three of these specify in addition that any clause in a consumer contract that has the effect of excluding access to judicial class actions is prohibited.[40] The Supreme Court has indicated that without such express statutory language excluding the binding effect of arbitration clauses, these clauses should be enforced, even in the consumer context, and even if they deny access to class actions.[41]

Alternatively, consumer contracts may include a forum selection clause, by which the merchant seeks to impose the same jurisdiction for claims to all its customers. While this does not necessarily exclude recourse to class actions, as arbitral clauses do, forum selection clauses can channel actions outside a consumer's

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[37] See the recent Supreme Court of Canada decision in *Douez v Facebook*, Inc., 2017 SCC 33, that allowed a claim of breach of privacy to go forward in British Columbia.

[38] *Marcotte c. Longueil (City)*, [2009] S.C.J. No. 43, [2009] 3 S.C.R. 65.

[39] See Art. 11.1, Quebec *Consumer Protection Act*; s. 7, Ontario *Consumer Protection Act*; s. 16, Alberta *Consumer Protection Act*; s. 101, Saskatchewan *Consumer Protection and Business Practices Act*. See also Geneviève Saumier, "Consumer Dispute Resolution: The Evolving Canadian Landscape," *Class Action Defence Quarterly*, Vol. 1, No. 4 (2008), pp. 52-57.

[40] This is the case in Ontario, Quebec and Saskatchewan.

[41] See *Dell Computer Corp. c. Union des consommateurs*, [2007] 2 R.C.S. 801, 2007 CSC 34. The Court did carve out an exception where the judicial remedy sought was in the public interest and not readily available in arbitration (see *Seidel v. TELUS Communications Inc.*, 2011 SCC 15).

own jurisdiction.[42] The only province that expressly guarantees access to courts to its resident consumers even in the face of a forum selection clause is Quebec.[43] The same result may be obtained in Ontario through its consumer legislation's expressly guaranteed access to class actions in the province, which should defeat any clause designating a foreign court for dispute resolution.[44] None of the other common law provinces take such a clear approach, although forum selection clauses can always be avoided if the plaintiff shows a "strong cause" for non-enforcement. Recently the Supreme Court of Canada has refused to enforce such a clause in a consumer class action brought against Facebook for alleged violations of privacy rights.[45] This decision was the first indication by the Supreme Court that jurisdictional clauses might be treated differently in the B2C than in the B2B context, absent specific legislation to that effect. Access to justice was an important consideration in that case.

III. Class Action Processes in Canada

This section will examine in greater detail the class action process that is found across Canada. The main features will be presented and then a more detailed examination of the processes in Quebec and Ontario will be provided, to illustrate some of the divergences in the Canadian provincial regimes.

1. Main Features of Class Actions in Canada

(1) Preliminary "Screening" Stage

In Canada, class actions are multi-step procedures, as all provincial systems provide for a preliminary screening (or "filtering")[46] stage involving a determination of the appropriateness of the action to proceed as a class action. This screening stage, which in no way addresses the merits of the case, is called "certification" in the common law provinces and "authorization", in Quebec. Once this stage is completed, the action may be pursued collectively as a class action.

By way of example, Quebec courts recently authorized a consumer class action brought on behalf of a "class" embracing all consumers residing in the

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[42] The transborder challenges that this may raise are discussed in the final section of this paper.

[43] Art. 3149, Civil Code of Quebec, for claims against foreign defendants and Art. 11.1 of the *Consumer Protection Act* for purely domestic claims.

[44] See *supra* note 41. This will only be available for claims arising under the legislation, thereby excluding claims brought under general contract law, for example.

[45] See *Douez*, *supra* note 37.

[46] *Sibiga c. Fido Solutions inc.*, 2016 QCCA 1299, paras. 33-35.

province of Quebec who were charged international mobile data roaming fees for their cellular phone use by four of the largest telecommunications companies "at a rate higher than $5.00 per megabyte after the date of January 8, 2010".[47] Montreal Fido customer Inga Sibiga went on vacation in the U.S. in the fall of 2012, and used her smartphone roughly six times to access Google Maps, without subscribing to a prepaid travel data add-on, and was charged $250.81 in data roaming charges, for 40.82 megabytes of data. Several months later, a Montreal class actions law firm contacted her, seeking out clients who had incurred excessive data roaming charges. She agreed to act as a representative for the class, and a motion for authorization of a class action was thereafter filed.

In the motion for authorization, Sibiga alleged that international roaming fees charged by wireless mobile phone service providers to Quebec consumers were "abusive, lesionary and so disproportionately high as to amount to exploitation", pursuant to applicable rules in consumer protection legislation and the Civil Code of Québec.[48] The motion was denied in 2014 by the Quebec Superior Court, in part on the basis that Sibiga could not prove how the data fees were "exploitative".[49] The Court of Appeal reversed the decision, and granted authorization, concluding that the high data roaming charges could be held to be "exploitative" and contrary to Quebec's *Consumer Protection Act*, as based upon Sibiga's filing of her monthly statements from the service provider and some publicly available information documents.[50] For the Court of Appeal, a mere spark of credibility is sufficient at this stage, and the first judge should not have required more evidence or have delved into the merits, in such a way that was considered "imprudent and indeed mistaken".[51]

(2) "Opt-Out" System

The class action procedure in Canada by and large functions based on the cornerstone "opt out" procedure, pioneered in the United States. This means that individuals who fit within the class definition are automatically included and made members of the class, even if they do not participate actively in the course of the proceedings, and unless they explicitly "opt out". Put differently, persons who do not wish to be part of a certified class action and bound by its outcome must take active steps to opt out of the action; otherwise, they will become members of the class so long as they fit within the description of this class.[52] Courts exercise juris-

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47 *Ibid.*

48 See *ibid.*, para. 13.

49 2014 QCCS 3235.

50 C.A. Decision, *supra* note 46.

51 *Ibid.*, paras. 69-96.

52 In some of the Canadian provinces, such as British Columbia and New-Brunswick, non-

diction over class members that are considered "absent" since they have not expressly consented to be represented in the action and are not actively involved in its prosecution. This fact is sometimes criticized because the process binds individuals who have not expressly consented to be included in the action. However, the notice and opt-out mechanism described below is seen as the way of preserving individual autonomy while maximizing the advantages of aggregation of claims. Such opt-out systems are thought to enhance access to justice for members, by allowing for the creation of larger classes, wider distributions, and broader binding effects of judgment.

(3) Class Action Notices

Notices are necessary at several stages of the class action in order to inform members of their rights. In fact, notices serve three important purposes: 1) to advise class members of a right to opt out of a class proceeding, 2) to ensure the adequate representation of "absent" class members, and 3) to inform those members of the procedural steps needed to participate in distributions in case of a favourable judgment in favour of the class, as well as their rights following settlement.[53] Judgments authorizing or certifying class actions order the publication of a notice to class members, providing them with ample time to opt out.[54] Importantly, an individual who wishes to opt out will not be constrained by the final judgment of the class action, but only if that class member followed the opt-out procedure and informed the court clerk before the expiry of the prescribed time limit.[55]

For fairness and due process considerations, notices must be approved by the court.[56] Class proceedings statutes provide for different manners of notice, which aim to reach the greatest number of class members and thereby lead to enhanced take-up rates. They also prescribe the contents of notice, which must be provided in clear and accessible language.[57]

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residents will not become a part of the class unless they take affirmative steps to opt-in. This will be further discussed in the final section of this paper.

[53] OLRC Report, *supra* note 16, Chapter III.

[54] Art. 576, para. 2 C.C.P., *supra* note 31; See also Art. 579 C.C.P.: The class action notice describes the class, outlines the main issues to be addressed collectively and the conclusions sought in relation to those issues, identifies the representative plaintiff, the contact information of their lawyer, and the district the class action is to be instituted, and declares that class members have the right to opt out, among other information. See also *Canada Post Corp. v Lépine*, 2009 SCC 16, para. 42, [2009] 1 SCR 549 (on how "indispensable" class notice is). In Ontario, see s. 17 Ont. CPA (on notice of certification).

[55] Art. 580 C.C.P., *supra* note 31.

[56] See *e.g.*, s. 20 and 21 Ont. CPA, *supra* note 31; Art. 576, para. 2, and 579 C.C.P., *supra* note 31.

[57] See *e.g.*, s. 17(6) Ont. CPA, *supra* note 31, and Art. 579 C.C.P., *supra* note 31.

(4) Adequate Representation

The class member who is appointed as representative plaintiff must be in a position to "adequately" represent the class members.[58] The certification judgment designates the member who will act as a representative plaintiff.[59] In *Dutton*, the Supreme Court of Canada listed various factors that the court may look to when assessing whether the proposed representative plaintiff is adequate, including "the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular".[60] In addition, the proposed representative is not required to be the "best" possible representative, nor be "typical" of the class.[61]

(5) Class Action Funding and Liability for Costs

Class actions are expensive to initiate and bring to settlement or judgement, and therefore, the issue of funding and liability for costs is fundamental. Class actions are financed primarily by class counsel, through the use of contingency fees. Contingency fees are possible and frequent in Canada, and those fees expose the lawyers to the risk of non-payment in the event of failure, in exchange for the possibility of a generous award in the event of success, roughly equivalent to 25-30% of the total award.

In Ontario and most other Canadian jurisdictions, the "loser-pays rule" for costs is applicable to all civil litigation, which means that the party who is defeated in a legal action faces the possibility of being ordered to pay for some or all of the winning party's legal costs and disbursements. Class representative plaintiffs are responsible for costs, if the class action is unsuccessful, but class members are not.[62] In Ontario, however, the court is given the discretion to depart from the traditional rule and deny the successful defendant costs where the proceeding is a "test case", "raises a novel point of law", or involves a "matter of public interest".[63] There is also a Class Proceedings Fund that provides financial support to approved class action plaintiffs for legal disbursements and indemnifies plaintiffs for costs

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[58] Art. 575, para. 4 C.C.P., *ibid.*; See also Walker and Watson, *supra* note 19, p. 922; In addition, the proposed representative must fairly represent the other class members and act without any conflict of interest.

[59] Art. 576, para. 1 C.C.P., *supra* note 31.

[60] *Dutton*, *supra* note 21, para. 41.

[61] *Ibid.*

[62] See *e.g.*, Art. 579(1)6) C.C.P., *supra* note 31; *Desgagné c. Québec*, 2010 QCCS 4838, para. 567.

[63] S. 31 Ont. C.P.A., *supra* note 31. See also *Smith v. Inco Ld.*, 2013 ONCA 724 (defendant sought to recover legal costs of over $5 million, but was instead awarded a still substantial, though smaller award of $1.76 million.)

that may be awarded against them in those funded proceedings. The Fund receives a levy of 10% of any awards or settlements made in favour of the plaintiffs in funded proceedings, plus a return of any funded disbursements.[64]

In Quebec, the loser pays rule also applies, but only nominal sums are ordinarily awarded against unsuccessful class representatives.[65] Importantly, the class action's proposed representative may also apply for financial assistance to the Quebec publicly funded *Fonds d'aide aux actions collectives*,[66] which helps finance class counsel fees and disbursements (including expert fees) in one third of all class actions in the province.[67] The Fonds retains a percentage amount from each class action concluded in Quebec, whether funded or not.[68] Generally, funding class actions publicly is justified, given the Fond's socially-focused access to justice objective and mandate that gives it a proper motive to assist litigants.[69]

Throughout North America and around the world, there has been a "palpable increase in private third party funding", which involves providing money to a party to fund the potential or actual class lawsuits in exchange for a portion of the proceeds.[70] While controversial, the practice is now accepted by courts in Canada.[71]

(6) Protector Judges

Given the need to protect "absent" class members, class action judges have an enhanced role as they must continuously verify that these members are adequately protected.[72] As the late H. Patrick Glenn duly noted, the class action dynamic disrupts the traditional conceptions of the judge, lawyers and parties' roles within the

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[64] Details of this fund are available at <https://www.ontario.ca/laws/regulation/920771>.

[65] See *Buonamici c. Blockbuster Canada Co.*, 2007 QCCA 468, paras. 25-29.

[66] See *An Act Respecting the Fonds d'aide aux actions collectives*, R.S.Q., c. R-2.1.

[67] Fonds d'aide aux actions collectives Website, *available at* <http://www.faac.justice.gouv.qc.ca/#>; See also Catherine Piché, "Public Financiers as Overseers of Class Proceedings," *New York Univeristy Journal of Law & Business*, Vol. 12, No. 3 (2016), *available at* <https://docs.wixstatic.com/ugd/716e9c_5479b347e58a465598a9e42172d3c912.pdf>.

[68] In Quebec, the *Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives*, chapter F-3.2.0.1.1, s. 38, par. a) provides for various percentage withheld by the publicly-funded *Fonds d'aide aux actions collectives* from the balance or from a liquidated claim.

[69] Piché, *supra* note 67, p. 787.

[70] *Ibid.*, p. 784.

[71] See *e.g.*, *Febr v. Sun Life Assurance Co. of Canada*, 2012 ONSC 2715, paras. 89-90.

[72] Pierre-Claude Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice, impact et évolution* (2006). As stated by Professor Glenn: "A class action is an action on behalf of an absent class ... The judiciary thus is requested to act on behalf of people who have not requested judicial intervention." H.P. Glenn, "The Dilemma of Class Action Reform," *Oxford Journal of Legal Studies*, Vol. 6 (1986), p. 262.

litigation.[73] Class action judges often become so actively involved in class action management that they assume some of the lawyers' traditional functions — such as organization of the procedures and strategy of the case, but remain uncomfortable doing so.[74] In time, nonetheless, class action judges have become much more active in class actions in terms of managing the file more efficiently. For example, they will schedule a class management conference at the very onset of the proceedings in order to organize the case's administration along with counsel for the case.

(7) Effect of Judgment and Recovery of Damages

The class action judgment, which acquires the force of *res judicata*, is binding on all class members who did not opt-out.[75] In other words, the "absent" class members can no longer bring this same claim before the court.[76] The judgment will identify whether the class members' claims are to be recovered collectively or individually.[77] Importantly, courts in Canada allow class plaintiffs to recover collectively and to have their damages assessed on an aggregate basis. Aggregate damages eliminate the need for complicated and costly individual damages assessments, and they provide an easier path to class-wide recovery.

In Ontario, aggregate damages allow a court to dispense with the need to calculate the quantum of damages individually.[78] For instance, in a 2014 Ontario Superior Court case, a claim was made that involved misrepresentations stemming from course calendars issued by a College about the benefits of its International Business Management Program.[79] At the common issues trial, the court found that the defendant had engaged in an unfair practice under the *Consumer Protection Act* and that there had been negligent misrepresentation. At the damages phase, the plaintiffs sought damages under the *Consumer Protection Act* rather than having to prove individual reliance and damages under a common law negligent misrepresentation claim. Claiming that aggregate damages were essential to the continuing viability of the class action, the Court indicated that proof of a causal connection had been made on a class-wide basis and that "all or part of the defen-

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[73] H. Patrick Glenn, "Class Actions in Ontario and Quebec," *Canadian Bar Review*, Vol. 6 (1984), p. 268.

[74] Catherine Piché, "Judging Fairness in Class Action Settlements," *Windsor Yearbook of Access to Justice*, Vol. 28 (2010), p. 129.

[75] *Gaudette* v *Whirlpool Canada*, 2017 QCCS 4193, para. 17.

[76] *Ibid*.

[77] Art. 592 C.C.P., *supra* note 31.

[78] See *e.g.*, s. 24(1) Ont. C.P.A., *supra* note 31, ("if all or part of the defendant's monetary liability to some or all of the class members can reasonably be determined without proof by individual class members, the court may do so and give judgment accordingly.").

[79] *Ramdath v. George Brown College*, 2014 ONSC 2066.

dant's monetary liability to class members [could] be fairly and reasonably determined without proof by individual class members."[80]

If an aggregate assessment of the defendant's liability is made, all or a part of the award may be applied so that some or all individual class members share in the award on an average or proportional basis.[81] In making this decision, the court will consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual members.[82] If the court determines that individual claims need to be made to distribute the aggregate award, the court must specify procedures for determining the claims.[83] Finally, the court may order that all or part of an aggregate award that has not been distributed within a certain time be applied in any manner that may reasonably be expected to benefit class members.[84] This distribution is called a "*cy près*" distribution.[85] The point of this is to ensure that the defendants pays the entire amount of the award regardless of how many class members actually file a claim.

If and when common issues are determined in favour of a class in Ontario and participation of individual class members is required to determine individual issues other than those determinable within the aggregate assessment procedure, the court has many options for resolving those individual issues, such as holding further hearings.[86] Considerable discretion is given to the courts for the distribution of amounts awarded.[87]

Similarly, under Quebec law, the recovery of claims is said to be a collective recovery when a sufficiently precise total claim amount can be identified from the evidence.[88] Collective recovery has been preferred over individual recovery in Quebec because it advances the societal objective of ensuring that the defendant is held fully responsible for the harm caused.[89] The judgment ordering collective recovery makes provision for individual liquidation of the claims, or for distribution

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[80] *Ibid*., paras. 1 and 27.

[81] S. 24(2) Ont. C.P.A., *supra* note 31.

[82] S. 24(3) Ont. C.P.A., *ibid.*

[83] S. 24(5) Ont. C.P.A., *ibid.*

[84] S. 26 Ont. C.P.A., *ibid.*

[85] See *e.g.*, Jasminka Kaladjzic, "The 'Illusion of Compensation': Cy près Distributions in Canadian Class Actions," *Canadian Bar Review*, Vol. 92 (2014).

[86] S. 25(1) and (7) Ont. C.P.A., *supra* note 31.

[87] S. 26(7) Ont. C.P.A., *ibid.*

[88] Art. 595 C.C.P., *supra* note 31.

[89] *Adams v. Amex Bank of Canada*, 2009 QCCS 2695, para. 440.

on an individual basis.[90] In situations where the individual liquidation of the class members' claims or the distribution of an amount to each class member is "impracticable, inappropriate or too costly", the court must determine the residual balance and has the discretion to instruct that the amount be remitted to a third person it chooses.[91] The court will dispose of the unpaid funds taking into consideration, among other things, the interest of the members.[92] The balance is generally distributed as a *cy près* donation to non-profit organizations whose activities are related to the interests of the class members.

A judgement ordering a collective recovery of claims orders the debtor either to deposit the established amount, or to carry out a determined reparatory measure, or both. In every case the liquidation, distribution or remittance of the amount of the collected recovery is carried out after the payment of the legal costs, class counsel fees, and the representative plaintiff's disbursements.[93] When it orders the individual recovery of claims, the court must determine the claim of each class member.[94]

2. Closer Examination of the Processes in Two Provinces: Ontario and Quebec

In the following section, we will very briefly present the two major Canadian systems of Ontario and Quebec in more detail for comparative purposes.

(1) Ontario Certification

Ontario class actions begin the same way as any other action: the issuance of a statement of claim, stating the facts alleged concisely and requesting that an award be issued. Within 30 days, the defendant will refute or admit the allegations in the statement of claim.The representative plaintiff will thereafter deliver a certification motion within 90 days, containing a notice of motion and affidavits providing the required evidence for certification.[95] Once the motion is filed, the court will set a timetable for certification, also providing for expert affidavits, cross-examinations and the exchange of legal briefs.

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[90] Art. 596 C.C.P., *supra* note 31. The Article further provides that remaining balances will be disposed of in the same manner as when remitting an amount to a third person, having regard, among other things, to the members' interests.

[91] Art. 597, para. 1 C.C.P., *supra* note 31.

[92] Art. 596, para. 3 C.C.P., *ibid.*

[93] Art. 598 C.C.P., *ibid.*; See also Art. 593 C.C.P., *ibid.* (on representative plaintiff indemnities for disbursements).

[94] Art. 600 C.C.P., *ibid.*; See also Art. 599 C.C.P.: A judgment that orders the individual recovery of claims must identify which matters remain to be decided to determine individual claims.

[95] S. 2(3) Ont. C.P.A., *supra* note 31.

In order to successfully certify a class action in Ontario, the plaintiff — by way of the class representative — must demonstrate to a judge that: (a) the pleadings disclose a cause of action; (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant; (c) the claims or defences of the class members raise common issues; (d) a class action would be the preferable procedure to resolve the common issues; and (e) there is a representative plaintiff.[96] If the parties have already negotiated a settlement, and certification is sought for the purposes of settlement, all the certification criteria must still be met.[97] In addition, a fairness hearing will be held, which will address the fairness and reasonableness of the settlement to the class as a whole, as well as the approval of class counsel's fees.[98]

In Ontario, the certification stage is divided into two parts. At the first stage, a hearing is held, at which point the Court will determine the threshold questions relating to whether the proceeding is appropriate for a class action and whether the five certification criteria are met. At the second stage, the hearing will define the class and the common issues, and will set out a litigation plan. The certification order defines the class of persons who will be bound by judgment, names the representative(s), states the nature of the claims asserted on behalf of the class and relief sought, sets out the common issues, and determines the deadline for opt out, that is, the latest time at which a class member may choose not to be a part of the class action.[99] A case management judge is appointed after certification, and he or she will have the discretion to manage the proceedings efficiently and fairly.

A plaintiff may thereafter appeal from an order refusing to certify a proceeding as a class proceeding.[100] The defendant who loses at certification requires leave to appeal from the order certifying a proceeding as a class proceeding.[101]

After the certification order has been issued, the Court will approve a method of providing notice to class members.[102] The notice announces to the members that a class action has been commenced on their behalf, describes the class action, including the name of the representative, and gives them the opportunity to opt out

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[96] S. 5(1) Ont. C.P.A., *supra* note 31.

[97] *Baxter v. Canada (A.G.)* (2006), 83 O.R. (3d) 481 (Ont. S.C.J.), para. 22; *Bellaire v. Daya* (2007), 49 C.P.C. (6th) 110, [2007] O.J. No. 4819 (Ont. S.C.J.), para. 16.

[98] See notably, s. 29 Ont. C.P.A., *supra* note 31; Catherine Piché, *Fairness in Class Action Settlements* (2011), p. 33.

[99] Ss. 5(5), 8(1), and 9, Ont. C.P.A., *supra* note 31.

[100] S. 30(1) Ont. C.P.A., *ibid.*

[101] S. 30(2) Ont. C.P.A., *ibid.* After the Divisional Court decides an appeal from a certification order, a further appeal to the Court of Appeal is possible, with leave of the Court of Appeal. See *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 6(1).

[102] Ss. 17(4), 20 and 22, Ont. C.P.A., *supra* note 31.

if they choose to. It can be sent by mail, postings or through technologies such as social media.

Trials of Ontario class actions are rare, as most certified actions are settled. Before a date is set for trial, mediation will be proposed by the judge. The first part of class action trial is an examination of the merits of the common issues.[103] Judgment on the common issues binds every class member who has not opted out of the class proceeding.[104] If the cause of action requires the individual assessment of damages for each class member, this typically occurs separately, and can be completed by an arbitrator, a mediator or another third-party expert. If the finding on the common issues is sufficient to determine the amount of compensation for each member of the class, there is no need for the second stage. In every case, the court may direct any means of distribution of amounts awarded that it considers appropriate.[105]

(2) Quebec Authorization

In Quebec, an application for authorization to institute a class action is first filed with the Superior Court of Quebec, which has exclusive jurisdiction over class actions in the province.[106] Judgments on authorization take on average two years to be issued,[107] which has been criticized by the courts as being too burdensome of a delay.[108] The application for authorization is considered as a means to filter frivolous or unfounded cases, and to avoid defendants' having to answer "untenable claims on the merits".[109] The application for authorization must state the facts on which it is based and explain the nature of the class action, as well as de-

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[103] S. 11(1) Ont. C.P.A., *supra* note 31; Winkler *et al.*, *supra* note 16, pp. 8-9, citing *Martin v. AstraZeneca Pharmaceuticals PLC* (2009), 83 C.P.C. (6th) 79 (Ont. S.C.J.), para. 14; leave to appeal refused (2009), 259 O.A.C. 155 (Ont. Div. Ct.).

[104] S. 27(3) Ont. C.P.A., *supra* note 31.

[105] S. 26(1) Ont. C.P.A., *ibid.*

[106] Art. 33, para. 2 C.C.P., *supra* note 31.

[107] Class Actions Lab Data, on file with author Professor Piché.

[108] *Charles v. Boiron Canada inc.*, 2016 QCCA 1716, paras. 69-75.

[109] *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59, paras. 37 and 59; "At the authorization stage, the court plays the role of a filter. It need only satisfy itself that the applicant has succeeded in meeting the criteria set out in Art. 1003 of the C.C.P., *supra* note 31, bearing in mind that the threshold provided for in that article is a low one. The authorizing court's decision is procedural in nature, as it must decide whether the class action may proceed." See also *Vivendi*, *supra* note 21, para. 37: "The judge's function at the authorization stage is one of screening motions to ensure that defendants do not have to defend against untenable claims on the merits. [...] In considering whether the criteria are met at the authorization stage, the judge is therefore deciding a procedural question. The judge must not deal with the merits of the case, as they are to be considered only after the motion for authorization is granted."

scribe the class on whose behalf the person intends to act.[110] In conformity with the principle of proportionality,[111] the application for authorization can only be contested orally, and cannot include any evidence without permission from the court,[112] which, in itself, is an important distinguishing factor from Ontario.

Once authorization is granted, a timetable (called a "protocol") is set for the trial of common issues and discovery. An originating application must be filed with the court office no later than three months after authorization.[113] In Quebec, a judgment denying authorization may be appealed as of right by the applicant or, with leave of a judge of the Quebec Court of Appeal, by a class member.[114] A judgment authorizing a class action may be appealed by the respondent, with leave.[115]

The special case manager judge assigned upon the filing of the initial motion, is responsible for presiding over the proceeding, and for hearing all procedural matters regarding the class action.[116] This judge will appreciate the four authorization criteria, and will decide whether the class action should thus be authorized and the representative plaintiff designated. To be authorized as a class action, (1) the claims of the class members must raise identical, similar or related issues of law or fact; (2) the facts alleged must appear to justify the conclusions sought; (3) the composition of the class must make it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and (4) the class member appointed as representative plaintiff must be in a position to adequately represent the class members.[117] Once the four criteria for authorization of a class action in Québec are met, authorization must be granted.[118]

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[110] Art. 574 C.C.P., *supra* note 31. The motion must be served on the defendant, with at least 30 days' notice.

[111] Art. 18 C.C.P., *ibid*.; See also Piché, *supra* note 26, p. 285.

[112] Finn, *supra* note 17, p. 172. A request to submit evidence that is relevant and proportional will be granted if the evidence is to assist the judge in evaluating the authorization criteria. *Ibid*.

[113] Art. 583, para. 1 C.C.P., *supra* note 31.

[114] Art. 578 C.C.P., *ibid*. See also Art. 602 C.C.P. (appeal of the case on the merits).

[115] *Ibid*.

[116] Art. 572, para. 2 C.C.P., *ibid*. On September 1, 2018, a special team of 10 judges will be constituted, at the Superior Court of Quebec, District of Montreal, in view of making class action cases proceed more efficiently and rapidly to the merits. These judges will be exclusively in charge of case managing all class action cases until an order is made to certify the case. After certification, cases will be redistributed to one judge within the larger pool of all Superior Court sitting judges.

[117] Art. 575 C.C.P., *ibid*.

[118] *Vivendi*, *supra* note 21, para. 67.

Quebec applicants do not have a heavy burden at authorization; they must demonstrate that they have an "arguable case" in light of the facts alleged and the applicable law.[119] The facts alleged in the authorization motion cannot be "vague, general [or] imprecise", even if the threshold is relatively low, and "some form of factual underpinning [must accompany] [a]n applicant's allegations [...] [such as] to form an arguable case."[120] At this stage, "[a]lthough more than bare allegations are required, this threshold falls comfortably below the civil standard of proof on a balance of probabilities."[121] Importantly, expert evidence is rarely presented at authorization in Quebec, but is a regular practice in the other Canadian provinces.[122]

The "common questions" test in Art. 575 (1) C.C.P. aims to determine whether proceeding by way of class action will "avoid duplication of fact-finding or legal analysis".[123] Only one common question between potential class members need be identified to pass the test.[124] For example, in a health insurance coverage class action, the individual employee insurance coverages were considered by lower courts to be important issues that would require a minimum of 22 individualized analyses in order to resolve the "common" issues raised by the action, but the Supreme Court of Canada confirmed a Court of Appeal finding that the validity of amendments made to the insurance coverage was a sufficient common question.[125]

The second criterion of Art. 575 C.C.P., whether "the facts alleged appear to justify the conclusions sought", requires courts to ensure that there is a "reasonable cause of action".[126] While not a "test of the merits of the action", the criterion mandates that the potential representative plaintiff merely demonstrate that the claim has "some basis in fact".[127] In other words, only a "*prima facie* case", or an "arguable case" must be established.[128] As for Art. 575's third criterion, which involves a consideration of the composition of the class, the court must be provided information regarding the potential size of the class and its characteristics.[129] This criterion will be met if the composition of the class renders another procedural channel imprac-

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[119] *Infineon*, *supra* note 109, paras. 65-67, 79-80, 100-101.

[120] *Ibid.*, para. 134.

[121] *Ibid.*, para. 127.

[122] *Ibid.*, para. 128.

[123] *Dutton*, *supra* note 21, para. 39. "An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim." *Ibid.*

[124] *Sibiga*, *supra* note 46, para. 122.

[125] *Vivendi*, *supra* note 21.

[126] Walker and Watson, *supra* note 19, p. 40.

[127] *Hollick v Toronto (City)*, 2001 SCC 68, para. 16.

[128] *Infineon*, *supra* note 109, para. 64.

[129] *Catucci v Valeant Pharmaceuticals International Inc.*, 2017 QCCS 3870, para. 327.

tical.[130] For example, when the class members know each other and are a relatively small group, the action will not tend to be allowed to proceed collectively.

Lastly, in accordance with Art. 575 (4) C.C.P., the court must ensure that the appointed representative plaintiff can "adequately represent" the interests of the class members.[131] In doing so, it considers whether three factors are met: whether the representative has an interest in the suit, whether he or she is competent, and whether he or she is in a conflict of interest with the other class members.[132] In the *Sibiga* case, mentioned earlier, the Court of Appeal recognized that one needed to be "mindful of possible excesses of what some have described as 'entrepreneurial lawyering' in class actions, [but that it was] best to recognize that lawyer-initiated proceedings are not just inevitable, given the costs involved, but can also represent a social good in the consumer class action setting".[133] In addition, the Court recognized that the representative did not have to be perfect. Indeed, in another instance, the *Vivendi* class action, the consumer was considered a competent representative to understand the basis of a claim for indirect harm caused down the chain of acquisition for the sale of computer memory hotly debated by economists.[134]

At the authorization stage, in contrast to the common law provinces, Quebec courts cannot consider whether the class action is the "preferable procedure".[135] Proportionality, however, as codified notably at Art. 18 C.C.P., is considered.[136] Generally, access to justice helps favour class actions in Canada.[137]

Similar to certification orders in Ontario, judgments authorizing class actions in Quebec define the class whose members will be bound by judgment, and this definition must be precise enough that members are able to identify themselves to

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[130] Walker and Watson, *supra* note 19, p. 41.

[131] Finn, *supra* note 17, p. 52. If the judge deems that the current representative plaintiff cannot properly represent the other class members, they have the power to replace them. *Ibid*.

[132] *Infineon*, *supra* note 109, para. 149.

[133] *Sibiga*, *supra* note 46, para. 102.

[134] See *Vivendi*, *supra* note 21; *Sibiga*, *supra* note 46, para. 108.

[135] Walker and Watson, *supra* note 19, p. 41.

[136] Alexandra Belley-McKinnon, "La procédure d'autorisation d'un recours collectif et les espoirs brisés du principe de proportionnalité," *Canadian Class Action Review*, Vol. 11, No. 2 (2016), pp. 265-68. See also Piché, *supra* note 26, p. 270 ("[...] in all provinces and at the national or multijurisdictional level, proportionality of procedures and of evidence is a key consideration, even in the class action context, [...]").

[137] *Marcotte*, *supra* note 38, para. 22 ("[...] despite some initial hesitation, [courts in Canada have] interpreted and applied the rules respecting [class] proceedings quite broadly. The decisions have favoured easier access to this form of legal proceeding because of the advantages it frequently offers to group members [...]").

the class.[138] In fact, the importance of class definition is underscored by the Supreme Court of Canada in *Dutton:*[139]

> Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state the objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claims to membership in the class be determinable by stated, objective criteria.

Solely those individuals that meet this definition will be considered as class members and thus be represented by the representative plaintiff in the course of the class action.

After certification, notice must be given to class members by proper means (newspaper advertisement, technological notices), which provides those members of the proposed class with a right to opt out and to seek their own personal remedy through an individual claim. The Quebec post-authorization process, similarly to other complex civil trials, includes the filing of a plea, discovery, expert reports and statistical evidence, amendments of the statement of claim and plea, etc.

Trials occur more frequently in Quebec than in the rest of Canada, with about two thirds of all class action trials in the country being conducted in the province.[140] Judgments on the merits in Quebec will dispose of the common issues and will approve a precise recovery process by way of individual recovery, collective recovery, punitive damages, and other mixed remedies and modes of recovery.

IV. Transborder Claims

A domestic class action can be defined as one where the members of the class and the defendant are all local and the good or service in question is purchased and consumed locally. Where the good or service is offered on a larger market, whether across two or more provinces, nationally or even internationally, the potential for a

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[138] Art. 576, para. 1 C.C.P., *supra* note 31.

[139] *Dutton*, *supra* note 21, para. 38.

[140] Jon Foreman & Genevieve Meisenheimer, "The Evolution of the Class Action Trial in Ontario," *University of Western Ontario Journal of Legal Studies*, Vol. 4, No. 2 (2014), p. 5, *available at* <https://ir.lib.uwo.ca/uwojls/vol4/iss2/3>.

larger class arises, and we can speak of a "transborder" action. Indeed, if the same good or service is offered in numerous jurisdictions by the same merchant, any deficiency in the good or service is likely to affect all consumers similarly.

Because class actions are particularly attractive to aggregate small-value claims that would otherwise not be worth suing over, the rise of class action claims that go beyond domestic borders is not surprising. Indeed, as the size of the class increases, that is, with a larger number of consumers who are included in the class, the potential impact of the claim on the defendant's business is greater, as is the negotiating power of the class itself. The possibility of certifying the largest possible class has advantages for legal efficiency (a single legal proceeding will be required as opposed to one for each jurisdiction) and for redressing the asymmetry between consumer and merchant, typically connected to greater negotiating power for the class. That in turn is said to further the behaviour modification impact of class actions, encouraging merchants to respect consumers' rights or risk facing a class action, even for the smallest infraction.[141] While there are reasons to support maximum aggregation of claims across borders, the rules governing transborder claims must also be taken into consideration.

There are at least three non-trivial obstacles to transborder class actions. The first relates to questions of court jurisdiction, namely the conditions for courts to hear cases against foreign defendants or by foreign plaintiffs. The second relates to the law governing the claims. As noted above, consumer protection legislation differs across Canada, thus giving rise to potentially distinct claims depending on where the goods or services are offered. This might limit the possibility for aggregating claims across provinces, even where the service or good offered is the same and flows from the same alleged wrongdoing of the defendant. The third and final issue relates to the possible problems of enforcement of judgments in non-domestic class actions. The three issues, usually combined under the category of private international law, will be examined in turn below.

1. Jurisdictional Questions

In Canada, the law governing court jurisdiction over transborder claims is within provincial legislative competence although there are constitutional limitations on the exercise of judicial jurisdiction in each province.[142] Broadly speaking,

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[141] On the economic arguments for maximum aggregation of claims see Craig Jones, *Theory of Class Actions* (2003).

[142] See Geneviève Saumier, "Competing Class Actions Across Canada: Still at the Starting Gate after Canada Post v. Lépine," *Canadian Business Law Journal* (2010), p. 462. See also Geneviève Saumier, "USA-Canada Class Actions: Trading in Procedural Fairness," *Global Jurist Advances*, Vol. 5, No. 2 (2005), p. 1.

the Supreme Court of Canada has held that there must exist a sufficient connection between a province and either the defendant or the claim brought against the defendant in order to justify the exercise of jurisdiction by courts of a province.[143] The specific rules governing judicial jurisdiction are provided in legislation in four provinces,[144] including Quebec,[145] and otherwise are found in judgments.

Where a claim is based in contract, jurisdiction in a transborder claim will typically be established against a local defendant by a non-resident plaintiff even if the contractual relation or its alleged breach took place abroad. Conversely, jurisdiction over a claim by a local plaintiff against a foreign defendant will usually be established if the contractual relation or its alleged breach arose within the local jurisdiction. Exceptionally, the law in Quebec is particularly generous to local consumers, who can bring their claims before a Quebec court even if the contract and the defendant have no connection to the province.[146]

These jurisdictional rules for contract face specific challenges when a claim is brought as a transborder class action, particularly where the claim is brought against a foreign defendant. In such a case, if the transborder class includes members from outside the local jurisdiction, and these members have entered into contractual relations with the foreign defendant outside the local jurisdiction, such members would not have been able to bring an individual claim in that local jurisdiction. Why then should that local court have jurisdiction over the transborder class? Courts in Canada have not responded uniformly to this question.

In Quebec, courts have routinely refused to certify consumer class actions against foreign defendants where the class was defined to include non-resident consumers whose relation to the defendant arose exclusively outside of Quebec.[147] In such instances, the court has agreed to certify only a class of Quebec resident consumers. As a result, claims for other Canadian consumers would have to be

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[143] See the Supreme Court of Canada's judgment in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17.

[144] Three common law provinces have adopted a statute entitled *Court Jurisdiction and Proceedings Transfer Act*, based on a uniform model proposed by the Uniform Law Conference of Canada. These are British-Columbia, Saskatchewan and Nova Scotia. See for example for British-Columbia: *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28.

[145] Book Ten of the Civil Code of Quebec provides a comprehensive codification of all aspects of private international law.

[146] See Art. 3149, Civil Code of Quebec. The constitutionality of this extensive jurisdictional rule has not yet been tested in court. Of course, jurisdiction over the claim does not entail that Quebec substantive law will apply. This choice-of-law dimension will be examined in the next section.

[147] This interpretation is explained most clearly by the Quebec Court of Appeal in *Hocking c. Haziza*, 2008 QCCA 800.

instituted outside Quebec. In Ontario, however, the courts have not taken this position and have often accepted to certify transborder class actions in similar situations. The courts in Ontario have held that the common issues linking all of the class members as against the same defendant were sufficient to create the necessary connection to Ontario for it to exercise jurisdiction over the entire class.[148] The Supreme Court of Canada has yet to address these differing approaches in a determinative manner.[149]

In a few provinces, the issue is resolved by the class action legislation itself.[150] For example, in British-Columbia, non-resident class members must opt in to the class in order for the court to have jurisdiction over their claim.[151] The statute therefore creates two different categories of class members: local members who are automatically within the class unless they expressly opt out and foreign members who are not in the class unless they expressly opt in. This resolves the jurisdictional question with regard to non-resident class members since by expressly opting into the litigation, they are held to have consented to the jurisdiction of the court.

A distinct jurisdictional challenge for transborder class action claims concerns the treatment of parallel overlapping claims in different jurisdictions. For example, it is not uncommon for one action to be brought in one province purporting to include consumers from across Canada while an action against the same defendant for the same complaint is brought in another province with respect to its resident consumers. In such a case, the two judges hearing the certification motion in each province will have to decide how to deal with the parallel claim in the other. Courts may address this issue using the traditional *forum non conveniens* doctrine and decide according to whether the other court is clearly more appropriate for the resolution of the claims.[152] This approach is expressly provided for in some of the provinces' class action legislation and includes criteria specific to the class

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[148] For a recent confirmation of this approach in Ontario in an international case, see *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792.

[149] See discussion in Saumier, *supra* note 142 (Competing Class Actions Across Canada).

[150] This is the case in British Columbia and New Brunswick. In several other provinces, including Alberta, Saskatchewan and Manitoba, a similar opt-in regime for non-resident was initially included in the legislation but has since been removed making all class members subject to the opt out system. The legislation in Quebec and in Ontario is silent on the issue, which has allowed the courts in those two provinces to arrive at distinct interpretations.

[151] See section 16, *Class Proceedings Act*, RSBC 1996, c 50.

[152] The doctrine is available across the country, including in Quebec (Art. 3135, Civil Code of Quebec).

action context.[153]

More informal mechanisms to increase cooperation and management of parallel or overlapping actions in different provinces have also been developed. One such mechanism is the creation of a national class actions database, set up by the Canadian Bar Association, which originally sought to enhance awareness of class actions filed in the various provinces.[154] This is turn gave rise to the development of judicial cooperation protocols for multi-jurisdictional class actions, by the same association. The most recent Canadian Bar Association protocol, entitled *Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions and the Provision of Class Action Notice*, addresses the importance of notice and recommends best practices for issuing notice in class proceedings.[155] This protocol also addresses multi-jurisdictional case management hearings and motions.[156] The CBA's original protocol,[157] issued in 2011, proved so persuasive that it was imposed in several provinces.[158] There is also a judicial protocol for cooperation in international class actions involving Canadian and American courts.[159]

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[153] See for example ss. 5(6) and 9.1 of the Alberta statute, *supra* note 31, and Art. 577 of C.C.P., *supra* note 31.

[154] See Class Action Database, *available at* <https://www.cba.org/Publications-Resources/Class-Action-Database>. In some provinces, the Superior has created its own database — the Quebec registry is available at <http://services.justice.gouv.qc.ca/dgsj/rrc/Accueil/Accueil.aspx>.

[155] *Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions and the Provision of Class Action Notice*, Ottawa, Canadian Bar Association National Class Actions Task Force (November 2017), approved by the CBA in February 2018, *available at* <http://www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2018/Class-Action-Judicial-Protocols-(1)/18-03-A.pdf>. The CBA states that its objective is to "facilitate the co-ordination of overlapping class actions in different jurisdictions, in the absence of a constitutional framework that would permit the creation of an equivalent to the U.S. Judicial Panel on Multidistrict Litigation".

[156] *Ibid.*

[157] *Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions, available at* <https://www.cba.org/Our-Work/Resolutions/Resolutions/2011/Canadian-Judicial-Protocol-for-the-Management-of-M>.

[158] See for example in Saskatchewan, by way of a civil practice directive issued by the Superior Court, *available at* <http://www.qp.gov.sk.ca/documents/english/QBPracticeDirectives/PD08.pdf>; and in Quebec by way of regulation: Art. 62, *Regulation of the Superior Court of Québec in civil matters*, CQLR c C-25.01, r 0.2.1.

[159] The protocol was developed by the American Bar Association and subsequently endorsed by the Canadian Bar Association, in 2011. It has not been formally adopted by courts or legislatures in Canada. See Protocol on Court-to-Court Communications in Canada-U.S. Cross-Border Class Actions, *available at* <https://www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2011/Protocole-de-communication-entre-les-tribunaux-dan/11-03-A-Annex02.pdf>.

While most of the cases involving transborder jurisdictional issues have arisen interprovincially, the above comments and analysis are equally applicable to international cases. In other words, where the proposed class includes members from outside Canada, or a defendant from outside Canada, the same result is obtained in the different provinces. The diversity of solutions to this jurisdictional question across the country means that a foreign defendant's situation will vary according to the province where a transborder claim is brought. That lack of uniformity adds a layer of complexity to class actions in Canada.

2. Choice-of-Law Issues

Even if a court is willing to certify a class action where the class includes members from more than one jurisdiction, a further challenge occurs if the basis for the claim arises from a specific domestic law. Since, as noted at the outset of this contribution, substantive private law, including consumer protection law, is within the legislative competence of provinces, the possibility that different laws will apply to different class members exists within a transborder case in Canada.

As with jurisdictional rules examined in the previous section, choice-of-law rules vary across Canada. In Quebec, these rules are included in the Civil Code, but the common law provinces typically draw their rules from decided cases. Unlike in the jurisdictional field, there are no statutory sources for choice-of-law rules in contracts in the common law provinces. Because there is no legislative intervention in these provinces, the choice-of-law rules derive from the common law through judgments and are largely uniform across those provinces.

By and large, all Canadian provinces recognize party autonomy in transborder contracts, meaning that the contract can include a clause that expressly designates the law applicable to the relationship.[160] Quebec law maintains this approach but adds special protection for consumer contracts, ensuring that the designation of a foreign law will not deprive the Quebec consumer of the protection of Quebec law where the contractual relationship is connected to Quebec.[161] In the common law provinces, there is no express protection for consumers and very little case law on this point. In most situations, if a claim exists only under a specific consumer protection statute, it is unlikely to take on a transborder dimension.[162] But

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[160] See generally, Stephen Pitel and Nicholas Rafferty, *Conflict of Laws* (2nd ed., 2016), Chapter 14.

[161] See Art. 3117, Civil Code of Quebec. This provision was largely modelled on the approach under the *1980 Rome Convention on the law applicable to contractual obligations*, now transformed into the Rome I Regulation and updated, whereas the Quebec provision has not been modified since its adoption in 1991.

[162] This is the case because the provincial statute will indicate that the claim is to be brought

where a consumer claim is based on the general law of contract, which is largely similar across the common law provinces, the choice-of-law issue will largely disappear. This still leaves the cases where similar claims arise under distinct consumer protection statutes; in these cases, courts can certify the transborder action but are likely to use the mechanism of sub-classes based on the residency of the class members.[163] While this phenomenon is possible in theory, there are very few examples of it taking place in Canada.[164]

The question of the law applicable to the class members' claims can pose several difficulties in a transborder action. First, it may affect the certification process in terms of identifying common issues and in terms of concluding that a class action is an adequate or appropriate procedure in a given case.[165] This is so because, as with any choice-of-law issue, a court may be concerned by the possibility of having to apply different foreign laws to different groups of members — which will complicate the entire case, including the necessity of hearing experts on foreign law.[166] Second, in the context of settlement negotiations, the potential diversity of interests within a class can have a negative effect on the likelihood of settlement or give rise to objections at the approval stage.

3. Enforcement of Foreign Class Action Judgments

There are several cases dealing with the enforcement of foreign class action judgments in Canada. One of the earliest ones involved a judgment from an Illinois court in a class action against the Macdonald's restaurant chain that purported to include all customers in the U.S. and in Canada.[167] The Ontario Court of Appeal confirmed that such a judgment could be enforced in Canada to prevent parallel litigation on the same claim from being instituted in Ontario in relation to Canadian customers.[168] The court specified that the judgment could be recognized if the jurisdiction of the Illinois court was considered appropriate, and if Canadian customers

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before the courts of the province, thereby giving it a territorial scope of application.

[163] This was the suggested approach in *Nantais v. Teletronics Proprietary (Canada) Ltd.*, 1995 CanLII 7400 (ON SC).

[164] This was discussed in *Pearson v. Boliden Ltd.* (2002), 2002 BCCA 624 (CanLII), but eventually certification of the sub-classes was refused.

[165] See the discussion of certification criteria examined earlier.

[166] This was discussed by the Ontario court involving a class that purported to include Canadian and American investors in a Canadian security: *Silver v. Imax Corporation*, 2009 CanLII 72334 (ON SC), paras. 135 to 165.

[167] *Currie v. McDonald's Restaurants of Canada Ltd.*, 2005 CanLII 3360 (ON CA).

[168] For a detailed discussion of this case see Saumier, *supra* note 142 (USA-Canada Class Actions).

had been adequately notified of the claim and given the opportunity to opt out of the class.[169] A similar approach has been taken when enforcement of a class action judgment from one Canadian province is sought in another.[170]

There is thus little difficulty associated with the enforcement of foreign class action judgments between jurisdictions that have similar approaches to class actions, such as between Canadian provinces and with the U.S. The more challenging situation is with the potential enforcement of a Canadian class action judgment in a country where no similar procedural vehicle exists, which is the case for most jurisdictions, at least with respect to the opt-out model.[171] The effectiveness of a class action judgment against a foreign defendant may therefore be highly dependent on where that defendant has assets against which an eventual judgment can be executed.

Conclusion

Overall, class action systems appear to be performing well in Canada, although precise measurements are largely unavailable to support this assertion. Funding is generally available to institute class actions, and there is some evidence that class members are being compensated through the collective procedure, at least in Quebec.[172] Lawyers involved in the proceedings are sometimes criticized as being remunerated too generously, but the fact remains that without them, the class action would not see the light of day. In the end, the class action procedure has been and continues to be perceived as legitimate in Canada and may provide a viable model for law reform in other countries, particularly for consumer claims.

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169 The first condition was answered in the affirmative because Macdonald's is headquartered in Illinois. The second question was answered in the negative, the court having found that insufficient notice of the action was provided for Canadian customers. As a result, the judgment was not enforced.

170 For Ontario judgments brought for enforcement in Quebec, both times refused, see *Hocking v Haziza*, *supra* note 147 and *Canada Post v Lépine*, 2009 SCC 16. Since then a new provision has been added to the Code of Civil Procedure in Quebec concerning the enforcement of foreign class action judgments, including approved settlements. Art. 594 provides that the court must verify that the Civil Code of Quebec rules pertaining to the recognition and enforcement of foreign decisions have been followed, and that that class members were given a sufficient notice. In addition, the court must ensure that Quebec residents can exercise rights that are equivalent to those applied before a Quebec court. The exact meaning of the final condition has yet to be clarified by a court.

171 The question of the non-enforceability of an Ontario class action judgment in Europe was discussed at length in *Airia Brands Inc. v. Air Canada*, 2015 ONSC 5332, eventually overturned by the Court of Appeal, see *supra* note 150.

172 Piché, *supra* note 26.