

# Class Action Value

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*This Article attempts to clarify a proposition of certain Canadian authors that while class actions represent a significant part of our court activities, they may not truly be compensating our citizens. I argue that leading up to the present study, we did not know for certain whether a class action was an effective mechanism to compensate class members. Through empirical data collected up by the Class Actions Lab from the past twelve years from cases filed in the province of Quebec, District of Montreal, analyzed through the lens of a collective approach to compensation, I demonstrate that Quebec citizens are in fact being compensated by class actions.*

## INTRODUCTION

In a seminal class actions law article published in 1979, American Professor Arthur Miller referred to the class action instrument as a supposed “Frankenstein monster” driven by lawyers he called “shining knights,” and contrasted the myths and realities associated with class action litigation.<sup>1</sup> The author discussed a few of the controversies surrounding the procedure, its portrayal in the mass media, and its growing popularity over time. In his opinion, the monstrous burden and risks perceived by its critics were overstated. However, it was still too early in time to gauge the legitimacy of the procedure and whether the class action would help achieve the goals of an ideal society. Importantly, for Professor Miller, even if very little empirical evidence existed relative to the class action, it was essential to evaluate its effectiveness and to measure its negative effects against its societal benefits:

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1 Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664 (1979).

[D]espite the attention that has been riveted on [the class action] rule . . . , we have precious little empiric evidence as to how it actually has been functioning, in terms of either its alleged benefits or supposed blasphemies. Even if the negative effects of class actions were assumed, they would have to be balanced against the societal benefits derived from deterring socially proscribed conduct and providing small claim rectification — considerations that thus far have escaped measurement and perhaps always will.<sup>2</sup>

Almost forty years later, several questions arise. Have the monsters been tamed? Are the knights “shining” in the class action community? It is difficult to say for sure. For some, the class action is not entirely meeting its intended goals, as it arguably is not properly compensating Canadian citizens, as it appears from Canada’s secretly low take-up rates.<sup>3</sup>

This Article discusses the initial data obtained over the course of an empirical project currently underway at the University of Montreal’s Faculty of Law Class Actions Lab addressing member compensation through class actions (hereinafter “The Class Action Compensation Project” or the “Lab’s Project”). The Project began in the summer of 2015 and is scheduled to conclude in 2022. It is unique because it is conducted in partnership with judges, lawyers, public servants and governmental agents, all actors of the judicial system; notably, the Quebec Bar Association, the Quebec Superior Court and Superior Court judges, the *Fonds d’aide aux actions collectives, Educaloï, Soquij* and *Options Consommateurs*, and the *Law Commission of Ontario*, among many others. The first phase of the Project involved a thorough analysis of class action files introduced in Quebec in the past twelve years. It also included a compilation and comparison of participation and take-up rates in various class action files, as well as per-plaintiff recovery data. The Lab’s Project has sought to measure the end product of class action litigation, the value and benefit of this kind of litigation, and incidentally, its costs as assumed by the parties and the system. It has identified specific parameters that can be used to empirically evaluate class action costs and benefits, and a significant list of criteria directly associated with higher rates of participation and compensation.

Ultimately, the Project has sought to answer the following questions: Which class action cases serve to provide true access to justice and compensation and

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2 *Id.* at 666.

3 See Ward Branch & Greg McMullen, Take-Up Rates: The Real Measure of Access to Justice, Paper Presented at the 8th Annual Symposium on Class Actions, Osgoode Hall Law Sch., York Univ., Toronto (Apr. 2011).

which ones “are simply not worth it,” largely at a policy level?<sup>4</sup> How must we evaluate the degree of “success” of a class action — whether it ends in a judgement or a settlement? Is the class action success principally relative to member compensation or to societal benefits, more largely? Are the objectives of the class action, namely compensation, access to justice and deterrence or behavior modification, relevant to this notion of success, and if so, can we confirm that they are being met? Which factors affect the accomplishment of these objectives positively or negatively? Can we appreciate the legitimacy of class actions objectively and empirically? Looking beyond Professor Miller’s so-called “societal benefits,”<sup>5</sup> can economic benefits stem from class actions individually and collectively?

This Article addresses the desirability, economic utility, and effectiveness of class actions. It serves to conclude that class actions are instruments of compensation of class members, but that this compensation remains imperfect by way of the numbers of members compensated, the extent to which they are compensated, and the exorbitant costs of bringing such actions. In Part I, I establish a framework of analysis of class action monetary outcomes based on a renewed approach to compensation, and in doing so, I highlight the significant lack of data in Canada about civil justice systems in general (including class action activity). In Part II, I discuss the class action law system’s objectives, as I believe that these objectives should be met if we expect the class action procedure to be successful and legitimate. In Part III, I define the value of class actions and I particularly suggest that the successful class action is the “optimal” one. In Part IV, I provide a measure of class action value, based on data collected at the Lab over the past two years, and include a detailed analysis of my empirical findings.

## I. CONTEXT: (SIGNIFICANT LACK OF) CLASS ACTION DATA

There is a dearth of data on judicial activity in Canada in all sectors of litigation, including class actions.<sup>6</sup> In fact, apart from the limited and rather

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4 See DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 31 (2000), [http://www.rand.org/pubs/monograph\\_reports/MR969.html](http://www.rand.org/pubs/monograph_reports/MR969.html) (referring to the “worth it” test).

5 Miller, *supra* note 1.

6 Catherine Piché, *Le recouvrement et l’indemnisation des membres dans l’action collective [Indemnification of the Members in Class Actions]*, 94 CAN. B. REV. 171 (2016); Catherine Piché & André Lespérance, *L’action collective comme outil de prévention, d’évitement et de dissuasion [The Class Action as a Tool to Prevent, to Avoid and to Deter]*, in COLLOQUE NATIONAL SUR L’ACTION COLLECTIVE

informal data gathered by the provinces' superior court class action judges, the court registries, bar association registers, and informal (often more impressionistic) numbers circulating within the class action bar and among judges,<sup>7</sup> no one can reliably draw any conclusions as to class action activity in Canada. Consequently, we do not know if our class action system is truly effective, fair and efficient. We are therefore unable to determine how the law should move forward, evolve and be reformed. Often, law reforms are based on inaccurate data. The absence of a documented monitoring system of implemented reforms makes for an imprecise, opaque civil justice system. The class actions sector is no exception.

Given the tremendous media attention that these actions receive and their effects on corporate behaviors, it is likely that class actions have a significant impact on the courts, on the defendants and on the market. Indeed, market and corporate behaviors often appear to be changed as a result of these actions.<sup>8</sup> One scholar argues, justly or not, that large-scale class actions brought on behalf of thousands or millions of unnamed plaintiffs positively affect the judicial economy, and that the system is fair because it provides a form of compensation for those who would not otherwise have sought an indemnity for their individual harm or damage (or did not have the necessary resources to seek such an indemnity).<sup>9</sup> In fact, this author and other proponents of class actions contend that the procedure allows for the effective compensation of large groups of people in many instances.<sup>10</sup> Other scholars argue instead that in the class action system, the conduct apparently deterred and the behavior modified justifies the energy spent and the high costs of justice, as well as the increase in caseloads and the backloads felt by the courts as a result of these massive actions.<sup>11</sup>

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— DÉVELOPPEMENTS RÉCENTS AU QUÉBEC, AU CANADA ET AUX ÉTATS-UNIS [NATIONAL COLLECTIVE ACTION SEMINAR — RECENT DEVELOPMENTS IN QUEBEC, CANADA, AND THE UNITED STATES] 61 (Yvon Blais ed., 2006).

7 See Branch & McMullen, *supra* note 3, at 4.

8 Piché & Lespérance, *supra* note 6, at 70.

9 CRAIG JONES, THEORY OF CLASS ACTIONS 80-95 (2003); see also JAY TIDMARSH, CLASS ACTIONS: FIVE PRINCIPLES TO PROMOTE FAIRNESS AND EFFICIENCY para. 1.03 (2013); Russel M. Gold, *Compensation's Role in Deterrence*, 91 NOTRE DAME L. REV. 1997 (2016).

10 E.g., Myriam E. Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 108 *et seq.* (2006) (arguing against a so-called “compensationalist hegemony” in class action literature and policy in the United States).

11 E.g., Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2047-69 (2010) [hereinafter Fitzpatrick, *Class Action Lawyers*]

Unfortunately, these arguments in favor of deterrence or compensation objectives of class actions are largely based upon anecdotal evidence, and sometimes on cases where members appear to benefit from the action due to high take-up rates. The little existing empirically-based evidence largely points to impressive transaction costs, such as extravagant legal and administrator fees,<sup>12</sup> and sometimes to cases where individual class members receive barely any compensation or no compensation at all.<sup>13</sup> Generalizations are easily made, but true empirical data, evidence and statistics about the outcomes and/or effects of the class action are scarce and unavailable. Only one empirical study to date, led in 2014 by Professor Brian T. Fitzpatrick and Attorney Robert C. Gilbert, has examined the amount class claimants are paid for their claims as a result of the litigation, based on original data on the distribution of class action settlements in fifteen related, small-stakes consumer class action lawsuits against a few of the largest banks in the United States.<sup>14</sup> My project, herein addressed, conducted at the Class Actions Lab, is the first similar empirical study taking place in Canada.<sup>15</sup>

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(“[S]mall-stakes class actions serve no [beneficial compensatory] function. Rather, the only function they serve is deterrence.”); Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J.L. & Bus. 767 (2014); see also Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing?* (Vand. L. Research Paper No. 17-40, 2017), <https://ssrn.com/abstract=3020282> [hereinafter Fitzpatrick, *Deter*].

- 12 Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, (Reuters, Executive Summary, 2013), <http://blogs.reuters.com/alison-frankel/files/2013/12/mayerbrownclassactionstudy.pdf>.
- 13 See, e.g., *Engler-Stringer v. City of Montréal*, 2007 Q.C.C.S. 1627, 2012 Q.C.C.S. 4413 (class action against the City of Montreal based upon the extracontractual liability following manifestations against WTO and illegal arrests where class members did not receive any money nor any excuses from the city and indirectly benefited — perhaps — from additional training of police guards).
- 14 Fitzpatrick & Gilbert, *supra* note 11 (thirteen of the lawsuits examined were consolidated pursuant to the multidistrict litigation statute before one federal district court; two of them remained outside the MDL and before other federal district courts); see also Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013); Linda S. Mullenix, *Ending Class Actions As We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 419 (2014) (“[T]here is scant evidence upon which to conclude that class action litigation and settlement actually accomplishes the stated goal of compensating victims of wrongdoing.”).
- 15 I must, however, note the following article discussing Canadian securities class actions: Adam C. Pritchard & Janis P. Sarra, *Securities Class Actions Move North: A Doctrinal and Empirical Analysis of Securities Class Actions*

In fact, while some of the existing literature discusses the face value of settlements, very few studies have examined the distributions or awards to class members.<sup>16</sup> In an article published in 2016, however, professors Alon Klement and Keren Weinshall-Margel propose an analytical framework to evaluate the effectiveness of class actions. The authors compare the costs and benefits of class actions, whether they have attained the three stated objectives,<sup>17</sup> and whether the 2006 Israeli Class Action Law, which applies to substantive laws in various sectors such as consumer protection, banking, and securities, is both efficient and effective. Precisely, Klement and Weinshall-Margel conduct a quantitative analysis of all motions to certify a class action, using a unique database that includes over two hundred variables measuring a variety of aspects of class action files. These variables refer to characteristics of plaintiffs, defendants, their lawyers, to the groups represented, to the causes of action, and to all court proceedings and decisions in each case. Having measured the social costs and benefits of 1397 class action cases resolved between 2006 and 2012, the authors conclude that class actions have not substantially facilitated access to courts in Israel, nor do they serve to deter or compensate.<sup>18</sup>

By way of comparison, Fitzpatrick and Gilbert's study, mentioned above,<sup>19</sup> presents original data on the distribution of class action settlements in fifteen related small-stakes consumer class action cases against large American banks. A majority of these actions were multidistrict litigation cases and were heard before the federal district court.<sup>20</sup> The authors conclude that between one percent and seventy percent of class members received compensation and that the average payout ranged from thirteen dollars to ninety dollars. In their view, these amounts represent between six percent and sixty-nine percent of

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*in Canada*, 47 ALBERTA. L. REV. 881 (2010) (exploring securities class actions involving Canadian issuers since the provinces added secondary market class action provisions to their securities legislation. Through analyses of the substance and framework of the statutory provisions, the article presents an empirical and comparative examination of cases involving Canadian issuers in both Canada and the United States.).

16 F. Paul Morrison & H. Michael Rosenberg, *Missing in Action: An Analysis of Plaintiff Participation in Canadian Class Actions*, 53 SUP. CT. L. REV. 97 (2011), reprinted in ACCESSING JUSTICE: APPRAISING CLASS ACTIONS 97 (Jasminka Kalajdzic ed., 2011).

17 Alon Klement & Keren Weinshall-Margel, *Cost-Benefit Analysis of Class Actions: An Israeli Perspective*, 172 J. INSTITUTIONAL & THEORETICAL ECON. 75 (2016).

18 *Id.*

19 Fitzpatrick & Gilbert, *supra* note 11.

20 *Id.*

the average class member damages.<sup>21</sup> Interestingly, Fitzpatrick and Gilbert manage to calculate participation and compensation rates, even if only in a very small sample of cases. They acknowledge the challenges in obtaining distribution data in completed cases.<sup>22</sup>

In another study published in 2008, Nicholas M. Pace and William B. Rubenstein report on class compensation data collected through a randomized sample of thirty-one class action settlements, and acknowledge being able to find relevant data in only six cases, thereby underscoring the general lack of transparency in communicating the data. The authors explain that in four cases, automatic payouts have led to participation rates varying in some cases between 65% and 99.5%, and that in two other cases, the rates obtained were 20% and 4%, respectively.<sup>23</sup> In another important study conducted for the Rand Institute, Professor Deborah Hensler and her colleagues perform case studies of ten class action settlements and are able to obtain useful compensatory data in six of the cases, with large payouts in most of them.<sup>24</sup> In yet another study conducted in 2007, Nicholas M. Pace and some colleagues survey insurance companies by collecting information about class action lawsuits defended in recent years, as well as distributions and awards received in twenty-nine settlements of these lawsuits.<sup>25</sup> Pace finds that in ten cases, one hundred percent of the class members were compensated, and over the entire sample, the average participation rate was forty-five percent.<sup>26</sup> Finally, one nonacademic study from the American firm Mayer Brown has administered a survey of all one hundred and forty eight federal court consumer class actions filed in 2009 and has reported that in forty of these cases that settled, participation rates could be found in merely six cases and those rates varied between cases from 0.000006% to 0.33%, 1.5%, 9.66% and 12%, and 98.72%.<sup>27</sup>

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21 *Id.* at 770.

22 Fitzpatrick & Gilbert, *supra* note 11, at 772 (citing Nicholas M. Pace & William B. Rubenstein, *How Transparent Are Class Action Outcomes?* 34 (RAND Corp. Working Paper Series, Working Paper No. WR-599-ICJ, 2008)).

23 *Id.* at 775. Pace & Rubenstein, *supra* note 22, further attempted to complete their study and obtain additional data through a survey of fifty-seven federal and state settlements from websites of claims administrator companies. The authors found relevant data in only nine cases and participation rates varying tremendously in an inconclusive manner.

24 HENSLER ET AL., *supra* note 4, at 55.

25 NICHOLAS M. PACE ET AL., *INSURANCE CLASS ACTIONS IN THE UNITED STATES* 55 (2007).

26 *Id.*

27 Mayer Brown LLP, *supra* note 12.

Although these findings are interesting and important, I argue that they are not sufficient to draw conclusions relative to class action effectiveness, especially in Canada. As Fitzpatrick and Gilbert have rightly remarked in their March 2015 study, “given that there are over 300 class action settlements every single year in federal court alone, it is indefensible that scholars have been able to unearth data in only 62 settlements over the last thirty years.”<sup>28</sup> In fact, this lack of data and information about class action outcomes — expected or real — makes it near impossible for lawyers and their clients to base class action settlements on the merits.<sup>29</sup>

Accordingly, at present, we are unable to determine whether class actions benefit the members or the class in Canada or elsewhere in North America, and whether they are generally successful. There has not been any empirical data made available in Canada examining the impacts of class actions or of their settlement, or establishing the average or typical amount of compensation each class member receives, or what that amount should be. The reason for the lack of data is that throughout North America, to my knowledge, parties have not been requested or obliged to report back on class distributions. However, since the adoption of the reformed 2016 Province of Quebec Code of Civil Procedure (CPC),<sup>30</sup> and its related court rules, class action distributions must be reported back to the court at the conclusion of every class action case.<sup>31</sup> This requirement was integrated into the Quebec Superior Court rules of practice

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28 Fitzpatrick & Gilbert, *supra* note 11, at 778.

29 Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 567 (1991).

30 Civil Code of Quebec, S.Q. 2016, c C-25.01 (Can. Que.).

31 Règlement de la Cour supérieure du Québec en matière civile [Rules of the Superior Court of Quebec in Civil Matters], r. 0.2.1, c C-25.01 (Can. Que.), Rule 59 (translated by the author) (emphasis added):

In the case of a judgment ordering collective recovery of the claims with individual liquidation, the special clerk or the third party appointed by the court (i.e., the claims administrator, for example, or a representative of the defendant) *shall file in the court a detailed report of its administration*, after the expiry of the deadline given to the members to present claims, and shall give notice of this report to the parties and to the Public Fund (the Fonds d'aide aux actions collectives).

This report shall list the members who produced a claim, the amount paid to each, the amount of the balance and the amount deducted pursuant to . . . .

There is no such requirement in U.S. FED. R. CIV. P. 23, although scholars have recommended to the Rule 23 Advisory Committee that the rule be amended to require such a disclosure. See Fitzpatrick & Gilbert, *supra* note 11, at 779.

in early 2016,<sup>32</sup> as a result of judicial training activities I have conducted through the Class Actions Lab, as well as specific recommendations I have made to judges and court administrators in the past few years, advocating the need for a better and more systematic reporting of distributions data.

## II. THE CANADIAN CLASS ACTION LAW SYSTEM AND ITS OBJECTIVES

### A. Overview of the Law of Class Actions in Canada

The Federal Court of Canada and all Canadian provinces (except for Prince Edward Island) have class action legislation.<sup>33</sup> Apart from the underlying differences in the common law system (which applies to all Canadian provinces except Quebec, which has a largely civil law-driven system), Canadian class actions legislation is modelled on the American Federal Rule 23.<sup>34</sup> In fact, it can be argued that North American class action regimes have very similar objectives and features.<sup>35</sup> In the United States and in the Canadian common law provinces, certification is required for the class action to be pursued collectively. Quebec, however, requires that the action be “authorized” pursuant to four criteria listed under article 575 of the Quebec CPC.<sup>36</sup> In terms of those class action certification criteria, the main distinctions between Quebec and the rest of Canada are that the Quebec provisions do not require that the class action be the “preferable procedure,” nor do they mandate a litigation plan from the class representative.<sup>37</sup>

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32 See Rules of the Superior Court of Quebec.

33 An Act Respecting the Class Action, R.S.Q., c R-2 (Can.); Class Actions Act, R.S.N.L. 2001, c C-18.1 (Can.); Rules Amending the Federal Court Rules, S.O.R. 98-106 (Can.); Code of Civil Procedure, R.S.Q. 1977, c C-25, secs. 999-1051 (old Quebec Code of Civil Procedure) (Can. Que.); Class Proceedings Act, R.S.O. 1992, c 6 (Can. Ont.); Class Proceedings Act, R.S.B.C. 1996, c 50; Class Actions Act, R.S.S. 2001, c 12.01 (Can. Sask.); The Class Proceedings Act, C.C.S.M., c C130 (Can. Man.); Class Proceedings Act, R.S.A. 2003, c. C-16.5 (Can. Alta.); Class Proceedings Act, R.S.N.S. 2007, c 28 (Can. N.S.).

34 FED. R. CIV. P. 23.

35 See Catherine Piché, *The Cultural Analysis of Class Action Law*, 2 J. CIV. L. STUD. 101 (2009).

36 Civil Code of Quebec, S.Q. 2016, c C-25.01, art 575 (Can. Que).

37 To understand this important distinction, one has to compare article 575 of the Quebec CPC and the five-part test provided in Ontario Class Proceedings Act: (1) the pleadings disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;

Importantly, 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,<sup>38</sup> especially when considering access to justice and judicial economy.<sup>39</sup> Proportionality in class litigation mandates that due regard be given to the principles of good faith and of balance between litigants, and that the class action procedure never be used in a way abusive of the public service provided by the institutions of the civil justice system.<sup>40</sup> It reinforces the judge's discretion at the certification stage and can be considered in the analysis of each authorization criterion, at least in Quebec, as was established by the Supreme Court of Canada.<sup>41</sup> Proportionality is, in fact, a cardinal factor in determining whether a class action has been used "properly" and whether the proceeding has been conducted with reasonable means and in a balanced and logically conductive way towards the ends and outcomes

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(3) the claims of the class members raise common issues; (4) a class proceeding would be the preferable procedure for the resolution of the common issues; and (5) there is a representative plaintiff who: (a) would fairly and adequately represent the interests of the class; (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. *See also* Vivendi Can., Inc. v. Dell'Aniello Canada, 2014 C.S.C. 1.

- 38 The Supreme Court of Canada in *Marcotte* has rightly recognized that proportionality is not "limited to a principle of interpretation that confers no real power on the courts in respect of the conduct of civil proceedings in Quebec." *Bank of Montreal v. Marcotte*, 2014 S.C.C. 55, ¶ 45 ("[A]uthorizing judge has an obligation to consider proportionality — the balance between litigants, good faith, etc. — when assessing whether the representative is adequate, or whether the class contains enough members with personal causes of action against each defendant."); *see* Charland v. Lessard, 2015 Q.C.C.A. 14, ¶ 174 *et seq.*; *Vivendi*, 2014 C.S.C. 1; *see also* Catherine Piché, *La proportionnalité procédurale: une perspective comparative* [*Procedural Proportionality: A Comparative Perspective*], 40 R.D.U.S. 551 (2009-2010) (Fr.).
- 39 *City of Marcotte v. Longueuil*, 2009 S.C.C. 43, ¶ 42; *see also* Yves-Marie Morissette, *Gestion d'instance, proportionnalité et preuve civile: état provisoire des questions* [*Case Management, Proportionality and Civil Proof: Provisional Status of Issues*], 50 C. DE D. 381 (2009) (Fr.).
- 40 *Marcotte*, 2009 S.C.C. ¶ 43.
- 41 *Vivendi*, 2014 S.C.C. ¶¶ 67 *et seq.* The proportionality principle, an important precept of the Quebec Code of Civil Procedure, cannot however serve as a basis for denying the authorization (certification) of a class action if the other conditions are met.

originally envisioned.<sup>42</sup> Unfortunately, since these ends and outcomes are hard to appreciate, as herein explained, proportionality as a principle has been applied somewhat vaguely by the courts, at least in Quebec.<sup>43</sup>

The nature of the relief made available to the members in the class action procedure throughout Canada generally amounts to compensatory damages for pecuniary losses. Injunctions may also be awarded, but with less frequency. When a class action case ends in trial, an assessment is made of aggregate awards and sampling evidence is used to award damages to the class collectively, on an average or proportional basis.<sup>44</sup> In all Canadian jurisdictions, individuals can participate in claim recovery distributions individually or collectively.<sup>45</sup> In cases where collective recovery is ordered, individual liquidation of the class members' claims can be provided, or distribution of an amount to each class member can be ordered.<sup>46</sup> Reparatory measures are also possible and frequent.<sup>47</sup> The court will dispose of any remaining balance in the same manner as when remitting an amount to a third person, while always taking into consideration the members' interests.<sup>48</sup> In a case 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 determines the balance remaining and orders the amount to be remitted to that third designated person.<sup>49</sup> Finally, class action litigation financing considerations are also similar in the different provinces, but the costs of litigation and liability are much lower in Quebec as they are capped to foster a greater access to justice.<sup>50</sup> Class actions are primarily funded by the lawyers on contingency in Canada, but third-party, private forms of funding also exist.<sup>51</sup> In addition, governmental funds in the provinces of Ontario and Quebec help finance class litigation. For instance,

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42 *Id.*

43 Piché, *supra* note 38, at 562 *et seq.*

44 This is possible, for example, through the application of the Canadian province of Ontario Class Proceedings Act, R.S.O. 1992, c 6, secs 23-24. *See also* Markson v. MBNA Can. Bank, 2007 O.N.C.A. 334 ¶ 45 (statistical sampling possible without proof of individual claim).

45 Civil Code of Quebec, S.Q. 2016, c C-25.01 art 595 (Can. Que.); Class Proceedings Act, R.S.O. 1992, c 6 secs 24-25 (Can. Ont.).

46 Civil Code of Quebec art 596.

47 *Id.* art 598.

48 *Id.*

49 *Id.* art 597.

50 Catherine Piché, *Public Financiers as Overseers of Class Proceedings*, 12 N.Y.U. J.L. & Bus. 776 (2016).

51 *See, e.g.*, Schenk v. Valeant Pharm. Int'l Inc., 2015 ONSC 3215 (Ont. Sup. C.J.); Marcotte v. Banque de Montréal, 2015 QCCS 1915 (Que. Sup. Ct.).

the Quebec fund, called the *Fonds d'aide aux actions collectives*, serves to finance one third of all Quebec class action cases.<sup>52</sup>

## B. Objectives of Canadian Class Actions

This Article is about defining class action measure and value and providing data relative to measure and value. I argue here that the desirability and legitimacy of the class action device must be evaluated in light of its objectives, and eventually, in consideration of their accomplishment. Furthermore, and importantly, I propose a new framework for analysis of class action outcomes based upon a novel approach to class compensation, which is one of the three class action objectives.

Under Canadian law, class actions seek to achieve the following three objectives: 1) providing access to the courts for all (including the less favored) by rendering the process more economical (at least in theory); 2) compensating injured parties for modest but nontrivial losses suffered by widely dispersed individuals who are nonetheless in similar circumstances, in ways that that cannot practically be achieved through individual litigation; and 3) enforcement of the law and deterrence or modification of the injurious behavior of wrongdoers.<sup>53</sup>

### 1. Access to Justice and Judicial Economy

The access to justice objective traditionally has been considered to be the most important prerequisite for and benefit of the class action mechanism, and a principal objective of class action statutes.<sup>54</sup> In *Dutton*, the Supreme Court of Canada explained that class actions serve to improve access when fixed litigation costs are divided over a large number of class members because they “[make] economical the prosecution of claims that would otherwise be

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52 Piché, *supra* note 50.

53 See the following Supreme Court of Canada trilogy: *Hollick v. Toronto (City)*, 2001 S.C.C. 68; *W. Can. Shopping Ctrs. v. Dutton*, 2001 S.C.C. 46; *Rumley v. British Columbia*, 2001 S.C.C. 69.

54 See Piché, *supra* note 35, at 127; *Hollick*, 2001 S.C.C. ¶ 19; see also ACCESSING JUSTICE: APPRAISING CLASS ACTIONS, *supra* note 16; ONTARIO LAW REPORT COMM’N (MINISTRY OF THE ATTORNEY GEN.), REPORT ON CLASS ACTIONS 139 (1982) (“[E]ffective access to justice is a precondition to the exercise of all other legal rights.”); Frank Iacobucci, *What Is Access to Justice in the Context of Class Actions?*, 53 SUP. CT. L. REV. 17 (2011); Jasminka Kalajdzic, *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (2009) (unpublished LL.M. thesis, University of Toronto) (on file with the University of Toronto Library system).

too costly to prosecute individually.<sup>55</sup> For the Court, “[w]ithout class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied . . . .”<sup>56</sup> Accordingly, the access to justice argument supposes that without the class action, important numbers of low-value claims would never be brought before the courts.<sup>57</sup> Moreover, while individual litigation may — at least in theory — be feasible, its extraordinary legal and judicial costs and efforts needed to file the action, to oversee and manage it, to negotiate a settlement or to try the case, may discourage individuals from bringing a case before the courts. Whether the class action truly makes litigation more economical and accessible to the members remains debatable, especially given the lack of data detailing costs and benefits in this context. As Supreme Court of Canada Justice Iacobucci has stated, “access to justice should also include the quest for substantive justice by providing appropriate restorative results.”<sup>58</sup>

## 2. Compensation

The second class-action goal that logically follows is compensation. Access to justice, in the class action context, implies that plaintiff victims are compensated for the harm caused by defendant wrongdoers. Indeed, in a case where the vast majority of members do not receive any form of compensation and the take-up rate is low, can one reasonably affirm that the class action is successful, or that it provides access to justice?

I have considered that conducting a quantitative study of compensation data in class action litigation is the most effective way of measuring and eventually comparing the value of Quebec class action cases. In my view, compensating class members in class actions is essential to access to justice for the masses, even in small-claims cases.<sup>59</sup> In the Lab’s Project, herein discussed,

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55 *Dutton*, 2001 S.C.C. 46.

56 *Id.*

57 *Morrison & Rosenberg*, *supra* note 16; *see also* *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); 1 HERBERT NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* 1-18 e 1.06 (3d ed. 1992) (“[T]he class action serves to afford individual claimants with small claims access to judicial relief that otherwise would be economically unavailable by means of individual litigation.”).

58 Iacobucci, *supra* note 54.

59 *See* Piché, *supra* note 6, at 176 *et seq.* My argument stands opposed to Brian Fitzpatrick’s view that deterrence is the sole purpose of small-stakes class

compensation has appeared to be easiest to define and objectively compare of all three class action objectives, given the fact that it involves working with numbers and calculating rates based on those monetary distributions paid by defendants in this context.

In this Article, I go one step further than other scholars that have shown interest in challenging the class action outcomes in providing a definition of compensatory success in class actions involving monetary distributions. Indeed, to conduct valuable and legitimate empirical scholarship, it is necessary to define what is within the scope of the analysis and what is not, or, more precisely, what qualifies as “empirical material,” and why the data is needed. Hence, before collecting the data and analyzing it, it is necessary to clarify what makes for a successful class action.

The aim of compensation, as we know it, and across the common and the civil law, is to restore and redress the balance of justice, to place the victim in the position he or she would have been had it not been for the wrongdoer’s contravention of the law.<sup>60</sup> There are various types of compensation, such as means-replacing compensation and ends-replacing compensation.<sup>61</sup> Importantly, those persons who are entitled to compensation must “actually

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actions, at least from a social welfare utilitarian perspective. See Fitzpatrick, *Class Action Lawyers*, *supra* note 11, at 2067-68.

60 Robert Goodin, *Theories of Compensation*, 9 OXFORD J. LEGAL STUD. 56, 59 (1989). In tort-based actions, the Supreme Court of Canada has stated that

[t]he general principles underlying our system of damages suggest that a plaintiff *should receive full and fair compensation*, calculated to place him or her in the same position as he or she would have been in had the tort not been committed, insofar as this can be achieved by a monetary award. This principle suggests that in calculating damages under the pecuniary heads, *the measure of the damages should be the plaintiff’s actual loss*.

Ratyck v. Bloomer, [1990] 1 S.C.R. 940 ¶ 71 (emphasis added); accord Livingstone v. Rawyards Coal Co., [1911] A.C. 301, 307 (P.C.). In breach of contract cases, the measure of damages is the amount of money that would serve to place the plaintiff in the position he or she would have been had the contract been performed. See Hamilton v. Open Window Bakery, Ltd., 2004 S.C.C. 9, [2004] 1 S.C.R. 303 (Can.); Wertheim v. Chicoutimi Pulp Co., [1911] A.C. 301, 307 (P.C.). Speaking broadly, compensation must be commensurate with the injury received. It is alternately referred to as “reparation,” “indemnity,” “compensation” and “recompense.” The Supreme Court of Canada has stated that “[d]amages are a monetary payment awarded for the invasion of a right at common law.” See Canson Enter., Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534 ¶ 39 (per La Forest J.).

61 Goodin, *supra* note 60, at 60.

receive compensation and in the amount to which they are entitled.”<sup>62</sup> In a collective redress or class action context, once the parties conclude a settlement, or a final judgment on the merits is issued against one or more defendant(s), the plaintiff representative, and the class members that he or she has represented and that have suffered a similar loss, are entitled to compensation. Compensating appropriately is fundamental in all litigation contexts — whether individual or collective. Overcompensation and undercompensation undermine the reputation of class action procedures and decrease citizens’ confidence in the civil justice system. When a number of claimants are overcompensated, other claimants will necessarily be undercompensated, thereby creating situations of injustice or unfairness. And when class members ultimately receive nothing, an appearance of unfairness is created and public confidence in the system decreases.

How accurate does the compensation of class members have to be? How far can we bend the rules and accept inaccuracy of compensation, for the sake of collective or class recovery? In the class action context, are we hoping to respect the law or instead to provide a form of social appeasement, to provide for a “just” result? In this Article, I argue in favor of a collective approach to compensation, one that requires that a substantial majority of the class members — viewed as an “entity” — be compensated appropriately in order to meet the objective. I discuss this normative contention below, in Section III.B., as I suggest that the successful class action is one that compensates the substantial majority of the members and is conceptualized and administered optimally.

### 3. *Deterrence and/or Behavior Modification*

Class action lawsuits are believed to impact the behavior of defendants forced to compensate victims. When defendants compensate class members — and necessarily a large number of them — they in fact are acting as though they admit liability. As a result, the argument is that they are then deterred from acting wrongly in the future. The deterrence view is that “the primary purpose of class litigation is not so much to redress injured plaintiffs as to deter wrongful conduct on the defendant’s part by forcing him to disgorge his unlawful gains or by restructuring his behavior through the use of injunctions.”<sup>63</sup> A crucial

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62 *Id.* Indeed, compensation requires that the defendant provide the plaintiff with the equivalent of his or her loss. *Id.* at 59.

63 Note, *Defendant Class Actions*, 91 HARV. L. REV. 630, 632-33 (1978); see also Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 105-07 (2006) (describing deterrence as the primary goal of class actions);

question that arises, however, is whether they truly do feel so disinclined to act injuriously in the future, and, if we do so believe, how a causal relationship may be proven to exist between the fact of class litigation and its related consequences (such as the duty to pay damages and/or the reputational effects), and the deterrence and/or behavior modification effects.

Proving the existence of deterrence and behavior modification and measuring their scope is challenging. For economists, the value of deterrence is conceptualized in terms of desirable and undesirable behaviors, with the difference between the two created by the class action being evaluated, and then subtracted.<sup>64</sup> For others, the true value of deterrence is measured by the difference between sanction and compensation, that is, by the amount paid as a whole by the defendant sanctioned minus the amount of damages that would have served to merely compensate the members.<sup>65</sup>

Recent informal discussions held this year with several high-profile general counsels of different European and American companies have revealed that they do not actually believe that they are being subjected to deterrence through the class action.<sup>66</sup> While they admit to altering their behaviors as corporate actors reacting in anticipation of litigation or impending litigation, by way of offering solutions to consumer victims such as refunds or payouts in response to the harm suffered, they do not acknowledge that these adjustments are correlative to the fact of being sued in court collectively, or that they are in any way indicative of a corporate responsibility that they might be assuming. These companies argue that they do not feel responsible nor deterred because, at least in their minds, they did not willingly act injuriously or wrongly. My view is that these kinds of *ex ante* reactions are most definitely considered to be behavior modification of the kind envisaged by the legislator in class actions.

Importantly, behavior modification and deterrence concern the actions of the defendant and, more generally, those of other actors in society in similar

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David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1906 n.62 (2002) (discussing the “dominant consensus” among scholars and commentators that the class action device helps to “correct the obvious asymmetric litigation power” seen in low-stakes claims); Linda Sandstrom Simard, *Fees, Incentives, and Deterrence*, 160 U. PA. L. REV. 10 (2011) (on how to promote a maximal deterrent effect of class litigation on corporate behavior).

64 See, e.g., Jared N. Jennings, Shiva Rajgopal & Schaefer Chaired, *The Deterrent Effects of SEC Enforcement and Class Action Litigation* (Dec. 2011) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1868578](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1868578).

65 John J. Chapman & Patti Shedden, *Class Proceedings, Gains-Based Claims, and Deterrence*, 4 CAN. CLASS ACTIONS REV. 47 (2007).

66 Notes in Class Actions Lab Archives (on file with author).

circumstances.<sup>67</sup> Even if one specific defendant is not deterred by litigation, general deterrence may occur when the rest of the industry is behaviorally affected and incited to modify its behavior.<sup>68</sup> Indicia of deterrence may be subtle. Deterrence will be thought to exist when medications are pulled from the market as a result of lawsuits or threats to litigate, or when adhesion contracts are modified by companies in light of potential or actual claims of violation of consumer protection laws.<sup>69</sup> Since deterrence concerns the psychological and social reactions to class actions, or those responses to the prospect of being sued by a class entity, measuring the value of deterrence requires a different scientific approach. Interviews with corporate representatives or in-house counsels addressing the impact of litigation or the threat of litigation could allow us to gather specific data about changes in business plans, budgeting or corporate sales, which are measurable and comparable indicators of deterrence and/or behavior modification.

While deterrence is not the focus of my Article,<sup>70</sup> I nonetheless emphasize the importance of this objective as a justification of class actions, especially those that provide little or no compensation to the members, but instead serve to deter defendants in a way that is presumably beneficial to them.<sup>71</sup> In fact, scholars have recently supported “low-value” class actions on the basis that they permit entrepreneurial lawyers to act as “private attorney generals,” and

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67 Pearson v. Inco, [2005] O.J. No. 4918, ¶¶ 85-91 (Court of Appeal), leave to appeal to the Supreme Court denied by [2006] S.C.C.A. 1; see also HENSLER ET AL., *supra* note 4, at 4 (arguing that consumer advocates and government regulators both believe that class action lawsuits “provide additional incentives for businesses to comply with regulations”).

68 Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47 (1975).

69 See, e.g., Fitzpatrick, *Deter*, *supra* note 11.

70 Evaluating deterrence is a part of the larger Class Actions Lab Project. This aspect will be addressed in another article in the near future. Evaluating deterrence is very hard, as Berryman has noted:

[T]he empirical evidence is weak that paying damages acts as a significant deterrent to wrongful conduct in class action suits. The issue of determining cause and effect (i.e. whether the class action litigation is the single reason for change in defendant’s future conduct), may simply be too difficult to isolate from other causal factors (i.e. regulatory prosecution, impact of rising insurance premiums, adverse publicity, change in managerial direction, etc.).

Jeff Berryman, *Nudge, Nudge, Wink, Wink: Behavioural Modification, Cy-près Distributions and Class Actions*, 53 SUP. CT. L. REV. 133 (2011).

71 The Ontario Law Reform Commission has specifically approved these kinds of actions. See ONTARIO LAW REFORM COMM’N, *supra* note 54.

that these actions are an effective means of enforcing market regulations.<sup>72</sup> Meanwhile, the better approach is to recognize that class actions serve the three stated purposes, but that these purposes are not always fulfilled together in the same case, and that a given case may principally serve to provide compensation while another may merely deter the defendants without providing any form of compensation.

### III. MEASURING THE VALUE OF CLASS ACTIONS

#### A. Varying Perceptions and Standpoints About Value and Success

Although measuring justice and the utility and effectiveness of procedures is challenging, this approach is necessary to enhance our understanding of class action legitimacy and effectiveness.<sup>73</sup> Class actions are easily criticized. Often perceived as powerhouses, they are readily portrayed by experts as providing very little compensation to the class members and incommensurate, disproportionate, outsized fees to the lawyers who pursue them.<sup>74</sup> These critics often argue that compensation does not matter in class actions and that their value should not be measured by their compensation, but rather by their deterrence.<sup>75</sup> For instance, professors Myriam Gilles and Gary Friedman argue that the focus in class actions should be entirely upon whether defendants internalize the social cost of their wrongdoing, and that there is generally no legitimate utilitarian reason to care whether class members with small claims get compensated at all.<sup>76</sup>

The evaluation of civil justice systems and their procedural mechanisms may be completed by comparing the actual reward to the just reward.<sup>77</sup> This process compares the real outcomes to what are perceived to be the just

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72 Deborah R. Hensler, *Goldilocks and the Class Action*, 126 HARV. L. REV. F. 56, 56 (2012).

73 Jane Aiken & Stephen Wizner, *Measuring Justice*, 2013 WIS. L. REV. 79.

74 Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J.L. & BUS. 767 (2015); Klonoff, *supra* note 14; Mullenix, *supra* note 14.

75 Fitzpatrick, *Class Action Lawyers*, *supra* note 11, at 2047 (“[S]mall-stakes class actions serve no [beneficial compensatory] function. Rather, the only function they serve is deterrence.”); *see also id.* at 2047-69.

76 Gilles & Friedman, *supra* note 10, at 107.

77 Guillermina Jasso, *Studying Justice: Measurement, Estimation, and Analysis of the Actual Reward and the Just Reward 2* (IZA Discussion Paper No. 2592, 2007), <http://ftp.iza.org/dp2592.pdf>.

outcomes. Regardless of the outcome of individual and class litigation, the appreciation by the parties of the value of litigation outcomes can vary considerably.<sup>78</sup> Some will foresee value in participating in a class action and having their “day in court,” while others will consider litigation and outcome judgments ordering the payment of large sums of money as punishment of the defendant. Redemption and solace,<sup>79</sup> on the one end, or vengeance and punishment, on the other, are all foreseeable values in this context. “Value” in litigation may be perceived by litigants as correlative to the amount of money that will be awarded and that they will recover from the case. This “value” may nonetheless diminish over time due to increasing court delays. Indeed, the longer it takes to be compensated, the lesser the monetary value of the award and the degree of satisfaction of the parties.<sup>80</sup>

Parties compare litigation outcomes based on a standard of what they feel is “fair” under the circumstances.<sup>81</sup> The Hague Model Measuring Access to Justice Project has provided a methodology to measure the costs and quality of paths to justice, from the perspective of the user.<sup>82</sup> The model has sought

78 Hensler, *supra* note 72, at 58.

79 A relevant example of a case where these sentiments were felt by one of the class members upon receipt of a cheque from the defendant is the following extract of an email, sent to class attorneys in a sexual abuse class action case:

Hello [dear class counsel],

Thanks for the cheque that I received today. It represents, for me, the end of one of the most difficult events of my life — a process I never thought would ever take place but which, after all the pain and disruption it caused to me, I now know was not only necessary but a vital part of a larger struggle, which our society has long avoided, which is the confrontation of the very existence of pedophilia and how these predators hide behind facades of respectability.

I would like to thank you and all of your colleagues who took on this lawsuit. I would also like to think that what motivated you to fight for us was above and beyond a mere interest in jurisprudence, and beyond just the challenge of winning. You did good, in every sense, and I am very, very grateful.

Truly,

John Doe

E-mail from John Doe, to attorneys (Sept. 9, 2017) (correspondents’ details to remain confidential) (on file with author).

80 Jean-François Roberge, “*Sense of Access to Justice*” as a Framework for Civil Procedure Justice Reform: An Empirical Assessment of Judicial Settlement Conferences in Quebec (Canada), 17 *CARDOZO J. CONFLICT RESOL.* 323 (2016).

81 Tom R. Tyler, *Justice Theory*, in 2 *HANDBOOK OF THEORIES OF SOCIAL PSYCHOLOGY* 344 (Paul A.M. Van Lange et al. eds., 2011).

82 See, e.g., Martin Gramatikov, Maurits Barendrecht & Jin Ho Verdonschot, *Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology*,

to measure three “pillars” of experience that comprise the costs of justice such as monetary costs, opportunity costs, and intangible costs. Specifically, it has noted the quality of the procedure and the quality of the outcome, the whole using surveys of random samples of persons who have engaged in various paths to justice.<sup>83</sup>

Accordingly, the quality of procedures is often operationalized in terms of fairness of process and outcomes. Fairness of process being excluded for now,<sup>84</sup> fairness of outcomes requires a close analysis of

distributive fairness — the outcome is fair because it is founded either on the criterion of merit or equality, or on the criterion of capacity, limits, and needs; reparative fairness — the outcome is reparative because it compensates for financial and non-financial loss; functional fairness — the outcome is functional because it resolves the actual problem; and transparent fairness — the outcome is transparent because it is substantiated and comparable to the outcome achieved in similar situations.<sup>85</sup>

In truth, distributive and corrective justice are irrelevant in smaller class action cases. In addition, because class members are considered to be “absent” members, unaware of the class procedure’s existence and not expecting any form of compensation for the harm suffered, their perspective of success may not be the most relevant here. Class litigation success must then be perceived, again, in the aggregate. The question that arises is what portion, if any, of the aggregate awards paid out by class defendants and made available to the members find their way into the hands of these members? In addition, what portion of class action awards actually serves to repair injurious or wrongful behavior?

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3 HAGUE J. RULE L. 349 (2011). This project was developed by Tilburg University, the Tilburg Institute for Interdisciplinary Studies of Civil Law and the Conflict Resolution Systems, and the Hague Institute for the Internationalisation of Law.

83 *Id.*; see also MARTIN GRAMATIKOV ET AL., HANDBOOK FOR MEASURING THE COSTS AND QUALITY OF ACCESS TO JUSTICE (2010).

84 Which would involve an analysis of fair process as well as informational and interactional treatment. Tom R. Tyler, *Justice and Effective Cooperation*, 25 SOC. JUST. RES. 355 (2012), cited in Roberge, *supra* note 80, at 344 n.76.

85 Roberge, *supra* note 80, at 343 (citing Gramatikov, Barendrecht & Verdonschot, *supra* note 82).

## B. Value and Success Perceived Collectively: The *Optimal* Class Action

The class action's purpose is to allow an entity to be collectively compensated through a peculiar, unique procedure. Generally recognized as a regular procedure that does not — and should not — change the substantive law,<sup>86</sup> the class action has, in fact, impacted the development of the substantive law by better defining its limits and by permitting novel applications of the law in increasingly different contexts and cases.<sup>87</sup> Class actions are, indeed, in a class of their own in that regard.<sup>88</sup> With the advent of the class action, substantive and procedural laws are on an equal footing, such that the class procedure can encroach upon the remedial law. Recoveries in the form of damages may then be appreciated collectively or globally. Accordingly, I argue here that when it comes to appreciating outcomes and the degree of success of these kinds of actions, individual litigation values and objectives do not matter.

The class action is justifiable because it provides justice for the masses, collective justice to an entity: the class. Instead of being an individual form of justice conducted in the aggregate, it is a purely aggregative procedural tool serving to provide a form of collective justice. The North American class action has evolved to accept the principles of collective causality, common prejudice and common proof through collectively appreciated evidence. Significant progress has been made towards conceptualizing the class action as a peculiar procedure unlike any other, rather than an “idealized version of individual litigation.”<sup>89</sup> Indeed, class actions have traditionally been justified as consistent and necessary in light of “rough justice” considerations.<sup>90</sup>

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86 *Bendall v. McGhan Medical Corp.*, [1993] 14 O.R. 3d 734, 739 (“Class proceedings legislation creates no new cause of action. It is solely procedural.”); *Ontario New Home Warranty v. Chevron*, [1999] 46 O.R. 3d 130, 150 (Supreme Court Judgments) (“Class proceedings legislation is solely procedural and does not supplement or derogate from the substantive rights of the parties.”).

87 See Élodie Falla, *Les dommages de masse: proposition pour renforcer l'efficacité de l'action en réparation collective* [Mass Damage: Proposal to Enhance the Effectiveness of Collective Redress] (Dec. 14, 2016) (unpublished Ph.D. dissertation, Université de Montréal and Université Libre de Bruxelles) (on file with author).

88 Catherine Piché, *L'emprise des cinq doigts de Frankenstein: Réflexion en cinq temps sur l'action collective* [*Frankenstein's Five Fingers: A Five-Step Reflection on Collective Action*], 2 *REVUE INTERNATIONALE DE DROIT COMPARÉ* [REV. INT'L COMP. L.] 1 (2016) (Fr.).

89 *Id.*

90 Ethan E. Litwin & Morgan J. Feder, *European Collective Redress: Lessons Learned from the U.S. Experience*, in *THE LAW AND ECONOMICS OF CLASS ACTIONS* 209, 237 (James Langenfeld ed., 2014).

Certain scholars denounce the actions' inconsistencies with traditional principles of civil justice such as legal interest to sue, representation and proportionality of proceedings.<sup>91</sup> Others argue that compensation in a class action context remains imperfect if efficiency and costs are prioritized and distributions are quickly completed.<sup>92</sup> Because the class action claims recovery process has been conceptualized and organized in light of collective justice considerations,<sup>93</sup> accuracy of distribution schemes is often disfavored in light of efficiency considerations. Indeed, the greater the fine-tuning of settlement allocations, the greater the costs incurred.<sup>94</sup> Accordingly, "the more intricate the calculation, the greater the delay in having a settlement distributed to class members."<sup>95</sup> For these reasons, averages, approximations and lump-sum payments are resorted to whenever possible at the distribution's design stage. Ultimately, an appropriate balance must be achieved between the efficient and speedy distribution of claims and administrative feasibility. Attention must be paid to individual claims in order to ensure that the settlement is fair to the members. Favoring efficiency over accuracy, and approximate justice and imperfect distributions over lengthy and complex distributions, has thus become justifiable in class actions when social appeasement is enhanced and fairness prevails.

In fact, this tendency to embrace collective and approximate justice and favor efficiency over accuracy is consistent with the theory and logic of collective action. As economist Mancur Olson brilliantly explained in his treatise entitled

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91 H. Patrick Glenn, *Class Action and the Theory of Tort and Delict*, 35 U. TORONTO L.J. 287 (1985); H. Patrick Glenn, *Class Actions in Ontario and Quebec*, 62 CAN. B. REV. 247 (1984); H. Patrick Glenn, *The Dilemma of Class Action Reform*, 6 OXFORD J. LEGAL STUD. 264 (1986); Daniel Jutras, *La fonction judiciaire et le recours collectif: Relire H. Patrick Glenn [The Judicial Function and the Class Action]*, in ACTES DU COLLOQUE 2015 DE L'ASSOCIATION QUÉBÉCOISE DE DROIT COMPARÉ [PROCEEDINGS OF THE 2015 COLLOQUIUM OF THE QUEBEC COMPARATIVE LAW ASSOCIATION] 161 (N. Vézina & C. Piché eds., 2017).

92 RACHAEL MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS* 51-52 (2004); see also Michael Legg, *Class Action Settlement Distribution in Australia: Compensation on the Merits or Rough Justice?*, 16 MACQUARIE L.J. 89, 99 (2016).

93 Piché & Lespérance, *supra* note 6.

94 Legg, *supra* note 92, at 99 ("[C]osts incurred by solicitors (and possibly by experts) [and claims administrators] to design the distribution scheme may reduce the settlement funds available for group members or increase the legal costs and disbursements that are incurred and usually paid by the respondent as part of a settlement.").

95 *Id.* at 100.

*The Logic of Collective Action*, unless the number of individuals in a group is small, or unless there is coercion or some special device that makes individuals act in their common interest, “rational, self-interested individuals will not act to achieve their common or group interests.”<sup>96</sup> Accordingly, for larger groups, smaller fractions of the total group benefit are received by he or she who acts in the group interest, less adequate rewards are provided for group-oriented action, and less than optimal supplies of the collective good are distributed to the group.<sup>97</sup> Put differently, “the larger the group, the farther it will fall short of providing an optimal supply of a collective good, and very large groups normally will not, in the absence of coercion or separate, outside incentives, provide themselves with even minimal amounts of a collective good.”<sup>98</sup>

Trial is our paradigm of how civil disputes should be resolved. In reality, however, only a small fraction of litigated class action cases are tried to judgment, and the majority of cases are resolved through settlement.<sup>99</sup> Parties believe that a bad settlement is always better than a good trial; thus, public policy favors settlement. As the parties and lawyers argue their case and the judge applies the substantive law, there is an expectation of substantive accuracy of result, that the outcome will reflect the correct result, based on the substantive law.<sup>100</sup> By contrast, in out-of-court settlements, what matters more than substantive accuracy is agreement and consent without coercion, which grants legitimacy to the negotiated outcome.<sup>101</sup> Interestingly, Professor Cooper Alexander has argued that while settlement outcomes are predicted to approximate trial outcomes and to reflect the substantive merits of a case,<sup>102</sup> some cases settle “at an apparent ‘going rate’ of approximately one quarter of the potential damages,” meaning that “a strong case [may sometimes] appears to have been worth no more than a weak one.”<sup>103</sup> Her study thus relativizes the importance of accuracy in outcomes in a class action context, thereby encouraging approximate justice over no justice at all. This line of reasoning supports a collective and less accurate appreciation of outcomes.

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96 MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION 2* (2009).

97 *Id.* at 48.

98 *Id.*

99 CATHERINE PICHÉ, *FAIRNESS IN CLASS ACTION SETTLEMENTS 202* (2001).

100 Alexander, *supra* note 29, at 498.

101 *Id.* at 499.

102 *Id.* (“[S]trong cases are worth more in settlement than weak ones because a plaintiff with a strong case can hold out for a better offer on the threat of going to trial. If this is true, settlements will be roughly as accurate as trials, and there is no reason to make a special inquiry into their accuracy.”).

103 *Id.* at 500.

At the fairness hearing, courts have to test the settlement's fairness and reasonableness "in light of the best possible recovery and in light of the risks the parties would face if the case went to trial."<sup>104</sup> When evaluating the reasonableness of proposed settlements in cases seeking monetary damages, courts will "compare the amount of the proposed settlement with the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing."<sup>105</sup> As such, the final compensation awarded to the members in a settlement context necessarily remains imperfect. The settlement approved is considered to be the best settlement for the parties, even if it is imperfect. It is considered to be the best possible alternative to trial, viewed collectively, and in the best interests of the class members as a whole.<sup>106</sup>

According to the American Law Institute (ALI), "[i]deally, the amount of compensation a claimant receives should reflect the merits of the claim itself, including the likelihood that the claimant would prevail at trial and the amount the claimant would win."<sup>107</sup> In the class action context, again, this ideal is rarely achieved and rough justice prevails, especially given the fact that the bulk of class action cases are settled through transactions concluded before trial. According to the ALI, class "settlements usually involve an element of 'damages averaging,' which occurs when an allocation plan ignores certain features of claims that might reasonably be expected to influence claimants' presumed recoveries at trial."<sup>108</sup>

Given that most class action cases settle through a micro-judgment process, the appreciation of the value, outcome, and overall success of the class action largely depends on whether the conditions of the contract are respected. Thus, once the take-up and participation rates are calculated, and it is clear that a substantial majority of class members have participated in the settlement and received a form of monetary relief, pursuant to the judge's order and a process established contractually, my view is that the class action may largely be considered as "successful." As for class action cases ending with a judgment on the merits thereby ordering a form of collective monetary distribution, the same reasoning applies, and the successful class action will be that in which the entity was compensated, that is, the substantial majority of class members will have received monetary relief.

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104 *Id.*

105 *Id.*

106 *Id.*; see also Samuel Issacharoff & Richard A. Nagareda, *Class Settlement Under Attack*, 156 U. PA. L. REV. 1649 (2008).

107 PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION ¶ 1.04(F) (AM. LAW INST. 2010).

108 *Id.*

For all these reasons, I believe that a novel framework for analyzing the success of class action outcomes is mandated. Determining the value and success of class actions requires focusing on what the *optimal* class action might be, in light of its underlying objectives. This *optimal* class action provides access to justice, deterrence and compensation, or alternatively, access and deterrence and/or compensation. On the assumption that we are focusing on compensation and access to justice as access to a form of compensation, at least in this Article, this goal will be reached *when a substantial majority of the class members receive monetary relief, even if minimal*. I recognize that these small-value (or negative value) class actions with minimal payouts make compensation a secondary goal to the action and deterrence then becomes the primary objective. Nonetheless, in these instances, class actions are justified as market regulators, existing through the actions of entrepreneurial “private attorney generals.”<sup>109</sup>

Importantly, the optimal class action realizes the objectives mentioned above, but does so while minimizing costs and while respecting procedural and evidential proportionality,<sup>110</sup> as well as societal proportionality,<sup>111</sup> evaluated in light of the administration of justice.<sup>112</sup> Proportionality reinforces the judicial discretion already found in the language of the Quebec Code’s provision outlining the certification criteria,<sup>113</sup> and mandates a due consideration of the impact of a given class action on the system as a whole.<sup>114</sup> In my view, this

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109 Hensler, *supra* note 72, at 56; *see also* Fitzpatrick, *Class Action Lawyers*, *supra* note 11.

110 Civil Code of Quebec, S.Q. 2016, c C-25.01 art 18 (Can. Que.).

111 *See, e.g.*, *Marcotte v. City of Longueuil*, 2009 S.C.C. 43, ¶ 43.

112 *See* Preliminary Provision, Qué. CCP; *see also* *Vivendi Can., Inc. v. Dell’Aniello*, 2014 C.S.C. 1 (confirming that proportionality is an important factor not only in civil procedure, but in the class action context, requiring that it be “considered in the assessment with respect to each of [the certification] criteria”).

113 *Vivendi*, 2014 C.S.C. ¶¶ 33, 68.

114 *See* another fundamental Supreme Court of Canada case in *Bank of Montreal v. Marcotte*, 2014 S.C.C. 55, ¶ 47 (“This Court’s flexible approach to authorization in *Infineon* and *Vivendi* supports a proportional approach to class action standing that economizes judicial resources and enhances access to justice.”). In fact, the latter case is one of a trilogy of decisions: *Marcotte*, 2014 S.C.C.; *Amex Bank of Can. v. Adams*, 2014 S.C.C. 56; and *Marcotte v. Fédération des Caisses Desjardins du Québec*, 2014 S.C.C. 57 (hereinafter collectively “*Marcotte* decisions”). This trilogy ruled on the application of articles 12 and 272 of the Consumer Protection Act, CQLR, c. P-40.1 (Can. Que.), to financial institutions issuing credit cards in Quebec, without ruling on the broader issue of the application of the balance of the Quebec Consumer Protection Act to banks.

extended vision of proportionality thereafter requires the court to appreciate the potential outcomes of the class action,<sup>115</sup> seeking to answer the following question: is this class action “worth” pursuing given the potential outcomes, appreciated in light of the weight and costs of the procedure on the administration of justice and on the litigants?

#### IV. EMPIRICAL VALUE OF CLASS ACTION COMPENSATION

##### A. The Class Actions Lab’s Class Action Compensation Project

###### 1. Research Method

###### i. Phase I — Summer 2015

The Class Action Compensation Project began in the summer of 2015, as I organized a two-week long research visit at the public financing fund, the *Fonds d’Aide aux Actions collectives*,<sup>116</sup> in order to review some three hundred and fifty non-archived closed cases, with the help of two students. My Lab’s team reviewed each of these individual case files, in an investigatory role, searching for indicia of compensation and/or deterrence. Luckily, the team was able to find several distribution reports filed by claims administrators and law firms, and many judgments approving class distributions and thereby detailing the process followed for filing claims and allocating the money. At other times, correspondence was found that helped connect the dots and draw conclusions about compensation levels.

In the end, my team was able to gather data relevant to the Project in less than forty files. The preliminary conclusions were directed toward expressing a frustration regarding the complete lack of transparency about outcomes, which leaves the courts and the users of the system in the dark on this crucial issue. Interestingly, we were able to identify several factors directly contributing to enhanced distributions, such as the identity of the members, the need for clear and accessible class action notices, the involvement of the judges throughout

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115 In *AIC Ltd. v. Fischer*, [2013] 3 S.C.R. 949, Cromwell J’s progressive view is that access to justice is a contextual concept that includes both substance and procedure. As Cromwell J wrote, “[a]ccess to justice requires access to just results, not simply to process for its own sake.” *Id.* ¶ 56s.

116 The *Fond d’Aide aux Actions Collectives* is an organization whose mission is to contribute to the financing of class actions during first instance and in appeal, as well as to distribute information relating to the exercise of the class action. For more information, see *Fonds d’aide aux actions collectives*, PORTAIL QUÉBEC, <http://www4.gouv.qc.ca/fr/Portail/citoyens/programme-service/Pages/Info.aspx?sqtype=mo&sqcid=211> (last visited Aug. 8, 2017).

the distribution process, the presence of consumer groups in the litigation, the extent to which class members' identities are known, etc.<sup>117</sup> We were unable to finalize our calculations and issue a definitive report during that first phase, but nonetheless presented our preliminary results and analysis at several judicial training activities and colloquia, and published our findings in peer-reviewed publications.

#### ii. Phase 2 — Summer 2016

In phase 2 of the Project, I contacted an agent of the Ministry of Justice in order to obtain a list of all class action cases filed in the past twelve years (from 2004 until 2016). From this list, I identified the case numbers and reviewed each file's case dockets (these official summaries of court proceedings are available in Quebec from a computer database called SOQUIJ), searching for indicia of class action reports, accountings and closing judgments (following class distributions). Using these indicia, I identified a number of potentially relevant case files, but remained unsure whether the annotations on the dockets had been made systematically, whether they were reliable, and whether we could stop searching for additional files to analyze.

Wanting to conduct the most exhaustive search possible, I decided to consult the files physically at the courthouse clerk's office. I reviewed, along with my team, all closed class action files of the past twelve years (from January 2004 to August 2016). I then found raw data relevant for our research's purposes in twenty additional files. For each of these files, my team created individual charts with contextual data to push the analysis further. Included in these charts were information relevant to group definition, the cost and duration of procedures, the parties and litigation questions, the involvement of the judge and of the parties, the distribution process, the identity of the administrator, any and all correspondence available, the notices, and, importantly, all required information regarding monetary distributions. For each of these charts, we notably sought to calculate the total amount paid directly to all class members, the actual or estimated total number of class members, the number of class members who received payments, the average amount paid directly to all class members, and the amounts paid to class counsel and claims administrators.

#### iii. Analysis

For each individual case, my team and I searched thoroughly through the physical court files, identifying relevant contextual elements organized in data points to distinguish and better compare the different cases. We gathered information about the timeframe of each action and of each significant procedural

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117 Piché, *supra* note 6.

step, the substantive law and claims at stake, the recovery process applied, the methods chosen for reaching out to the class members, the contents of notices and claim forms, and lastly, judicial fees. Regarding monetary awards, we identified the total amount paid directly to all class members, the actual or estimated total number of class members, the number of class members who received payments, and the average amount paid directly to all class members, class counsel and claims administrator fees. We calculated the take-up and participation rates, which I will explain below in Subsection IV.A.3. We also isolated the different factors that in our view serve to influence take-up rates.

The tables herein reproduced summarize our principal findings according to the six most fundamental factors: take-up rates, participation rates, total monetary award, total costs and attorney fees, proportion of total amount received by the members, and amount of leftover distributions. Importantly, within the four hundred and fifty files reviewed during the two phases, merely sixty were found to contain data relative to monetary distributions. Upon a closer review, fifty-two files only were chosen for reporting, as these files contained the relevant numbers for calculating monetary distributions *and* the take-up rates, which were prioritized for the Project's purposes. Cases which did not allow us to draw conclusions about take-up rates, or which contained uncertain or incomplete information, were set aside for these purposes.

My analysis focused on the definition of compensation and for each given class action, I asked: "what was the actual recovery achieved for the benefit of the class?"<sup>118</sup> I considered member recovery to involve the amounts distributed by defendants to each member, by way of check, money transfer, or other form of payment, through individual liquidation of collective damages, for those damages suffered.<sup>119</sup> Important leftover amounts provided by settlement or by way of final judgment, or amounts remaining after class distributions, were highlighted. One question that arose was whether leftover or *cy-près* distributions, transferred to public entities benefiting the class members indirectly rather than directly, counted towards the supposed "success" of the class action. Within our range of cases, compensation would also sometimes take the form of coupons, discounts, or other indirect (nonmonetary) benefits to the members and to future customers, sometimes independently of their membership in the class. Given that these modes of compensation only

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118 This consideration is inspired by the Ontario Court of Appeals case in *Lavier v. MyTravel Can. Holidays Inc.*, 2013 O.N.C.A. 92.

119 PICHÉ, *supra* note 99 (citing Mauro Cappelletti, *La Protection d'intérêts collectifs et de groupe dans le procès civil (Métamorphoses de la procédure civile)* [*The Protection of Collective and Group Interests in the Civil Process*], 27 *REVUE INTERNATIONALE DROIT COMPARÉ* [INT'L REV. COMP. L.] 571, 597 (1975) (Fr.).

indirectly benefit the members in a way that is inconsistent with traditional compensatory goals,<sup>120</sup> a decision was made to set aside cases providing exclusively for indirect compensation for this Article's purposes.

## 2. Challenges

In this Project, I sought to calculate the *actual* monetary benefit of class actions to class members. Measuring class action value, as well as the procedure's economic utility and effectiveness, is inherently challenging. Access to the required information is challenging, if not impossible. There is a general lack of transparency about class action outcomes in the court dockets and files in Quebec,<sup>121</sup> which suggests a lack of interest and/or incentives to collect and make available this kind of information. As I have explained above, Quebec court docket entries remain unclear and unsystematic such that it is difficult to determine whether an accounting was rendered in the class action, whether a report was filed or whether a closing judgment was issued.<sup>122</sup> In fact, it is literally impossible to draw definite conclusions about which cases may be closed and which may still be ongoing. To be sure, we identified potentially relevant cases, and reviewed the actual files in person at the courthouse.

During the physical review of the case files, my team was surprised to find reports and distributions data in files that were in fact closed (and for which distributions were completed), but had initially appeared to be open upon mere consultation of the docket. Another surprise was to come across largely generic and imprecise reports and accountings that did not provide distribution numbers, the progress made in distributions, and/or the details of the claims recovery process. Reports of class distributions were often incomplete, obscure or simply absent from the case file. Additional confusion stemmed from the absence of certainty within the file regarding the scope of the class size. In fact, the confidential nature of the data was on occasion dictated within the settlement agreement, upon agreement between settling counsel and/or as provided in confidentiality agreements.

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120 ACCESSING JUSTICE: APPRAISING CLASS ACTIONS, *supra* note 16.

121 Fitzpatrick & Gilbert, *supra* note 11 (also highlighting the lack of transparency and the inherent problems in the system in relation to its opacity); *see also* Mayer Brown LLP, *supra* note 12.

122 In our review of the dockets, we were pleased to report entries entitled "closing judgment," "Accounting," "Motion to Reopen Distributions," which are reflective of a certain amount of information in the file regarding distributions. These entries, again, are not systematic, and more often than not, there was no sign in the docket of a claims recovery process or of distributions having been made.

### 3. Calculating Rates

Measuring class action value has involved, in this Project, calculating the actual, direct economic benefit to the class members following class action settlement or judgment. For this purpose, the calculations included a take-up rate for each of the files reviewed. The *take-up rate* is defined as the number of class members who file a claim for recovery and are compensated pursuant to a class action settlement or judgment divided by the total number of class members estimated or confirmed. This rate reflects the number of members who ultimately received compensation; in other words, the number of members that actually benefitted from the class action. Take-up rates are important because “high take-up rates are evidence to the courts, policymakers and the general public that the class being represented really does care about their case and that they are being compensated for the wrongs they suffered,” as explained by attorney Ward Branch.<sup>123</sup>

Interestingly, for the Canadian province of Ontario’s Court of Appeal, take-up rates similarly reflect “the actual benefit to the class” and “an appropriate measure of the results achieved.”<sup>124</sup> These rates have historically been complex to collect, principally due to the extreme lack of transparency and substantial variations in rates.<sup>125</sup> In addition, as mentioned above, identifying the exact scope of the original class is complex, as these numbers are often conflated to be more conducive to certifications. Hence, additional data and calculations are required and were sought for the sake of this Project.

Accordingly, in addition to take-up rates, I attempted to calculate a *participation rate*. This rate compares the number of claims filed to the number of claims accepted, thereby attesting to the difficulty and the general effectiveness of the claims process, as well as the access to a system of compensation. With respect to additional fees, we sought to evaluate counsel and claims administrator fees, the costs of notice and the extrajudicial costs. I further identified the extent of leftover or *cy-près* distributions, which are considered to be a form of indirect distribution to members, and which I have chosen to include in the analysis to better evaluate the many forms of monetary compensation available.

Finally, to complete the analysis, I attempted to calculate a *compensation rate* for each file, which requires dividing the total amount paid for the

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123 Branch & McMullen, *supra* note 3, at 4.

124 Lavier v. MyTravel Can. Holidays Inc., 2013 O.N.C.A. 92, ¶ 57.

125 For HENSLER ET AL., *supra* note 4, and Hensler, *supra* note 72, the take-up rates vary between thirty percent and a hundred percent. For PACE ET AL., *supra* note 25, the mean rate is forty-five percent, and for MULHERON, *supra* note 92, the rates do not exceed seventy-five percent.

benefit of the class (the settlement fund made available to the members — the payout) by the total amount of damages suffered. The compensation rate helps measure whether the amounts awarded to the members were significant considering how much money they lost at the outset, thereby indicating the actual direct economic benefit to the members. Unfortunately, very few cases disclosed the amount of damages initially suffered by the plaintiffs, either individually or collectively, leading me to altogether give up on calculating this rate or disclosing the very few instances of participation rate that I was able to calculate.

## B. Observations and Findings

This Project's empirical study allowed me to make important observations and findings, from which I draw several conclusions. These relate to my analysis of data stemming from court case files where a monetary award was distributed directly to the members, during the years 2004 until 2016. For this purpose, I chose to exclude from my case sample those cases where monetary rebates or credits were awarded to the class members exclusively of any other form of monetary compensation. In cases where take-up rates varied between one amount and another, and only a range of rates was determinable, I chose to provide in my tables an average rate, in order to be more prudent and conservative in my calculations. In addition, I acknowledge here that there were many instances of overcompensation, thereby leading to rates over and above 100%. In this Article, I have chosen to present my results in a general chart, entitled Table VI and reproduced in the Appendix, and in the separate, more specific Tables I to V, found within this Section.

Generally speaking, the take-up rates I found in this Project were much more impressive than those that had been found before and suggested by the overall literature and media.<sup>126</sup> This first impression may be explained by the general climate favoring class actions in Quebec, and the fact that the Supreme Court has recently unanimously reaffirmed the broadness and flexibility of Quebec's conditions for class action certification.<sup>127</sup> A more conservative reason for these positive results could be that the large majority (47/55) of the cases studied were private bargaining cases in which negotiated settlements

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126 See, e.g., Daryl-Lynn Carlson, *Class Actions: Taking on the Low Take-Up Rates for Settlements*, NAT'L POST (Dec. 8, 2011), <http://business.financialpost.com/legal-post/class-actions-taking-on-the-low-take-up-rates-for-settlements>; see also Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010).

127 See *Vivendi Can. Inc. v. Dell'Aniello*, 2014 C.S.C. 1.

led to class distributions; thus, these cases were negotiated dispositions in which the parties were able to reach results (i.e., class distributions) that do not necessarily accurately reflect the applicable law or rules, but instead are coherent with individual values and preferences of the parties and counsel. The results of the empirical analysis of case files also showed mixed outcomes in terms of the great diversity of take-up rates found, varying from 0% to 100% and more, as shown in Table 6 in the Article's Appendix.

The most important conclusion of this Project is that while take-up rates vary tremendously between the case files studied, *class actions do compensate Quebec citizens*. Table 1 below provides a summary overview of my results, and highlights the differences between settlement and judgment outcomes, in terms of the average take-up rate, the average total award paid by the defendant, the average administration fees (including fees paid to the representative, symbolically or not, for his or her involvement in the action), the average attorney fees, and the average leftover amounts. The first column indicates whether the monetary compensation followed a class action settlement or a class action judgment on the merits. The second column provides the average take-up rates, while the third provides the average amount paid by the defendant(s) following a settlement or a judgment on the merits. The fourth and fifth columns provide average fees paid to claims administrators and class representatives (column 4) and average fees paid to attorney (column 5). The last column provides for average leftover and *cy-près* distributions that arguably are considered as indirect forms of compensation.

**Table 1: Summary Take-Up Rates and Monetary Distributions Following Class Action Settlement or Judgment**

<b>Settlement or judgement</b>	<b>Average take-up rate</b>	<b>Average total amount paid by the defendant</b>	<b>Average administration fees</b>	<b>Average attorney fees</b>	<b>Average leftover/ cy-près (indirect comp.)</b>
J (8)	68.75%	\$3,264,988	\$379,472	\$1,123,883	\$1,733,341
S (47)	52.33%	\$5,867,701	\$452,872	\$1,100,767	\$340,545
All cases (55)	54.76%	\$5,503,321	\$444,717	\$1,103,849	\$608,391

What Table 1 principally indicates is that an average of 54.76% (rounded to 55%) of class members are compensated.<sup>128</sup> Quebec class actions do serve

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128 It is also worth mentioning here that members are sometimes overcompensated in some of the cases studied (more than 100% take-up rate); therefore, the original

to compensate a majority of class members in the case sample, and, in my opinion, this result supports the proposition that class actions serve their compensatory objective.

*How well* are class members compensated, however? In Table 2 below, I provide a summarized breakdown of the take-up rates found. In the first column, take-up rates are divided into 25% brackets, the second column shows the number of cases within the take-up rate bracket, and the third column the percentages of cases found in each bracket.

**Table 2: Comparison of Take-Up Rate Levels as Between Settlement and Judgment Outcomes**

Take-up rate	Number of cases	% of cases
Lower than 25%	17	31.48%
Between 25% and 50%	8	14.81%
Between 50% and 75%	12	22.22%
Between 75% and 100%	12	22.22%
More than 100%	5	9.26%

This Table demonstrates that 46% of class action cases show less than 50% take-up rates. More significantly, 53.7% (rounded to 54%) of cases compensate at least 50% of all members (precisely, between 50% and more than 100%). Put differently, in more than half of our Quebec sample of cases, class actions serve to compensate a majority — and many more! — of the class member population.

One question that we asked at the Lab was whether settlements could provide for more appropriate, generous and adequate compensation of the members than court judgments and their distribution orders. We wondered whether these out-of-court agreements provide enhanced distributions since they are reached through negotiations between the parties. In Table 3 below, I separate these results found in Table 2 into settlement and judgment categories. The first column again shows take-up rates divided into different 25% brackets, while the second column indicates the number of judgments per bracket, followed by their percentage in the third column. The same exercise is completed in columns 4 and 5 for class settlements.

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class in these cases is modified and a larger group of people is indemnified through a negotiated outcome. In a class action context, we are not fundamentally concerned with this fact because these overcompensation cases do not otherwise show red flags of disproportionality.

**Table 3: Breakdown of Take-Up Rate Levels and Comparison Between Settlement and Judgment Outcomes**

Take-up Rate Brackets	Number of Judgements	% of judgements	Number of Settlements	% of settlements
Lower than 25%	2	25%	15	33%
Between 25% and 50%	1	12%	7	15%
Between 50% and 75%	2	25%	10	22%
Between 75% and 100%	2	25%	10	22%
More than 100%	1	12%	4	9%

This Table serves to demonstrate that 25% of cases ending in judgments have lower than 25% take-up rates, and 37% of these cases have rates of 50% or less. For cases ending by settlement out of court, these numbers are slightly higher, with 33% of settlements with lower than 25% take-up rates, and 48% having 50% or lower take-up rates. Furthermore, the Table shows that for cases ending with a judgment on the merits, 62% of these cases have a take-up rate of more than 50%.<sup>129</sup> Correspondingly, for cases ending in settlements, 51% of cases show take-up rates of more than 50%. Only 31% of cases ending in settlement compensated more than 75% of the members.<sup>130</sup> One interesting conclusion is that class members appear to be better compensated following a judgment on the merits, as a greater proportion of cases show higher take-up rates.

What I have found in my more detailed individual study of the cases is that high take-up rates are reached when a series of favorable factors in the action are found to be present. In the majority of the files for which take-up rates exceeded 75%, class members tended to already be identified or to be readily identifiable. These were cases where the defendant, for instance, is a company that owns lists of members and is able to identify those members with potential damages through client lists or otherwise. Hence, compensation is improved in instances where class members are simple to trace and reach, which is mainly the case in the consumer protection cases. Otherwise, higher take-up rates will generally be reached when the parties have made significant efforts to trace and notify class members. Such efforts are seen when, for instance, companies *bona fide* put in place programs, online or otherwise, which help reach members and facilitate compensation. In future reform efforts, defendants should accordingly be held to the highest standards of good

<sup>129</sup> There is a margin of error and rounding-up of 1% here.

<sup>130</sup> There is, again, a margin of error and rounding-up of 1%.

faith and collaboration in terms of efforts provided during claims distribution processes.

Additionally, I have found in my analysis of the individual cases that higher take-up rates are correlative to direct distributions. Put differently, the lesser the effort required individually to obtain compensation, the greater the chances are that members will be compensated, and many of them. When simpler distribution systems are put in place with automatic distributions or distributions following easy to follow/use claims procedures and simple, plain language claims forms — ideally without a required proof of damages suffered — members are more readily compensated and in greater numbers. Accordingly, one of my original hypotheses that complex claiming processes and fastidious forms have a negative impact on distribution processes was partially confirmed. I noted that intricate claiming procedures and forms generally have a negative effect on the take-up rate, especially in cases where the amount recoverable is low. In that regard, I firmly believe that technologies and social networks should be used to facilitate simpler claims distribution processes.

In fact, despite the existence — explosion, really! — of advanced communication technologies, newspapers continue to be the preferred medium of notification of class members, except in cases where members are individually identifiable and reachable. In several consumer cases, the costs invested in massive newspaper notice campaigns are disproportionate, given the data relative to class members' participation and take-up rates. The use of new communication tools, such as social media ventures, was not favored in many of the cases reviewed, as it should have been. In fact, as I have written elsewhere,<sup>131</sup> take-up rates are enhanced significantly when technological notices are used, as based upon data found at the Class Actions Lab.

Incidentally, in my analysis of the class action files, I sought to calculate participation rates, which I have defined above as the relation between the number of claims filed and the number of claims accepted, thereby testing the odds that a claim filed will be accepted by the claims administrator, defendant administrator or court clerk. I was not very successful there in obtaining systematic data and decided not to present these results in my tables. However, I can say that I found that participation rates varied within the files between 63% and 100%, which suggests that when a member files a claim, he or she almost systematically will be compensated. This data serves

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131 *See, e.g.*, Catherine Piché, Reaching the Universe of Class Action Claimants through New Technologies and Social Networks, Paper Submitted for Third Workshop on Civil Procedure, Tucson, Ariz. (Oct. 6-7, 2017) (on file with author).

to demonstrate that class members should be encouraged to file claims, even when the efforts required to do so appear extravagant or disproportionate to the financial advantages sought.

One observation that raises concerns is that in merely 9% of the cases studied, the take-up rates reached 100% or higher and the totality of the class's members was compensated. While this data could be interpreted to mean that the class action does not generally compensate the totality of members of a given class, I instead argue here that class actions do not aim for accuracy of outcomes, and that these data are to be expected.<sup>132</sup> Indeed, class actions are instruments of rough justice, and, again, what we are looking for is compensation of a substantial majority of class members. And what we are seeing in this Project's results is such a level of compensation in the cases herein studied.

Do higher promised individual awards lead to higher take-up rates? Will class members tend to make greater efforts to claim distribution amounts when potential awards are more significant? Logic would suggest that when higher payouts are at stake, members will more willingly choose to participate in claims distribution processes. In five of the files providing potential awards of less than \$50, only one presented a take-up rate of more than 25%. This result seems to suggest that lower payouts are less interesting to the members and lead to lesser incentives to participate, thereby lowering the rates of compensation. The sample of cases with low potential awards may, however, be too small to draw definitive conclusions in that regard.

How much are the members awarded by way of comparison for the costs of the case, including administration and attorney fees? In other words, how much does it cost to bring and try or settle a class action case by comparison to the total award paid by the defendant? Attorney fees and other disbursements, as well as costs of the case — administration and otherwise — were impressive in the majority of the cases analyzed. In Table 4, below, I present the average proportion between the costs of the case and the total amount paid by the defendant following judgment or settlement. In the second column, I added the cost of administrating the case (including any and all payments made to external firms, to consultants, to representatives for their special efforts, etc.) to attorney fees, and divided this amount by the total award paid by the defendant in the file. The percentage obtained represents the rough cost of instituting the action from beginning until the final outcome. Unfortunately, while settlements show an average of 38% of the total value of settlement being allocated to the costs of the case, this does not mean that the balance of that percentage represents class member distributions. Members will

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132 See OLSON, *supra* note 96.

often receive a minimal portion of the total award, and leftover amounts are impressive, as appears from Table 5 below.

**Table 4: Proportion of Costs Versus Total Award Paid**

Case Outcome	Proportion of Costs Versus Total Award Paid by Defendant (in % – Average)
Judgment	35.67%
Settlement	38.51%
Total	38.14%

What Table 4 serves to demonstrate is that costs of the case are a significant portion of the total amounts paid by defendants, varying between 36% (in judgment outcomes) and 39% (in settlement outcomes) of the total amounts disbursed by these defendants. Interestingly, in our sample of cases, settlement outcomes involved higher costs than judgment outcomes. Moreover, it is interesting to note that these percentages, which consider attorney fees and case administration fees, are much higher than the stated average percentages reserved for attorney fees as provided in Quebec case law, which vary today between 25% and 35% of the total case award. In a recent decision by the Superior Court of Quebec in the matter of *Option Consommateurs v. Amex Bank of Canada*,<sup>133</sup> Justice Claudine Roy refused to approve class action settlements and deemed the class counsel fees unfair and unreasonable. Justice Roy denounced the shift from contingency agreements providing for 15% or 20% to amounts more often reaching the upper limit of accepted fees of 25%, 30% or even 33%, without considering the specific context of each case.<sup>134</sup> In a similar way, our case samples presented a significant number of prohibitively high attorney fee payments. In twelve cases out of forty-five (the number of cases with data regarding attorney fees), fees paid to Quebec counsel varied between \$1,100,000 and \$11,622,587. Fourteen cases saw payments of more than \$500,000 and thirty cases saw payments higher than \$100,000. In several instances, attorney fees represent more than half the amount of member distributions. In other instances, as noted above, fees appear prohibitively important, given the broader context of the case and proportionality considerations. These numbers seem to suggest that in many instances, class members may not be getting the larger part of the settlement and that the case may not be managed optimally to further the best possible outcomes for the members.

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133 *Option Consommateurs v. Banque Amex du Canada*, 2017 QCCS 200 (Que. Sup. Ct.).

134 *Id.*

Another surprising conclusion deriving from the case data analysis is that leftover amounts and cy-près distributions are not only frequent, but important, thereby indicative of the degree of indirect compensation in the cases studied. I was therefore surprised to see an average amount of \$608,391 for this indirect compensation, and more significantly, that amongst the twenty-four cases where indirect compensation was awarded (of the fifty-five cases studied), eleven cases had \$100,000 or more in indirect distributions to external charities or otherwise. This high number is alarming, in my view, considering that the class action's primary purpose is to provide access to justice through compensation of the class members. If thousands of dollars do not see their way directly into the hands of the members, in one fifth of all cases studied, then I would suggest that a broader reform of our laws requiring a closer scrutiny of class settlements and distributions is warranted.

In Table 5 below, I sought to compare the amounts distributed directly to the members to these forms of leftover or indirect distributions. Column 5 provides the average proportion of indirect compensation relative to the total award provided.

**Table 5: Indirect Versus Direct Distributions**

<b>Case Outcome</b>	<b>Average Take-up Rate</b>	<b>Average Total Award Paid by the Defendant</b>	<b>Average Leftover or Cy-près</b>	<b>Average % Leftover or Cy-près / Total Award</b>
Judgment	68.75%	\$3,264,988	\$1,733,341	23.14%
Settlement	52.33%	\$5,867,701	\$340,545	17.61%
Total	54.76%	\$5,503,321	\$608,391	18.67%

Table 5 serves to demonstrate that in our sample of cases, settlements generated much less indirect distributions than judgment outcomes. This conclusion may need to be validated further, considering that take-up rates also appear to be much less favorable in a settlement context than by way of judgment.

On another note, I attempted to identify the impact, if any, of holding an external assessment process by a claims administrator of the merits of the claims presented. The existence of such a process does not seem to impact the members' compensation, considering the high participation rates in the majority of the cases (in most cases, participation rates reaching over 95%). In fact, the administrators' denial of compensation is often due to the duplication of claims or the non-eligibility of a member rather than other factors of nonconformity. One might believe that the lack of adequate proof to support a potential claim would prevent compensation of the members.

Instead, we found only one case in which the unavailability of documentary proof constituted a barrier to the approval of the claim by the administrator. High participation rates confirmed that assessment, especially given that long periods of time often separate the event that gives rise to damages and the time of the compensation, reducing the likelihood that members will still have documentary proof to support their claim.

Another question that arose in the Project was whether it is possible to establish a causal relationship between the length of class action proceedings and take-up rates. While the cases studied generally took between two and five years to be resolved judicially or out of court, we noted that the only two cases that lasted for more than ten years are both characterized by a less than 4% take-up rate. These cases suggest that the passage of time may have a negative impact on compensation. This factor will be the subject of our next report, detailing the results of our analysis of class actions data in year 3 of the Class Action Compensation Project.

Furthermore, our review of the physical files and the correspondence available within them allowed us to realize that the judge's close involvement in the process decisively and positively influences the success of the class action by enhancing distributions. Our team observed several cases that were actively managed by judges; cases where judges ordered searches for additional class members or required the publication of an additional notice to the members. These measures are resorted to in the hope of raising the take-up rates, or as a response to requests for progress reports detailing the distribution process. Active judicial involvement has led to finding additional class members and to considerably improved distributions. For instance, in at least five of the case files studied, we found evidence of dynamic, above average, judicial involvement in the management of the case, leading to enhanced take-up rates varying between 58% and 100%.

That being said, I was surprised to find too few cases in which a final, clear and straightforward accounting report was filed, or where a final judgement was rendered disclosing and approving distributions. In my work, I have urged judges, class counsel and claims administrators to make distributions data systematically, widely and clearly known.<sup>135</sup> Transparency is critical to creating greater incentives to compensate class members better and more generously. Data disclosure appears to be highly dependent upon the incentives of the lawyers and administrators to disclose, which tend to be negative, given the risk that negative outcomes and low take-up rates could lead to bad publicity. In that regard, the recent trend coming from the United States requiring enhanced transparency in the class actions data is a welcome development. The

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135 Piché, *supra* note 6.

Fairness in Class Action Litigation Act of 2017 was introduced on February 9, 2017 by Judiciary Committee Chairman Bob Goodlatte, and would require reporting class action settlement data to the Federal Judicial Center and the Administrative Office of the U.S. Courts.<sup>136</sup> In this regard, Quebec is one step ahead in requiring disclosure of the data and transparent distributions, with its 2016 practice rule, discussed above,<sup>137</sup> since then requiring the mandatory filing of class distributions reports.

## CONCLUSION

The Class Actions Lab Compensation Project and empirical analysis of class action files dated between the years 2004 and 2016 has shown that a majority of class actions within our sample serves to compensate Quebec citizens by way of 50-100% of the class member population. Accordingly, a collective approach to compensation applied to the data analysis has served to support a conclusion that class actions compensate people. If class actions serve to compensate, then access to justice can be said to be provided to citizens of the province. With enhanced access to justice and accomplishment of at least one goal of the action, the goal of compensation, the class action can further be affirmed to be a legitimate, desirable and effective procedural tool.

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136 H.R. Con. Res. 985, 115th Cong. (2017), <http://pdfserver.amlaw.com/ca/Fairness%20in%20Class%20Action%20Litigation%20Act%20of%202017.pdf>.

137 *See supra* note 31.

## APPENDIX

**Table 6: Measuring Class Action Value in Monetary Award Cases from the Canadian Province of Quebec (years 2004-2016)**

Settlement or Judgement	Take-up Rate	Total Award Paid by the Defendant	Administration Fees	Attorney Fees	Leftover/ Cy-près (Indirect Comp.)
J	80%	\$1,580,000	\$71,000	\$501,000	\$582,000
S	139%	\$1,150,000	\$86,000	\$242,000	N/A
S	93%	\$3,250,000	\$750,000	N/A	N/A
S	112%	\$1,028,020	\$12,465	\$257,000	\$70,525
S	45%	\$13,490,000	\$1,098,000	\$3,000,000	N/A
S	84%	\$83,885	N/A	N/A	N/A
S	N/A	\$375,000	\$6,077	\$93,750	N/A
S	67%	\$4,146,670	N/A	\$351,000	N/A
S	35%	\$2,880	N/A	\$320	\$1,800
S	149%	\$29,526,000	\$171,275	\$472,133	\$833
S	68%	\$6,000,000	N/A	N/A	N/A
S	91%	\$74,918	N/A	\$25,000	N/A
S	58%	\$500,000	\$141,386	N/A	\$35,000
S	1%	\$109,620	\$38,924	\$31,721	\$19,108
S	98%	N/A	\$900	\$25,000	N/A
S	4%	\$83,606	N/A	\$80,423	N/A
S	86%	\$10,181,297	\$281,059	\$331,769	N/A
J	76%	\$568,824	N/A	\$394,524	N/A
S	98%	\$55,000,000	N/A	\$11,622,587	\$362,550
S	100%	\$80,650	\$4,468	\$55,128	N/A
J	41,5%	\$4,397,316	\$212,422	\$1,467,775	\$824,531
S	26%	N/A	\$1,400,000	N/A	N/A
S	31%	\$977,000	\$55,078	\$309,018	\$311,210
S	80%	\$27,000,000	\$3,941,155	\$3,289,175	N/A
S	0%	\$550,000	N/A	\$189,709	\$180,146
S	73%	\$280,000	\$2,000	\$205,894	\$19,567
S	54%	\$5,000,000	N/A	\$1,300,000	N/A
J	72%	\$2,416,000	N/A	\$700,603	\$9,377

<b>Settlement or Judgement</b>	<b>Take-up Rate</b>	<b>Total Award Paid by the Defendant</b>	<b>Administration Fees</b>	<b>Attorney Fees</b>	<b>Leftover/ Cy-près (Indirect Comp.)</b>
J	71%	\$359,527	N/A	\$123,711	\$22,679
S	44%	\$4,397,316	\$219,671	\$25,065	\$824,531
S	4%	\$225,000	N/A	\$80,000	N/A
S	26%	\$302,500	\$20,000	\$83,125	N/A
S	16%	\$350,000	N/A	N/A	N/A
S	70%	\$7,803,824	N/A	\$2,500,000	\$1,068,988
S	73%	\$6,100,000	N/A	\$1,100,000	\$3,588,093
S	1%	\$109,620	\$38,924	\$31,721	\$38,219
J	2%	\$6,281	N/A	N/A	N/A
S	9%	\$373,324	\$500	\$350,000	\$25,000
S	16%	\$1,000,000	N/A	\$223,970	N/A
S	1%	\$4,200,000	N/A	\$2,750,000	N/A
S	73%	\$280,000	\$2,000	\$205,894	\$9,784
S	93%	\$3,570,488		\$377,655	\$149,651
S	54%	\$4,960,175	\$185,000	\$1,261,316	\$364,964
S	23%	N/A	N/A	N/A	N/A
S	11%	N/A	N/A	N/A	N/A
J	195.5%	N/A	N/A	N/A	N/A
S	0%	\$272,000	N/A	\$90,000	N/A
S	34%	\$43,452,502	\$1,130,354	\$9,612,323	\$32,371
S	0%	\$8,750,000	\$283,696	\$366,773	N/A
S	73%	\$6,057,171	\$1,000,000	\$1,424,372	N/A
S	98%	\$793,775	N/A	\$427,384	\$16,527
J	12%	\$13,526,967	\$854,993	\$3,555,685	\$7,228,120
S	1%	\$250,000	N/A	\$95,000	\$492
S	75%	\$113,885	N/A	\$30,000	N/A
S	20%	\$60,000	N/A	\$13,671	\$32,089
Average	54,76%	\$5,503,321	\$444,717	\$1,103,849	\$608,391

Total number of case files analyzed: more than 450 class action files.

Total number of relevant files for chart 1 purposes: 55 class action files where a monetary award was paid to class members and a take-up rate can be calculated.