

extended vision of proportionality thereafter requires the court to appreciate the potential outcomes of the class action,¹¹⁵ 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*,¹¹⁶ 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

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.¹¹⁷ 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

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?"¹¹⁸ 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.¹¹⁹ 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

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,¹²⁰ 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,¹²¹ 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.¹²² 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.

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.¹²³

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.”¹²⁴ These rates have historically been complex to collect, principally due to the extreme lack of transparency and substantial variations in rates.¹²⁵ 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

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.¹²⁶ 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.¹²⁷ 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

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

Settlement or judgement	Average take-up rate	Average total amount paid by the defendant	Average administration fees	Average attorney fees	Average leftover/ cy-près (indirect comp.)
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.¹²⁸ Quebec class actions do serve

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.

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%.¹²⁹ 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.¹³⁰ 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

¹²⁹ There is a margin of error and rounding-up of 1% here.

¹³⁰ 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,¹³¹ 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

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.¹³² 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

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*,¹³³ 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.¹³⁴ 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.

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

Case Outcome	Average Take-up Rate	Average Total Award Paid by the Defendant	Average Leftover or Cy-près	Average % Leftover or Cy-près / Total Award
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.¹³⁵ 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

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.¹³⁶ In this regard, Quebec is one step ahead in requiring disclosure of the data and transparent distributions, with its 2016 practice rule, discussed above,¹³⁷ 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.

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

Settlement or Judgement	Take-up Rate	Total Award Paid by the Defendant	Administration Fees	Attorney Fees	Leftover/Cy-près (Indirect Comp.)
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.