

2015 NYU Fall Conference: Litigation Funding

By Dr. Catherine Piché, Prof.

PUBLIC FINANCIERS AS OVERSEERS OF CLASS PROCEEDINGS

INTRODUCTION

Bentham once said that restrictions against litigation funding are a “barbarous precaution” born out of a “barbarous age”.¹ Was he right? Must litigation funding be regulated or restricted? Is it necessary at all costs and in any form – public or private?

In the past few decades, the volume of class action litigation has steadily risen in Canada, such that significant amounts of capital are required to prosecute these actions, provide access to justice, and, coincidentally, reduce the funding gap between plaintiffs and defendants. The funding issue is thus fundamental; it also threatens, however, some of the core values of our system such as client confidentiality and the preservation of solicitor-client privilege, and the duty of counsel to avoid conflicts of interest and to remain independent. Class litigation is typically financed privately by plaintiff firms, but it may also be financed by the members themselves, by provision of an indemnity by plaintiff’s counsel, by assistance from third party financiers, or by any of the two existing public funds. While third party litigation funding [“TPLF”] remains somewhat controversial, its existence is publicly acknowledged and related agreements have been judicially approved in Canada, unlike the United States. There is, nonetheless, a legitimate concern that without regulation, such funding may subvert the public policy purposes of the class action.

This essay focuses on the public forms of financing class litigation in Canada, and argues that publicly financing class actions by way of assistance by entities such as the Quebec *Fonds d’aide aux recours collectifs* (the assistance fund for class action lawsuits; the “*Fonds*”) is the most appropriate and effective way to finance class action litigation,

¹ Jeremy Bentham, *The Works of Jeremy Bentham* (ed. Bowring) (1843) (William Tait, Edinburgh) Volume 3, Part 1.

whenever available. I develop the proposition that the *Fonds* entity is not only effective as a class litigation funding mechanism, but also as a mandatory independent oversight body beneficial to the class action system and the industry as a whole, and that it should be recognized as such and should serve as a model for reform of other legal systems. I argue that for the objectives and public policy purposes of class actions to be fulfilled, successful cases must be used to help finance unsuccessful ones, and assistance must be provided to legitimate and promising cases from entities with proper motivations: that is, to provide a way to fund this kind of litigation, to provide true access to justice. Because the *Fonds*' right to compensation applies to all class actions in Quebec, every class action case initiated in the province – whether it is funded or not – helps finance the next one. Furthermore, the *Fonds*' motive to neutrally assist class plaintiffs helps provide access to worthwhile cases.

I. CONTEXTUALIZING THE ARGUMENT: THE CONVERSION CHARGES CLASS ACTION

In 2014, the financial industry saw the end of three gargantuan class proceedings involving nine Quebec financial institutions being sued for their illegal billing practices of charging foreign exchange conversion fees.² The Supreme Court of Canada ended the proceedings by ruling that Quebec's consumer protection legislation was applicable to federally regulated banks such that it provided the basis for consumer class actions in Quebec against those banks. The banks were ordered to reimburse consumer cardholders for conversion charges during the non-disclosing periods and were ordered to pay punitive damages – \$25.00 per class member – for failing to disclose the conversion charges. Overall, millions of class members were involved, and nine financial institutions. Five years passed from the filing of the motion to institute a class action until the case was ready to be heard. The trial lasted 34 days, constitutional arguments were made, hundreds of exhibits filed, and collective recovery eventually ordered for more than \$184M, in addition to punitive damages and interest, for a total condemnation of

² *Banque de Montréal v. Marcotte*, 2014 SCC 55, *Banque Amex du Canada c. Adams*, 2014 SCC 56 and *Marcotte v. Fédération des Caisses Desjardins du Québec*, 2014 SCC 57. Precisely, these fees should have been included in the credit rates and should not have been disclosed in variable credit conventions.

roughly \$300M.³ The final value of recovery was revised after the appeal at the Court of Appeal and the Supreme Court of Canada at some \$56M.⁴

Financing the class action in this instance was complex. Class counsel initially sought to finance the litigation themselves, but after having liquidated almost all their individual-retirement accounts, faced the fact that the value of the equity on their property assets was insufficient to finance their own firm, and with all their personal assets already on guarantee, they resorted to loans from a third party litigation firm. Counsel contracted with Therium (UK) Holdings Limited and Lexfund to fund the litigation and agreed that the financing fees would be assumed by class members. Counsel moved to have the agreement approved by the Superior Court of Quebec. The Court highlighted the twelve years that had gone by since the institution of proceedings, the 13,650 hours spent by lawyers working on the case, the lengthy trial hearing, the hundreds of exhibits filed, the various motions argued by the parties, and the appeals.⁵ The agreement was approved. Noting that counsel incurred financing fees of \$7,335,862, representing roughly 13.18% of the eventual total recovery,⁶ the Court ordered that the plaintiff's firm be paid 25% of the total recovery in fees and that it be reimbursed the financing fees of \$7,335,862 in proportion to each institution's final percentage of the collective recovery.⁷

This decision in *Marcotte* highlights the challenges faced by plaintiff firms in financing class litigation and contextualizes the issue of class financing. Many of the larger, more significant class proceedings in Canada and Quebec could not see the light of day without external financing. The decision also sheds light on the process followed in seeking assistance and negotiating financing agreements, thereby relaxing the historic restrictions and concerns related to the torts of champerty and maintenance.⁸ It confirms the need for courts to oversee the whole financing process by approving the agreements entered into with financiers. Finally, it highlights the importance of the *Fonds*, which helped to

³ *Marcotte v. Banque de Montréal et al.*, EYB 2015-251696, 2015 QCCS 1915 (Que. Sup. Ct.), par. 22.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*, par. 42, 47, 48.

⁷ *Ibid.*, par. 50ff.

⁸ See below, footnotes 18ff.

finance an important class action that would eventually make law, even if minimally⁹. Thus, one idea further developed below is that leadership in assistance means financing cases that will ultimately serve to develop the law.

II. RISK ASSUMPTIONS AND THE ACTUAL STATE OF CLASS ACTION FINANCING IN QUEBEC AND CANADA

The context of class litigation is complex: the cost of litigation is prohibitive, the delays too long, the system not only unequal and asymmetric, but inefficient as a whole. Significant economic barriers confront a group that has allegedly been harmed by a wrongdoer and seeks relief. There is, of course, the high cost of obtaining legal services to litigate the claim – collectively or individually. Part of this cost is the adverse costs award payable to the defendant. In fact, the representative plaintiff's exposure to adverse costs is a significant barrier to access to justice. Representative plaintiffs are responsible for costs in Quebec and Ontario,¹⁰ if the class action is unsuccessful, but class members are not.¹¹ While this exposure may be significant in Ontario, costs payable in Quebec remain more moderate - even nominal.¹² Certification costs awards are capped in Quebec. In Ontario and the rest of Canada, a trend of more predictable, and potentially lower, costs orders is emerging in class proceedings. According to the Ontario Superior Court of Justice, which released five decisions addressing legal principles relating to awards of costs on class action certification motions, “[a]ccess to justice, even in the very area that was specifically designed to achieve this goal, is becoming too expensive.”¹³

⁹ In total in the *Marcotte* Case, the *Fonds* paid \$172,837 in lawyer fees and another \$112,064 in various expenses.

¹⁰ S. 31 of the *Ontario Class Proceedings Act, 1992*.

¹¹ Except if this members intervenes formally in the action, See *Nadon c. Ville de Montréal*, 2010 QCCS 5734 (Que. Sup. Ct.).

¹² See e.g., *A.P.A. v. Canadian Honda Motors Ltd.*, [1980] R.P. 331, where the court limited the amount of costs payable to 253\$ (instead of 675 650\$), stating that the estimated value of the litigation is undeterminable pursuant to the costs tariff regulation. Also see *Fonds d'aide aux recours collectifs v. Nolisair Int'l inc.*, C.A., 500-09-001462-910 (March 27, 1996) (Que. C.A.); *Desmeules c. Hydro-Quebec*, C.S., 500-06-000011-854, (Jan. 13, 1992) (Que. Sup. Ct.); *Morin v. Planchers Beauceville inc.*, C.S., 350-06—000001-913, (June 1, 1992) (Que. Sup. Ct.); *Berdah v. Nationair Canada et al.*, C.S. 500-06-000009-882 (Aug. 23, 1991) (Que. Sup. Ct.).

¹³ *Rosen v BMO Nesbitt Burns Inc*, 2013 ONSC 6356 at para 1 (Ont. S.C.J.). Also see *Crisante v DePuy Orthopaedics*, 2013 ONSC 6351 (Ont. S.C.J.); *Dugal v Manulife Financial*, 2013 ONSC 6354 (Ont. S.C.J.); *Brown v Canada (Attorney General)*, 2013 ONSC 6887 (Ont. S.C.J.); *Sankar v Bell Mobility Inc*, 2013 ONSC 6886 (Ont. S.C.J.). In these decisions, Belobaba recommended

The only three possible responses to this economic barrier to initiating class proceedings are (i) third party private funding initiatives, (ii) public fund assistance,¹⁴ and (iii) indemnification of the representative for his or her “services”.¹⁵

Around the world, there has been a palpable increase in private TPLF, also defined as the practice of providing money to a party to fund the pursuit of a potential or pending lawsuit in exchange for a portion of the proceeds. Lord Jackson outlined the advantages of TPLF in his Review of Civil Litigation Costs – Final Report – 2010¹⁶, a report commissioned by the U.K. Parliament. The access to justice component was highlighted, as well as the advantage of reducing the pressure of litigation and of assuring a certain degree of litigation expertise by sophisticated investor companies.¹⁷ In the United States,¹⁸ as in Canada,¹⁹ many authors have strongly and soundly criticised TPLF of class

changes to the prevailing approach to cost awards on certification motions in Ontario. If adopted, these changes will turn Ontario into a 'no-costs regime'. Another justice, Justice Perell, has added to the discussion in a later case, stating that “The assessment of costs (and of lawyer's fees) must adapt to a changing and evolving class action regime and every case requires individual treatment.” See *The Trustees of the Drywall Acoustic Lathing v SNC Group Inc*, 2013 ONSC 7122, para. 18.

¹⁴ In Quebec, the class action proponent representative may apply for assistance as provided under the *Act Respecting the Class Action*. We will study the procedure below; see *infra* footnote 81ff. By way of comparison, in Ontario, the representative plaintiff may apply to the Law Foundation to ask that it be responsible for the disbursements of an action. If the funding decision is favorable, the Law Foundation becomes liable for the defendant's costs in the proceeding (granted the defendant is entitled to costs and applies to the Foundation for payment of these costs). However, a defendant who is entitled to make an application may not recover any part of the costs award from the plaintiff: *Law Society Act*, s. 59.4(3); *Garland v. Consumers Gas*, [2004] 1 S.C.R. 629 (S.C.C.).

¹⁵ *Fehr v. Sun Life Assurance Co. of Canada*, [2012] O.J. No. 2029 (Ont. S.C.J.) [*Fehr*], par. 53.

¹⁶ Honorable Lord R. Jackson, *Review of Civil Litigation Costs: Final Report*, Norwich (U.K.), TSO Publisher, 2010, p. 117-125 et 463-464.

¹⁷ *Ibid.*

¹⁸ Deborah R. Hensler, “Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?”, (2014) 63 De Paul L. Rev. 1101 [“Third-Party Financing”]; Deborah R. Hensler, ‘The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding’ (2011) 79 George Washington Law Review 306 [“Future of Mass Litigation”]; Deborah R. Hensler, “Financing Civil Litigation: The US Perspective” in M Tuil and L Visscher (eds), *New Trends in Financing Civil Litigation in Europe: A Legal Empirical and Economic Analysis* (Cheltenham, Edward Elgar, 2010) 155; John Beisner et al., *Selling Lawsuits, Buying Trouble: TPLF in the United States*, U.S. Chamber Institute for Legal Reform (Oct. 2009). Also see D. Collins, “Public Funding of Class Actions and the Experience with English Group Proceedings”, (2005) 31 Manitoba Law Journal 211MJ Legg, “Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions. The Need for a Legislative Common Fund Approach”, (2011) 30 Civil Justice Quarterly 52; State & Policy Affairs Dep’t,

actions. They have noted the risks of increased frivolous or abusive litigation, the involvement of lenders in litigation who have diverging interests, objectives and incentives, and even more importantly, the significant ethical risks that could arise such as conflicts of interest, loss of confidentiality, the financial and economical interest of the funders, etc.²⁰ Generally, a need for regulation, rather than outright prohibition, has been emphasised.²¹

The primary concern over this kind of funding has historically been the crime or civil wrong of the third party officiously intermeddling with somebody else's litigation, known as the common law torts of "champerty and maintenance". These torts have been defined as follows:

Maintenance may be defined as the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation nor any other motive recognized by the law as justifying his interference. Champerty is a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action.²²

In Ontario, while the law of champerty and maintenance still applies under *An Act Respecting Champerty*, R.S.O. 1897, c. 327, s. 1, the law has evolved such as to permit and make possible TPLF agreements as well as contingency fee agreements, the whole in

Third-Party Litigation Funding: Tipping the Scales of Justice for Profit, National Assoc. Mutual Ins. Companies (May 2011), http://www.namic.org/pdf/publicpolicy/1106_thirdPartyLitigation.pdf.

¹⁹ See e.g., Catherine Piché, "Le financement public et privé de l'action collective québécoise" (2014) 3 *Concurrences* 16 [Piché, "Financement"]; Jasminka Kalajdzic, Peter Kenneth Cashman, and Longmoore, Alana M., "Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding" (2013) 61:2 *American Journal of Comparative Law* 93.

²⁰ See e.g., Hensler, "Future of Mass Litigation", *supra* note 18; Kalajdzic, *ibid*, Hensler, "Third-Party Financing", *supra* note 18.

²¹ As remarked by Hensler, "No group has been as strident or as active in opposition to third-party litigation financing as the U.S. Chamber of Commerce's Institute for Legal Reform, and no area of legal practice has been more clearly targeted for prohibition of such financing than class action litigation." See Hensler, "Third-Party Financing", *supra* note 18, at 500.

²² *Buday v. Locator of Missing Heirs Inc.*, (1993), 16 O.R. (3d) 257 at pp. 262-63 (Ont. C.A.), quoting Halsbury (9 Hals, 4th ed. (1974), para. 400, p. 272). Also see Sarah Northway, "Non-Traditional Class Action Financing and Traditional Rules of Ethics: Time for a Compromise" (2000) 14 *Geo. J. Legal Ethics* 241, 243.

view of providing the greatest access to justice possible.²³ In Quebec, the *pactum in quota litis* was historically prohibited for lawyers and the prohibition is still codified in Article 1783 of the *Quebec Civil Code*, but is largely ignored in practice.²⁴ Meanwhile, the litigious redemption provision in Article 1748 of the *Civil Code* is useful in deterring third party financiers.²⁵

Motive is a crucial element in determining whether assistance to litigation by a third party constitutes maintenance or champerty.²⁶ Canadian courts have found financial assistance to be acceptable and not to constitute maintenance or champerty when the financier's motive is proper, such as compassion, charity, legitimate common interest, or where a pre-existing commercial interest exists in litigation.²⁷ In fact, these common law rules seek to prevent unnecessary litigation, intermeddling in the conduct of the litigation, and the overcompensation of the funder.²⁸ Public financiers such as the *Fonds* cannot be accused of providing champertous assistance when they assist with a proper motive, in exchange for a very reasonable "compensation" – that is not a compensation *per se* as it is a means of subrogation. This "compensation" does not serve to compensate; rather, it serves only to self-finance the entity, as opposed to making profit (which I further discuss below), with minimal intervention and intermeddling. Our view is that the *Fonds* has a socially-focused access to justice objective and a mandate that gives it a proper motive to assist litigants. Further, it is fully justified by its public status as a Government-funded entity to provide the assistance required.

Currently in Quebec, various forms of class litigation financing exist. Financing can be provided by class representatives or by class members, especially in instances where the

²³ *Fehr*, *supra* note 15, par. 73.

²⁴ Piché, "Financement", *supra* note 19, p. 17, 18; H. Patrick Glenn, "The Irrelevance of Costs Rules to Litigation Rates: The Experience of Quebec and Common Law Canada", in Mathias Reimann, *Cost and Fee Allocation in Civil Procedure: A Comparative Study*, p. 104. Also see H. Patrick Glenn, "L'écho double du champart: y a-t-il des traces en droit civil Québécois?", in *Mélanges Jean Pineau*, Dir. Benoît Moore, Montréal, Thémis, 2003, p. 713-14.

²⁵ *Ibid*, p. 105.

²⁶ *McIntyre Estate v. Ontario (Attorney General)*, (2002), 61 O.R. (3d) 257 (Ont. C.A.), p. 268.

²⁷ Poonam Puri, "Financing of Litigation by Third Party Investors: A Share of Justice?" (1998) 36 *Osgoode Hall LJ* 515, pp. 529-530; Piché, "Financing", *supra* note 19, p. 17.

²⁸ Kaladjic, *supra* note 19, p. 119.

class is smaller and cohesive, and class members may be easily identified.²⁹ Financing may also be provided – and most often is – by class counsel on a collective basis, or individually, where counsel delivers an indemnity to its representative client to pay an eventual adverse cost award.³⁰ As for TPLF, it exists in Quebec and the rest of Canada, as elsewhere around the common law world. A number of public and private corporations now specialise in such funding and assistance, such as LexFund, Therium (UK) Holdings Limited, IMF Australia Ltd., etc. Recent decisions in common law Canada have approved TPLF agreements that are disclosed to the court,³¹ but many Canadian courts have yet to stake out a position. These decisions have sought to impose important judicial safeguards designed to protect class members and shine light on the TPLF process. Justice Perell of the Ontario Superior Court of Justice approved one such agreement, and highlighted the need for transparency and regulation.³² The Quebec Superior Court, by way of comparison, has chosen to tacitly approve the TPLF fee reimbursement without qualifying or discussing the nature of the financing agreement.

If private funding assistance is tacitly (or secretly) yet cautiously accepted, public assistance appears to be a more favourable initiative, and as such, Canada's *Québécoise* province is a pioneer in establishing a public assistance fund for this very purpose.

III. QUEBEC AS THE CLASS ACTIONS PIONEER IN CANADA

Quebec's class actions provisions in the newly-reformed and soon to be enforced *Code of Civil Procedure* ("C.C.P."),³³ similar to other legislation adopted throughout Canada³⁴

²⁹ See, e.g., *Nantais v. Teletronics Proprietary (Canada) Ltd.*, 1996 7984 (Ont. S.C.J.), where the representative loaned money to the class counsel on a contingency basis.

³⁰ See, e.g., *Poulin v. Ford Motor Company*, 2007 O.J. No. 4988 (Ont. S.C.J.).

³¹ See e.g., Marcotte, *supra* note 2; *Stanway v. Wyeth Canada Inc.*, 2014 BCSC 931 (B.C.S.C.); *Dugal v. Manulife Financial Corporation*, O.J. No. 1239 (Ont. S.C.J.) [2011], para. 33.

³² Fehr, *supra* note 15, par. 87 ("Third party funding of a class proceeding must be transparent and it must be reviewed in order to ensure that there are no abuses or interference with the administration of justice. The propriety of third party funding agreements is controversial and problematic, and, in my opinion, at a minimum, they should not be allowed to operate clandestinely...There is a legitimate concern that if not regulated, third party funding might subvert the public policy purposes of class proceedings.")

³³ *Quebec Code of Civil Procedure*, R.S.Q., c. C-25, Book IX, 2014, RLRQ, c. C-25.01.

³⁴ See notably *Ontario Class Proceedings Act*, 1992, s. 2(1) and *British Columbia Class Proceedings Act*, R.S.B.C. 1996, c. 50.

and U.S. Rule 23 of the *Federal Rules of Civil Procedure*,³⁵ enable a person who is a member of a class of persons to sue, without a mandate, on behalf of all the members of the class and to represent the class.³⁶ Quebec, a civilian jurisdiction, was the first province to introduce class action legislation in 1978.³⁷ Quebec class action law was enacted “with policy objectives of promoting and favouring access to justice, and more efficiently enforcing social and remedial legislation”, as a “measure intended to advance a public interest agenda, along with labour reform and consumer protection statutes”.³⁸ While the Quebec rule originally sought to replicate Federal Rule 23, it still provided novel provisions addressing interlocutory rights of appeal, the forms of collective recovery, the conduct of the lawsuit, as well as detailing the procedural specificity of a preliminary screening of the case’s merits, at the so-called “authorization” stage.³⁹ Importantly, preoccupied by the accessibility of the class action as a procedural tool for litigants regardless of their resources,⁴⁰ the Quebec legislator established a governmental agency for the distribution of public funds to potential class action representatives: the *Fonds*.⁴¹

³⁵ U.S. Rule 23 F.R.C.P.

³⁶ Statutory authority for class action proceedings in Quebec is codified in the Quebec *C.C.P.*, Book IX (class actions) ss. 999 – 1030, and in R.S.Q. Chapter R-2.1 and in the reformed Code in ss. 574 to 604 C.C.P. See particularly, s. 571.

³⁷ *Loi sur le recours collectif/An Act Respecting the Class Action*, LQ 1978, c. 8 [“ARCA”], enacting ss. 999-1052, *Code of Civil Procedure*. For a further discussion of the history of the Canadian class action, see: Shaun Finn, *Class Actions in Quebec: Notes for Non-Residents* (Montreal: Carswell, 2014); Andrew Borrel, “The Evolving Evidentiary Standard for Certification in Canada”, 26:6 *Class Action Rep.* 3 (2005); Garry D. Watson, “Class Actions: The Canadian Experience”, 11 *Duke Comp. & Int’l L. J.* 269 (2001); W.A. Bogart, “Questioning Litigation’s Role— Courts and Class Actions in Canada”, 62 *Ind. L. J.* 665 (1986-87); Williams, “Consumer Class Actions in Canada—Some Proposals for Reform”, 13 *Osgoode Hall L. J.* 1 (1975); John A. Kazanjian, “Class Actions in Canada”, 11 *Osgoode Hall L. J.* 397 (1973). Also see generally on the Canadian class action settlement law, Catherine Piché, *Fairness in Class Action Settlements* (Toronto: Carswell, 2012).

³⁸ Catherine Piché, “The Cultural Analysis of Class Action Law” (2009) 2 *Journal of Civil Law Studies* 101, p. 118. Also see Pierre-Claude Lafond, « Le recours collectif : entre la commodité procédurale et la justice sociale », (1998-99) 29 *R.D.U.S.* 3, at 24 (explaining how the procedure was adopted at a time of great social change).

³⁹ See e.g., Piché, “Cultural Analysis”, *ibid.*, p. 117.

⁴⁰ Yves Lauzon, “Le recours collectif Québécois: Description et bilan”, (1984) 9 *Can. Bus. L.J.* 324, p. 335.

⁴¹ This *Fonds* will become the « *Fonds d’aide aux actions collectives* » with the revised and reformed New *Code of Civil Procedure*, to be adopted in Winter 2016. On February 20, 2014, the

In the rest of Canada, class action reform followed in 1982, with the publication of the Ontario Law Reform Commission Report on Class Actions.⁴² The impetus for modern class action legislation in Canada effectively arose out of the recognition by the Supreme Court of Canada in *Naken*⁴³ that the previous rules of court for representative proceedings were inadequate, and that a “comprehensive legislative scheme for the institution and conduct of class actions” was needed. All of the Canadian provinces except one (Prince Edward Island) gradually enacted class proceedings statutes. The legislative schemes adopted across Canada drew on U.S. rules and class action experience, but with a more liberal approach to certification. In 2001, a trilogy of class action Supreme Court of Canada cases officially recognized the critical importance of class actions in Canada.⁴⁴

In Canada, class actions are provincial and thus very few cases are ever initiated and heard at the Federal Court. In Quebec, in order to commence such an action, the person who seeks to represent the class and institute the class action must present a demand for an order authorizing the action as a class action and recognizing him or her as the representative of the class.⁴⁵ Article 575 C.C.P. sets out four criteria by which a judge is to assess whether the class should be authorized.⁴⁶ Pursuant to Article 576 C.C.P., the judgment authorizing a class action describes the class whose members will be bound by the class action judgment, appoints the representative plaintiff and identifies the main issues to be dealt with collectively and the conclusions sought in relation to those issues, describes any subclasses that have been created and determines the district in which the

Quebec National Assembly passed Bill 28, *An Act to establish the new Code of Civil Procedure*. The New Code is intended to make the civil justice system more accessible, while protecting the rights of all parties to state their claims before a court. See Piché, “Financing”, *supra* note 19.

⁴² 1-3 Ontario Law Reform Commission, *Report on Class Actions* (Ministry of the Attorney General 1982).

⁴³ *Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72 (S.C.C.).

⁴⁴ *Western Canadian Shopping Centres v Dutton*, [2001] 2 SCR 534 [*Western Canadian*]; *Hollick v Toronto (City)*, [2001] 3 SCR 158 [*Hollick*]; *Rumley v B.C.*, [2001] 3 SCR 184.

⁴⁵ Article 574 C.p.c.

⁴⁶ The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that 1° the claims of the members of the class raise identical, similar or related issues of law or fact; 2° the facts alleged appear to justify the conclusions sought; 3° the composition of the class makes it difficult or impracticable to apply the rules for mandates to sue on behalf of others or for consolidation of proceedings; and 4° the class member appointed as representative plaintiff is in a position to properly represent the class members.

class action is to be instituted, orders the publication of a notice to class members, and determines the opt-out period. No Multi-District Litigation or other co-ordinating procedure currently exists in Quebec or Canada for class actions brought in multiple jurisdictions, although the judiciary is prepared informally to co-ordinate to achieve judicial economy.⁴⁷

Some key distinctions remain, however, between the Canadian and American class action regimes. In Canadian class action regimes, there is no requirement of predominance or numerosity; instead, the courts weigh common issues in relation to individual issues as part of the preferability analysis, but have explicitly rejected a requirement that common issues predominate over individual issues. Proportionality considerations are nonetheless relevant at certification.⁴⁸ In addition, Canadian courts (excluding those of Quebec) consider the preferability of a class action for certification — in particular, whether the proposed action will promote access to justice, judicial economy and behaviour modification. Finally, in the years 2013-2014, the Supreme Court of Canada has issued five decisions on class action procedure including two related to Quebec’s specific rules. The court revisited the standard for authorization, stating that a class action should be authorized in Quebec if plaintiffs demonstrate an “arguable case in light of the facts and the law asserted in the motion.”⁴⁹ It also noted that the “common issues” requirement in Quebec was lower than in the common law provinces (allowing authorization where merely “similar or related questions” exist).⁵⁰ Indeed, a single common question is enough to justify a class action if it provides a “not insignificant” benefit to all of the

⁴⁷ There are nonetheless three Canadian protocols that address multi-jurisdictional class proceedings in Canada: the Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions (<http://www.cba.org/CBA/resolutions/pdf/11-03-A-Annex01.pdf>), the Notice Protocol: Coordinating Notice(s) to the Class(es) in Multijurisdictional Class Proceedings (<http://www.cba.org/CBA/resolutions/pdf/11-03-A-Annex03.pdf>), and the Protocol on Court-to-Court Communications in Canada – U.S. Cross-Border Class Actions (<http://www.cba.org/CBA/resolutions/pdf/11-03-A-Annex02.pdf>). These protocols do not have the scope or latitude of the U.S. MDL.

⁴⁸ *Dell’Aniello v. Vivendi Canada Inc.*, 2010 QCCS 3416, paras. 67-68.

⁴⁹ *Infineon Technologies AG v. Option consommateurs*, [2013] S.C.J. No. 59, [2013] 3 S.C.R. 600 (S.C.C.). Also see Brandon Kain, “Developments in Class Actions Law: The 2013-2014 Term — The Supreme Court of Canada and the Still-Curious Requirement of “Some Basis in Fact”, (2015) 68 S.C.L.R. (2d) 77.

⁵⁰ *Ibid.*

class members. The reality, however, is that only TPLF can help fund the prohibitive cost of experts and hundreds of hours of work necessary to bring a case to authorization. Public funding remains, to this date, insufficient, even in Quebec. I will further discuss the Fonds' assistance below.

Importantly, the Supreme Court of Canada has outlined the three important advantages class proceedings have over a multiplicity of individual suits:⁵¹ First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential “wrongdoers” modify their behaviour to take full account of the harm they are causing, or might cause, to the public.⁵² Are these objectives being met? It is difficult to confirm one way or another, due to the dearth of empirical work in this area in Canada.⁵³

⁵¹ *Western Canadian*, *supra* note 44, at paras 27-29

⁵² *Western Canadian*, *ibid.* Also see *Fehr*, *supra* note 15, para. 40: “To be more expansive about the public policy goals, class actions are designed to provide access to justice because they provide a procedural means for individuals to litigate claims on behalf of a group. They provide judicial economy because by allowing an individual to represent the group’s claim through the mechanism of a class action, a multiplicity of proceedings is avoided as is the embarrassment of possible inconsistent results in multiple proceedings about the same alleged wrongdoing. Class actions provide behaviour modification because defendants learn not to think they can commit wrongs harming many and get away with it simply because no individual claimant could afford to pursue justice for himself or herself, let alone for a group of similar claimants. Class actions also have a deterrent effect and their mere possibility discourages wrongdoing.” Most Canadian provinces have enacted legislation enabling class actions. In provinces that do not have class action legislation, the Supreme Court of Canada has extended the right to bring class actions notwithstanding the absence of legislation, effectively creating a “common law” class action. See *Western Canadian*, *ibid.*

⁵³ I have attempted to provide empirical data in the area of class actions with my doctoral work on class action settlements: see Piché, *Fairness*, *supra* note 37, and since May 2015, in the Class Actions Lab at the University of Montreal: www.classactionslab.ca. At the Lab, we are currently working on a project on the compensatory objective of class actions and take-up rates.

The Quebec class action has evolved into an innovative procedure that allows class members to be indemnified for a wide variety of harms.⁵⁴ The specificity and uniqueness of this procedural tool is, in part, the possibility of assistance in financing the litigation through a public entity called the *Fonds*.

IV. FUNDING ONE THIRD OF ALL QUEBEC CLASS ACTION CASES:⁵⁵ WHO IS THE *FONDS D'AIDE AUX RECOURS COLLECTIFS*?

1. The *Fonds* as a Major Actor of the Quebec Class Action Bar

At present, class actions in Quebec and Canada are principally financed through private, class counsel initiatives. Only two of the Canadian provinces, Ontario and Quebec, have meaningfully addressed the issue and true challenge of litigation funding in Canada, with Quebec having the more ambitious and successful approach.⁵⁶ The existence of the *Fonds*, a legal person established in the public interest,⁵⁷ proves that Quebec has the longest history of class action assistance and funding in Canada. In fact, no other Canadian provincial class action regime can provide funding for class litigation to the extent that Quebec does.

The *Fonds* falls under the Quebec Ministry of Justice and is composed of three administrators named by the Government.⁵⁸ Its board of administrators sits officially two days per month to hear requests for funding. A secretary is named who will manage the daily activities of the *Fonds*. The Auditor General of Canada annually audits the *Fonds*' books and accounts.⁵⁹ The object and mandate of the *Fonds* is to ensure the financing of

⁵⁴ Piché, "Cultural Analysis", *supra* note 38; Shaun Finn, "In a Class all its Own: The Advent of the Modern Class Action and its Changing Legal and Social Mission", 2(2) *Can. Class Action Rev.* 333 (2005).

⁵⁵ In its report of 2013-14, the *Fonds* acknowledged that it had financed 35% of all 453 active class action cases. See Report of the Quebec *Fonds*, at <http://www.farc.justice.gouv.qc.ca/doc/RapportAnnuel2013-2014.pdf>.

⁵⁶ Ziegel, p. 889. For a discussion of the problems with the Ontario Fund, see: Watson, Garry D., "Fee shifting in Ontario Class Actions and the Failure of Ontario's Class Proceedings Fund to Meet its Intended Purpose", and for a detailed review of the Quebec *Fonds*' operations, see Desmeules, Claude, "Public Funding of Class Actions in Quebec", both articles in *First Annual Class Actions Symposium, Class Actions: Where Are We and Where Are We Going?* (Toronto: Osgoode Hall Law School of York University, 2001).

⁵⁷ Art. 6 ARCA.

⁵⁸ Art. 8 ARCA.

⁵⁹ Art. 19 ARCA.

class actions in first instance or on appeal and to disseminate information respecting the exercise of such actions.⁶⁰

Significantly, the Quebec system managed by the *Fonds* has made 776 decisions on applications for funding over the past ten years, and has granted funding in more than one third of these cases.⁶¹ These decisions are kept confidential to the public. In the year 2013-2014, of all 453 active cases in Quebec, 157 were financed by the *Fonds*. The next year, in 2014-2015, out of 480 active cases, the *Fonds* financed 141.⁶² As I will discuss in further detail below, the *Fonds* can assist with both legal fees and disbursements, without charging interest fees. It is well capitalized with yearly provincial subsidies and warranties from the provincial government which guarantee payment of capital and interest of any loan or other financial commitment made. Importantly, it also retains a percentage of any recovery made in every class action, a right that applies to all actions, not only those in which funding was afforded. Given this feature, as well as the potential ongoing legal fee support that can help to supplement class counsel's cash flow, there is a strong incentive for Quebec class plaintiffs to apply for funding.

2. The Fonds as a Self-Sustainable Assistance Provider

Since its creation, the *Fonds* has been almost entirely self-sustainable, essentially through resorting to four different sources of revenue: Government subsidies, subrogation revenues, a percentage of recoveries pursuant to the *Regulation respecting applications for assistance for a class action*, and interests on investments. Annual Government subsidies have been an important source of revenue, contributing to both the functioning and the financing activities of the *Fonds*. For instance, in 2011, for a total subsidy of \$716,900, \$418,700 was reserved for the functioning of the *Fonds* and \$298,200 for financial assistance to litigants.⁶³ Unfortunately, over the course of the years 2005 until 2013, total Government subsidies have fallen drastically from \$724,800 to \$419,400.⁶⁴

⁶⁰ Art. 7 ARCA.

⁶¹ See, generally, the Fonds' website: <http://www.farc.justice.gouv.qc.ca/>.

⁶² Statistics on file with author.

⁶³ See 2010-11 Report of the *Fonds* at <http://www.farc.justice.gouv.qc.ca/doc/RapportAnnuel2010-2011.pdf>.

⁶⁴ See reports of the Fonds for years 2005 until 2014 at <http://www.farc.justice.gouv.qc.ca/>.

This drastic fall in Government contributions is due to the fact that the portion of the subsidy reserved for financial assistance to litigants was cancelled in 2012. This decision was probably made following a steady increase in recent years in the amounts withheld by the *Fonds* in collective recovery claims and on liquidated claims. Indeed, these amounts, which serve to provide the financial assistance to litigation, rose from a meagre \$49,922 in 2015 to an all-time high of \$7,575,194 in 2012 and \$1,872,167 in 2014.⁶⁵

The second source of self-financing is the subrogation of the *Fonds* in the rights of the recipient or his attorney up to the amounts paid to them.⁶⁶ Indeed, the recipient is obligated to reimburse to the *Fonds* the amounts paid by it up to the amounts it receives from a third party as fees, costs or expenses.⁶⁷ This reimbursement only occurs when the action is successful; otherwise, the financing is not reimbursed and the financing risk is assumed entirely by the *Fonds*.

The third source of financing is the percentage of recoveries made pursuant to Section 42 of the *Class Proceedings Act* and the *Regulation respecting applications for assistance for a class action*.⁶⁸ By this mechanism, the *Fonds* may seek and obtain a percentage of the balance from collective recovery or of individual recoveries.⁶⁹ Section 42 provides that “[I]n the case of a collective recovery of the claims, the *Fonds* shall withhold a percentage fixed by regulation of the Government on the balance established [...]; in other cases, the *Fonds* shall withhold a percentage fixed by regulation of the Government on every liquidated claim.” These percentages are provided for in the *Regulation respecting the percentage withheld by the Fonds d'aide aux recours collectifs*.⁷⁰

Article 1(1) of the Percentage Regulation provides the calculation of the percentage withheld by the *Fonds* from the balance or from a liquidated claim. For example, there will be “collective” recovery when the judgment fixes a total amount payable to the class

⁶⁵ See annual reports for these years at: <http://www.farc.justice.gouv.qc.ca/>.

⁶⁶ Arts. 25 and 30 ARCA.

⁶⁷ Art. 30 ARCA.

⁶⁸ *Regulation respecting applications for assistance for a class action*, c. R-2.1, r. 1, adopted pursuant to ARCA.

⁶⁹ According to Art. 38a) of ARCA, the Government may, by regulation, “fix, for the application of section 42, the percentage withheld by the *Fonds* from the balance or from a liquidated claim”.

⁷⁰ Chapter R-2.1, r. 2, adopted pursuant to ARCA [Percentage Regulation].

members as a whole. The members will each have to present a claim to be indemnified from this collective amount. After distribution to the members, some amounts will remain unclaimed. The Regulation indicates how and in what percentage the *Fonds* can claim a portion of the undistributed balance. Article 1(2) of the Percentage Regulation also applies to collective recoveries, but only when the court considers that the individual liquidation of the class members' claims or the distribution of an amount to each class member is impracticable, inappropriate or too costly, and seeks to determine the balance remaining after the collocation of the costs, fee and disbursements, thereby ordering that the amount be remitted to a third person it designates.⁷¹ Article 1(3) of the Regulation provides for a percentage to be withheld on each "individual" recovery (i.e., the type of recovery that is ordered when it is not possible for the court to determine the total value of a valid claim), the whole pursuant to Article 599 C.p.c. Accordingly, the following percentages may be claimed, for each of the three categories:

1. 50-90% of the balance remaining after claims by class members from any aggregate award;
2. 30-70% of the total award less costs and attorney's fees if the court decides not to allow individual claims;
3. 2-10% of each individual award (if no aggregate award is made).⁷²

These percentages demonstrate that the most advantageous form of recovery for the *Fonds* in terms of claiming higher percentages of final recovery is collective recovery pursuant to paragraph 1.

With respect to the assistance it provides, the *Fonds* spends the sums given by the Government as subsidies and those which have been withheld in accordance with the percentage fixed by regulation of the Government.⁷³ Accordingly, its mission and incentive in providing assistance to litigants is not to make money as with other third

⁷¹ Art. 597 C.p.c.

⁷² Art. 1 of the *Percentage Regulation*.

⁷³ Art. 43 ARCA. It may also make, annually, financial commitments other than a loan for an amount up to the amount determined by the Minister of Justice at the time of approval of the budget of the *Fonds*. *Ibid*.

party private financiers. Rather, its objective is to promote recovery and provide access to justice.

By way of comparison, the Ontario government established a class proceedings fund right after its class proceedings legislation came into effect in 1992 and contributed the sum of \$5M to establish the fund.⁷⁴ While counsel fees are not covered, Ontario funding covers approved disbursements and adverse cost awards,⁷⁵ and is provided based on several factors including the strength of the claim and the public interest involved. When the Fund finances the action and it is unsuccessful, the defendant is entitled to apply to the Fund for recovery of the defendant's costs.⁷⁶ Alternatively, if the action is successful, the plaintiff will have to repay the contribution to the plaintiff's costs made by the Fund. In addition, the Fund will be entitled to receive ten percent of the judgment awarded in favour of the class.⁷⁷ Importantly, the cases supported by the Ontario Fund must seek to advance the *Class Proceedings Act* and jurisprudential objectives. As such, these funded cases seek to enhance access to justice and judicial efficiency, to advance the public interest, to achieve behaviour modification and to further the establishment of new legal principles.⁷⁸ The Ontario Fund remains, to date, vastly underused with only about 10% of all cases being funded annually.⁷⁹ This failure to apply for funding may be due to the difficulties in meeting the criteria for assistance, or to the significant levy of 10% of the total judgment. All in all, the comparison between the 130 requests for funding made over the course of ten years in Ontario and the more than 100 requests for funding made over the course of only one year (2012-13) in Quebec, is tremendously revealing.⁸⁰

3. The Fonds as a Preliminary Screener of Class Action Cases

According to Section 20 of ARCA, every representative and every person intending to be ascribed such status may apply in writing for assistance from the *Fonds*, outlining the

⁷⁴ *Law Society Act*, R.S.O. 1990, c. L.8, S. 59.1(1) [LSA].

⁷⁵ S. 59.3 and 59.4 LSA.

⁷⁶ S. 59.4(1) LSA.

⁷⁷ S. 59.5 (g) LSA and S. 8 of the Ontario Reg. 771/92.

⁷⁸ S. 5 of the Ontario Regulation. Also see <http://www.lawfoundation.on.ca/wp-content/uploads/CPF-Brochure-2013.pdf>.

⁷⁹ *Ibid.*

⁸⁰ See Report of the Quebec Fonds, at <http://www.farc.justice.gouv.qc.ca/doc/RapportAnnuel2013-2014.pdf>.

basis of the claim and the essential facts determining its exercise, and describing the group on behalf of which he or she intends to bring or is bringing the action.⁸¹ The applicant must also state his or her financial condition and that of the putative class members, as well as indicate the purposes for which the assistance is intended to be used, the amount required, and what other revenue or service is available.⁸² In its determination for assistance, the *Fonds* assesses whether the class action may be brought or continued without such assistance, and if the applicant has not yet been named as representative, and it considers the probable existence of the right he or she intends to assert and the probability that the class action will be brought.⁸³ Ultimately, the *Fonds* may defer the study of a part of the application, refuse assistance or grant it, in whole or in part, and in all cases, it shall render its decision within one month following receipt of the application.⁸⁴ In any event, reasons for a decision to refuse or defer assistance must be provided,⁸⁵ as well as the conditions for assistance.⁸⁶ A negative decision may be contested by the applicant in front of the Administrative Tribunal of Quebec.⁸⁷

When a favourable decision is rendered, and assistance is granted, the recipient is entitled to payment by the *Fonds* of the expenses expedient for the preparation or bringing of the class action, including attorney and expert fees of the recipient, the recipient's costs and other court expenditures including costs of notification, and any other expenses related therein.⁸⁸ The payment of attorney fees, unfortunately, is insignificant as compared to the market rate, being of maximum \$100/hour for senior lawyers and maximum \$40/hour for juniors. Meanwhile, expert fees are often significant. Furthermore, an agreement may be made to indemnify representative plaintiffs for adverse costs awards.⁸⁹ Importantly, the

⁸¹ S. 21 ARCA.

⁸² *Ibid.*

⁸³ S. 23 ARCA.

⁸⁴ *Ibid.*

⁸⁵ S. 24 ARCA.

⁸⁶ S. 25 ARCA.

⁸⁷ Ss. 35, 37 ARCA.

⁸⁸ Ss. 27 and 29 ARCA.

⁸⁹ S. 29 ARCA.

recipient or his attorney shall reimburse the *Fonds* the amounts paid by it up to the amounts received from a third party as fees, costs or expenses.⁹⁰

V. PUBLIC FINANCIERS AS OVERSEERS OF CLASS PROCEEDINGS

As already noted, the *Fonds* represents for Quebec litigants a primary source of financial assistance to initiate class actions, precisely one third of all such actions annually. This, in itself, affords considerable access to justice to Quebecers who are able to rely upon a source of financial assistance to initiate class actions and pay, notably, their legal and expert fees and costs, with no interests. The *Fonds* is, however, much more than a public financier: the *Fonds de facto* supervises and oversees class action activities in Quebec (and to a certain extent national class actions as well), notably through the careful analysis of all active cases and the collection of some statistics. Its official mandate, however, should be redefined to include a specific oversight mechanism of class action litigation. This mechanism would serve to avoid the potential pitfalls and ethical risks of third party funding, while ensuring that the class action objectives and public policy objectives are furthered. Importantly, through this oversight mechanism, the class action system would become more transparent, to the benefit of all litigants – actual and future.

I, along with the few members of my Class Actions Lab team, have spent several months studying the active files of the *Fonds* during the summer of 2015, collecting empirical data and statistics regarding claims rates and collective recoveries. Our objective was to compile conclusive statistics regarding the claims rates and the overall success of the class action in relation to the three class action objectives. I was astounded to find out how very little data is actually available in that regard in court files, and how obscure the litigation process truly is. The responsibility for providing the information lies with the class action lawyers who are obligated to provide copies of all documents and procedures to the *Fonds*. The files that we consulted at the *Fonds*, however, were incomplete in that

⁹⁰ S. 30. In addition, s. 31 provides that: “In the cases where the representative was granted assistance, if the defendant in whose favour the final judgment has been rendered shows to the satisfaction of the *Fonds* that it is impossible for him to obtain the full payment of the judicial costs on the property of the representative, the *Fonds*, after examining the financial condition of the defendant, may pay these judicial costs in the name of the representative. The *Fonds* then becomes subrogated in the rights of the defendant up to the amount paid to him.”

they allowed us to draw definite conclusions about the outcome of the class actions in less than forty cases of the several hundred files consulted.⁹¹ I thus agree with authors Pace and Rubenstein that although “[c]lass actions are among the most public forms of civil litigation”, “[ironically] a veil of secrecy can fall over class action litigation [...] and ultimately, little information is available about how many class members actually received compensation and to what degree.”⁹² There is a real problem here. Transparency being a fundamental issue in the Quebec and Canadian justice system⁹³, it is becoming clear that increased oversight, accountability, and transparency will lead to an improved class action system. The *Fonds* can contribute by acting as an official overseer of class actions in Quebec and by requesting clearer and more definite data from the parties and lawyers. And in fact, should it not be that Government or semi-Governmental entities like the *Fonds* have an utmost obligation to be so transparent in their legal activities and reporting?

Because the *Fonds* carefully considers applicants’ files based on the need for financial assistance, but also on the basis of the claim and of the essential facts determining its exercise, it acts as a *de facto* screener of class actions, a powerful gatekeeper of the Quebec system. This screening function further has a temporal permanence as the *Fonds* may grant funds on a continuing basis throughout the litigation. In terms of incentives, the *Fonds* is – even if only implicitly – motivated to assist cases that have a greater chance to succeed, especially since the loan provided to the class action initiator is reimbursed only in the event of success in litigation. The *Fonds*’ decisions are kept confidential, but once an announcement is made that a case has been funded, a strong indication will be

⁹¹ See draft report, “The Class Action as a Compensatory Device”, on file with author.

⁹² Nicholas M. Pace, William B. Rubenstein, « How Transparent are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data”, *Working Paper*, Rand Institute for Civil Justice, July 2008, p. v.

⁹³ Canadian Bar Association, Systems of Civil Justice Task Force Report, Aug 1996, online at: https://www.cba.org/cba/pubs/pdf/systemscivil_tfreport.pdf, p. 19 (« accountability of the system to the public it is intended to serve cannot be accomplished unless the functioning and operations of the system are understandable to the public. Further, and significantly, a genuinely accessible system cannot be achieved unless additional ways are found to make the system comprehensible and transparent to potential users”).

sent to the legal community and to the parties that the case is well worth litigating.⁹⁴ Of course, I must hereby recognize the risk that this implicit signaling function and related empowerment of the *Fonds* will supplant the court's function as a filter of cases at authorization.⁹⁵ The *Fonds*' involvement, however, is continual, throughout the litigation, and as such, it gives lawyers incentives to continue to conduct the case properly, in light of an eventual future loan. Fundamentally, the *Fonds*' gatekeeping or screening function acts, in practice, as a deterrence factor for eventual defendants, making actions that could not have been initiated without assistance possible, thereby supporting one of the prime policy objectives of the class action. One way to enhance the deterrence effect would be to increase the total assistance provided and the numbers of cases funded in Quebec. At the end of the year 2013-14, the *Fonds* had a significant surplus of \$13,676,811⁹⁶, which could well be invested in enhanced funding for a greater access to justice.

Furthermore, pursuant to Section 7 ARCA, the *Fonds*' objective and mandate is not only to provide financial assistance, but also "to disseminate information respecting the exercise of [class] actions." In fact, the initial financing objective was enlarged in 1984 to include the educational information objective.⁹⁷ Throughout the years, the Quebec experience has demonstrated that the *Fonds* has played and continues to play a fundamental role in making the class action procedure known and understood by the public and by the legal community, while also helping provide a more specific form of help to those wishing to institute such actions. In the first few years, the *Fonds* published reports, gave informational seminars to the public, and collected significant statistics. As the years passed, this informational objective was, in part, lost. Today, the *Fonds*

⁹⁴ *Québec (Commission de la santé et de la sécurité du travail) c. Pillin*, EYB 1983-142308 (Que. C.A.). In that case, the Court of appeal remarks how the *Fonds*' written decision appears as a decision of the merits of the case.

⁹⁵ *Infineon, supra*, note 49, at para. 65 (emphasis added). Similar comments are found in the Supreme Court case of *Vivendi Canada Inc. v. Dell'Aniello*, [2014] S.C.J. No. 1, [2014] 1 S.C.R. 3 (S.C.C.), at para. 71 ("[T]he motion judge performs a function of screening motions; this is a procedural stage that does not involve consideration of the questions on the merits").

⁹⁶ See *Fonds' Report of 2013-2014*, at <http://www.farc.justice.gouv.qc.ca/doc/RapportAnnuel2013-2014.pdf>.

⁹⁷ *Deraspe c. Fonds d'aide aux recours collectifs*, EYB 2007-120152 (Que. Sup. Ct.), par. 24. See Yves Lauzon, « Le financement des recours collectifs » dans Alain Prujiner et Jacqueline Roy, dir., *Les recours collectifs en Ontario et au Québec : actes de la première Conférence Yves Pratte*, Montréal, Wilson & Lafleur, 1992, 65, p. 74.

continues to publish one annual report with less statistics and simpler data, and it informs the public on a one-on-one basis by answering calls made at its head office. Resources available to fulfil the informational objective are meagre.

If additional Government resources were made available, the *Fonds* could beneficially assume a much more important role of information, ideally in collaboration with the Superior Court, which has exclusive jurisdiction over class actions, and eventually, with our Class Actions Lab. With greater information could come greater access to justice, another public policy objective of the class action, as more citizens would understand and trust the procedure, and more cases would be initiated. While the *Fonds* is already sent copies of all active class action files in the province (whether funded or not), more complex statistics could be collected about the numbers of cases filed, tried and settled, the moment at which these events occur, the financial amounts, take-up rates, etc.⁹⁸ This empirical data is critically important to researchers of course, but also to the legislator, the courts and the public in general. One way of providing this information would be to contribute to the existing Quebec class action registry, which was created on January 1, 2009 and provides a great quantity of information regarding the case, the names of the parties, the amounts involved, the type of case, the notices to members, the claim forms, the introductory motions and related judgments, etc.⁹⁹, or alternatively, to the Canadian Bar Association National Class Action Database¹⁰⁰. At the moment, the dire need for additional financial resources to administer the *Fonds* is the reason why the informational component is almost nonexistent.

Accordingly, while the *Fonds* acts *de facto* as overseer of all Quebec class actions, whether funded or not, with an official recognition of this function in the legislation, and additional Government resources to administer the entity, more legitimacy could be given to the *Fonds*' involvement in court files and to its claims and demands. As a public

⁹⁸ More extensive statistics were published by the Fonds up until the year 2007-2008.

⁹⁹ See website at www.tribunaux.qc.ca. Also see *Tourel c. Brault & Martineau inc.*, EYB 2014-238337, 2014 QCCS 2609 (Que. Sup. Ct.). See also Pierre-Claude LAFOND, *Le recours collectif, le rôle du juge et sa conception de la justice - impact et évolution*, Éditions Yvon Blais, 2006, p. 171.

¹⁰⁰ See e.g., <http://www.cba.org/ClassActions/main/gate/index/>.

guardian, the *Fonds* could protect the interests of absent class members.¹⁰¹ It has acted, over the years, as a proactive and efficient vehicle of change, challenging class settlements, Superior Court decisions, and the application and interpretation of various regulations.¹⁰² In the years 1979-80, the *Fonds* made representations to the Quebec Bar to request that amendments be made to the judicial tariff to limit the extent of costs payable and further, to make appeals of class action authorization decisions possible only upon a refusal to authorize.¹⁰³ These requests were granted and amendments were made. They became measures of great social importance in Quebec class action law. Later on, the *Fonds* made representations in Court on many instances, often successfully.¹⁰⁴ It notably sought to intervene to force the courts to apply the Percentage Regulation in the way originally intended, in the face of the contrary intentions of settlement transaction signatories wishing to circumvent the Regulation with clauses preventing the existence of any leftover amounts –and thus making recoveries by the *Fonds* impossible. The Court sided with the *Fonds*, and held that the correct application of the Percentage Regulation is a tool allowing the *Fonds*' self-sustainability without losing priority over the compensation of class members.¹⁰⁵

Another advantage of involving the *Fonds* as a public overseer of class actions undoubtedly is to solve the risk of agency cost in representative actions, as was raised by many authors, including Samuel Issacharoff.¹⁰⁶ Indeed, in addition to increased efforts to

¹⁰¹ See for a similar idea, Martin H. Redish, “Rethinking the Theory of the Class Action: The Risks and Rewards of Capitalistic Socialism in the Litigation Process” (2014) 64 Emory L. J. 451, at 465.

¹⁰² See most recently *Option Consommateurs v. Banque nationale du Canada*, 2015 QCCS 4380 (Que. S.C.). Also see Samy Elnemr, « Le Fonds d'aide aux recours collectifs : trente ans plus tard », *Développements récents en recours collectifs* (2010), vol. 327, Cowansville, Éditions Yvon Blais.

¹⁰³ Elnemr, *Ibid*, p. 4.

¹⁰⁴ *Fonds d'aide aux recours collectifs v. Syndicat des employés d'entretien et de garage de transport de la C.U.M.*, C.A., 500-09-001113-893, 27 juillet 1995; *Clavel v. Productions musicales Donald K. Donald inc. et al*, C.S. 500-06-000010-922, 19 janvier 2010.

¹⁰⁵ *Cornellier c. Province canadienne de la congrégation de Sainte-Croix*, EYB 2011-199631, 2011 QCCS 6670 (Que. Sup. Ct.), citing *Option Consommateurs c. Fédération des caisses Desjardins du Québec*, 2011 QCCS 4841, EYB 2011-195835 (Que. Sup. Ct.).

¹⁰⁶ Samuel Issacharoff, « Litigation Funding and the Problem of Agency Cost in Representative Actions », draft, available at: <https://www.law.duke.edu/sites/default/files/centers/judicialstudies/mdl2015/P3-B2-Litigation%20Funding.pdf>.

involve the courts in the class action process and provide greater judicial oversight, which I have advocated for elsewhere,¹⁰⁷ my proposition here is, in line with that of Issacharoff's, that the *Fonds* should act as an intermediary agent watching over the primary agents.¹⁰⁸ The *Fonds* has a strong incentive to monitor the lawyer-agents' performance as it collects a percentage of all class actions' recoveries in funded and unfunded cases. To respond to Issacharoff's preoccupations, the *Fonds* is neutral, and has no potential of becoming a "toll collector"¹⁰⁹ or a "trafficker of litigation".¹¹⁰ Its main incentive is to be mostly self-sustainable, and to do so, it must recuperate its investment, limit its risks in litigation, and see the Percentage Regulation applied¹¹¹. In any event, it has no incentives to win or lose a case (other than the fact of not being able to recuperate any monies in case of a defendant's win), or to profit from the case or the litigation. Accordingly, it should act as an overseer which, in light of protecting the absent members' interests, is allowed and encouraged to make representations on their behalf notably at settlement fairness hearings.¹¹²

In addition, the presence of a strong overseer of class actions such as the *Fonds* makes the process more symmetric, as between plaintiffs and defendants, as well as between the firms representing them. The increased information about cases and their judicial outcomes would lead to enhanced transparency and to greater efforts being made to divulge and assure collective compensation. As for absent class members more specifically, they would be better protected; with greater information would come increased participation in the class action litigation. The involvement, eventually, of the

¹⁰⁷ C. Piché, *Fairness in Class Action Settlements*, *supra* note 37, at 277ff..

¹⁰⁸ See e.g., Issacharoff, p. 13. Also see Samuel Issacharoff & Daniel R. Ortiz, "Governing Through Intermediaries", (1999) 85 Va. L. Rev. 1627.

¹⁰⁹ Issacharoff, *ibid*, p. 14.

¹¹⁰ Christopher Hodges & Stefan Vogenauer, *The Costs and Funding of Civil Litigation*, (Oxford: Hart Publishing, 2010), "Australia", by Camille Cameron, at p. 212.

¹¹¹ See, notably, the *Fonds*' Report of years 1992-93, p. 6 ("Le Fonds d'aide chemine vers l'auto-financement. En effet, de nombreux recours soutenus par le Fonds depuis sa création arrivent à maturité. Le Fonds est ainsi remboursé peu à peu de ses avances : ses coffres sont maintenant réapprovisionnés par les revenus de subrogation et, phénomène plus récent, par l'encaissement de reliquats. L'exercice 1992-93 constitue à cet égard un record inégalé. Ce « retour de l'ascenseur » permet à notre organisme de supporter de nouveaux recours qui, s'ils ne connaissent le succès, contribueront à soutenir les recours à venir dans 5 ou 10 ans. »)

¹¹² See e.g., Piché, *Fairness*, *supra* note 37.

Fonds in class settlements would, furthermore, make proceedings beneficially more adversarial.¹¹³ Furthermore, to underline the *Fonds*' impartiality relative to class plaintiffs and defendants, a proposition could be made to require the *Fonds* to mitigate the financial burden assumed by the respondents, in cases where the action is funded, goes to authorization and is later dismissed.

Importantly, the involvement of an overseer would further lessen the potential for unethical behaviour and practices in financing class actions. In fact, the *Fonds* simply does not have any conflicts of interest and cannot strip plaintiffs of their control and direction over the litigation. Moreover, it does not charge a "fee" for the provision of assistance and the risk taken – it merely seeks to self-sustain by recuperating the amounts provided to initiate the action. Meanwhile, by way of comparison, the costs of financing through third-party initiatives, in Quebec at least, encourages unethical behaviour as they are repayable over and above class counsel fees, rather than deducted from that amount, thereby depriving class members of benefits.¹¹⁴ Furthermore, the required distance between the financier and plaintiff firm is often difficult to maintain when the potential financial gains are so significant.

The primary method of financing consumer class actions in the United States is the common fund doctrine, with another crucial element of the class action financing method being the "American rule".¹¹⁵ While the country has had a long tradition of public interest litigation brought by privately-financed groups such as the American Civil Liberties Union, Government-financed litigation through an entity such as the *Fonds* could face resistance in the U.S. Similar litigation oversight models, however, have been argued for by academics: the guardianship model¹¹⁶, the financier monitor model¹¹⁷ and more recently, the public agency oversight model¹¹⁸.

¹¹³ See Piché, *Fairness*, *supra* note 37.

¹¹⁴ See *Marcotte*, *supra* note 3.

¹¹⁵ Janet Cooper Alexander, « An Introduction to Class Action Procedure in the United States », *Debates over Group Litigation in Comparative Perspective* Geneva, Switzerland, July 21-22, 2000, unpublished.

¹¹⁶ Sarah Northway, "Non-Traditional Class Action Financing and Traditional Rules of Ethics: Time for a Compromise" (2000), 14 *Geo. J. Leg. Ethics* 241, at 257;

The *Fonds* has shaped class action litigation in Quebec. It has helped provide access to justice and judicial economy, two of the fundamental public policy objectives of class actions. It has also oriented the kinds of cases brought forward – mostly consumer cases – and has contributed to Quebec’s reputation as a class action haven.¹¹⁹ Public funding entities such as the *Fonds* have the great advantage of being sophisticated and neutral entities interested in public interest value claims, even if the outcome of public interest litigation does not involve large monetary awards, and that, in itself is advantageous to the legal system as a whole. While the idea of a public financial litigation assistance entity such as the *Fonds* has supporters around the world, such as the Australian Law Reform Commission¹²⁰ and the Victorian Law Reform Commission,¹²¹ the *Fonds* remains unique in all class action systems. If I were to go one step ahead, one ideal way to litigate collectively might just be to publicly finance public interest lawyers that are a part of a government agency such as the *Fonds* to bring the cases directly, as a way to ultimately meet the class action objectives. These lawyers would be experts in the field, paid on contingency fees, motivated at protecting the interests of the victims. Importantly, the lawyers would bridge the existing gap between the class action bar and government regulators.

¹¹⁷ Elizabeth Chamblee Burch, “Financiers as Monitors in Aggregate Litigation” (2012) 87 N.Y.U. L. Rev. 1273, at 1277 (“allowing third parties to fund nonclass aggregation helps to manage principal-agent problems by freeing attorneys from their financial self-interest and encouraging them to act as faithful agents”).

¹¹⁸ John C. Coffee Jr., *Entrepreneurial Litigation: Its Rise, Fall, and Future* (Boston, Harvard University Press, 2015).

¹¹⁹ See e.g., Stuart Kugler and Robert Kugler, «Quebec : The Class Action Haven» (2004) 1 Can. Class Action Rev. 155.

¹²⁰ Law Reform Commission, Grouped Proceedings in the Federal Court, Report No. 46 (1988), para. 307-314. The Australian Law Reform Commission has recommended that contingency fees be permitted in class actions and that a class action fund be introduced, modeled in part on the two class action funds in Canada. Also see Kaladjzic, *supra* note 19, p. 98.

¹²¹ See Civil Justice Review, Report 14, Victorian Law Reform Commission, 2008, chap. 10. The Commission proposed a statutory fund called the “Justice Fund”, funded by way of a percentage of the recovery in successful cases and subject to a cap on adverse costs. Neither of these propositions were followed but they nonetheless indicate an interest in the idea of publicly financing class litigation. Also see The Right Honourable Lord Justice Jackson, Review of Civil Litigation Costs: Final Report 334–35 (2009), available at <http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A9356F09672EB6A/0/jacksonfinalreport140110.pdf>, which report recommended experimentation with a public financing scheme funded by a tax against successful class actions, modeled after the Ontario class action fund. *Id.* at 131.

