The *Fourth Dimension* to Class Actions: Access to a Meaningful Benefit

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INTRODUCTION

Five years ago, an Australian teenager measured his foot-long Subway sandwich and discovered that it was only 11 inches long. Eager to share the newfound information on Facebook, his post, including a photograph of the sandwich alongside a tape measurer, went viral. Class action litigation ensued across the United States, alleging breaches of state consumer-protection laws and seeking class certification under Rule 23 of the *Federal Rules of Civil Procedure*.[1] The class action lawsuits were eventually combined in a multidistrict litigation in the Eastern District of Wisconsin.[2] Early discovery established that consumers were not prejudiced in any way by Subway's practices. Subway's unbaked bread sticks were found to be uniform, and baked rolls only rarely produced shorter than 12 inches sticks. This evidence, along with the fact that Subway sandwiches are made to order for each customer, with standardized ingredients, and sandwich makers adding toppings in quantities requested individually and variably by customers according to individual tastes, meant that no compensable injury could be proven. The claims alleged simply did not have merit.

The parties ultimately agreed to settle their dispute on the condition that Subway, for a period of four years, (1) inspect and measure its baked rolls to ensure that its sandwiches were at least 12 inches in length; and (2) pay plaintiffs' counsel $525,000 in attorney fees. The U.S. District Court for the Eastern District of Wisconsin approved the settlement in February 2016,[3] and the Center for Class Action Fairness[4] appealed the decision to the U.S. Court of Appeals

1. See e.g., Maureen MORRISON, "Footlong-Gate: Subway Apologizes for Sandwiches Not Measuring Up", *AdvertizingAge* (Jan. 25, 2013), online: <http://adage.com/article/news/subway-apologizes-footlongs-measuring/239427/>.
2. *In re: Subway Footlong Sandwich Marketing and Sales Practices Litigation*, MDL No. 2439.
3. 7th U.S. Circuit Court of Appeals, No. 16-1652.
4. The Center was established in 2009, and represents class members *pro bono* in class actions where class counsel employs unfair class action procedures to benefit themselves at the expense of the class.

for the Seventh Circuit. In August 2017, the Seventh Circuit rejected the proposed settlement because it provided "worthless" benefits to Subway's customers, and solely "enriched" plaintiffs' counsel and to a lesser degree, the class representatives.[5]

There is a steady, problematic tendency for class action settlements to yield benefits for stakeholders other than the class. Fortunately, the *Subway* Seventh Circuit decision reflects a growing trend of North American courts scrutinizing class action settlements to determine whether they predominantly serve to enrich class attorneys, or whether they in fact provide meaningful benefits to class members.[6] I will argue in this paper that class actions should serve a new objective, or purpose, which is to provide access to a meaningful benefit to class members. Correspondingly, my view is that courts should utilize two safeguards – one substantive and one procedural – to ensure this objective is being served.

Class actions are procedural devices that are controversial because they purport to bind absent class members without their express consent or participation. However, they are not "mere procedural vehicles" as the doctrine and courts have believed them to be.[7] They have a DNA of their own, and are, in fact, extraordinary procedural vehicles that serve varying purposes depending on their genre. For instance, a price-fixing class action will likely serve to deter rather than compensate, and a consumer class action case will serve to compensate rather than deter. The class action "fishbowl" – to quote Deborah Hensler – reveals a mixed portrait of class

5. *In re: Subway Footlong Sandwich Marketing and Sales Practices Litigation*, MDL No. 13-02439 (E.D. Wis.): "A class action that "seeks only worthless benefits for the class" and "yields [only] fees for class counsel" is "no better than a racket" and "should be dismissed out of hand."
6. Also see – in the U.S.: *In re Dry Max Pampers Litig*., 724 F.3d 713 (6th Cir. 2013) (where 50 class representatives signed off on a settlement that granted them "incentive awards" of $1000 each per affected child, afforded class counsel a hefty fee, and left absent class members with prospective injunctive relief and the right to participate in a money-back guarantee program that was already available to them before the settlement), *Crawford* v. *Equifax Payment Servs*., 201 F.3d 877 (7th Cir. 2000) and *Grok Lines, Inc.* v. *Paschall Truck Lines, Inc*., 2015 U.S. Dist. LEXIS 124812 (N.D. Ill. Sept. 18, 2015) – and in Canada: *2038724 Ontario Ltd.* v. *Quizno's Canada Restaurant Corp,*, 2014 ONSC 5812, para. 44, and *Waldman* v. *Thomson Reuters Canada Ltd.*, 2014 ONSC 1288, para. 88, quoting *Kidd* v. *The Canada Life Assurance Co.*, 2013 ONSC 1868 (CanLII) at para. 130.
7. See e.g., *Bisaillon* v. *Concordia University*, 2006 SCC 19, at para. 18. Also see for a recent discussion of this point: *Canadian Imperial Bank of Commerce* v. *Green*, 2015 SCC 60, at para. 62.

action activity, with some actions driven by financial incentives and goals, others motivated by "the desire to right perceived wrongs", and others yet again seeking to do both.[8] What is the social utility of class actions in North America?[9] According to a member of the 1966 Civil Rules Advisory Committee, "we do not know whether this is a good or a bad thing. The great big question is whether the social utility of the large class action outweighs the limited benefits to individuals, the aroma of gross profiteering, and the transactional costs to the court system."[10]

Leaving aside the social utility of class actions, my argument is that a new dimension must be embraced by class actions, a dimension *oblivious to their genre*. This dimension is *a Fourth Dimension,* a dimension of *benefit*. Benefit will be envisaged as benefit to class members in all types of class actions, large or small, involving small claims distributions or large payouts, in all areas of the substantive law. Even with the most powerful visual imagination, trying to envisage how a four-dimensional object would look in a three-dimensional world is impossible. Similarly, attempting to conceptualize a four-dimensional procedure in a three-dimensional system of collective justice is tremendously challenging.

In the astonishing 1920s painting depicted on the cover of this book, Los Angeles modernist Benjamin F. Berlin attempts to portrait, for the very first time, the *Fourth Dimension*.[11] This beautiful composition of intersecting planes and diagonal lines was painted at a time "inspired with a sentiment of endless possibilities," at "a modern age marked by technological wonders."[12] This paper will seek to provide readers with a similar sentiment of endless possibilities, as it suggests, we need to subject class actions to a fourth justification.

In Section I, I will begin by discussing the power and legitimacy of class actions, followed by a second section (Section II) reviewing the traditional class action effects, in a functional approach to class actions. I will follow through with an argument in favour of

8. Deborah R. HENSLER *et al.*, *Class Action Dilemmas: Pursuing Public Goals for Private Gain,* 2000, 49-51; available at: <https://www.rand.org/pubs/monograph_reports/MR969.html>, at 401 ["RAND Class Action Report"].
9. This is the question the RAND authors sought to answer. See *ibid*., at 401.
10. *Ibid*., an extract from a memorandum to the Chair of the 1995 Committee.
11. See Curator Notes, online: <https://collections.lacma.org/node/233500>.
12. See *ibid*. Also see Pam MEECHAM and Julie SHELDON, *Modern Art: A Critical Introduction*, 2nd ed., New York & London, Routledge, 2005, 62.

a cost-benefit approach in class actions, and will suggest that two things are needed, for enhanced legitimacy and better control of quality outcomes in class actions: first, better anticipation of class action outcomes by way of reporting and transparency of such outcomes (Section III); and second, reviving a suggestion made in the seminal 1982 Ontario Report on Class Actions that a cost-benefit approach be applied in class actions (Section IV).

I– THE POWER AND LEGITIMACY OF CLASS ACTIONS

In the early 1990s, an ideological discussion about the social purposes and legitimacy of class actions began in the United States, leading a team of researchers from the Institute for Civil Justice to analyze the current landscape of money damages class actions and to study the practices and outcomes of these suits. This study led to a comprehensive report, published in 2000 by Stanford Professor Deborah Hensler and a team of researchers (Hensler *et al.*, 2000), entitled *Class Action Dilemmas: Pursuing Public Goals for Private Gain*.[13] The RAND study used qualitative and quantitative research methods to describe the landscape of class litigation, elucidate problems, and identify solutions. Hensler *et al*. asked many fundamental questions, such as whether class actions were "worth" their costs to society and to business, and whether they did more harm than good.[14] The RAND Class Action Report concluded that the controversy over damage class actions had proven intractable, given the "deeply held but sharply contested ideological views among stakeholders".[15]

Reflecting upon the future of the class action mechanism, Hensler *et al*. asked:

> [Is the class action device] primarily an administrative efficiency mechanism, a means for courts and parties to manage a large number of similar legal claims, without requiring each litigant to come forward and have his or her claim considered individually? Or is it primarily a means of enabling litigation that could not be brought on an individual basis, in pursuit of larger social goals, such as enforcing government regulations and deterring unsafe or unfair business practices?[16]

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13. RAND Class Action Report, *supra*, note 8.
14. *Ibid*., at chapters 2 and 15.
15. *Ibid*., at 2.
16. *Ibid*., at 49.

They ultimately argued that the debate between the goals of efficiency and negative value litigation is a false one, given that an increase in efficiency will necessarily lead to an increase in access.[17]

Two main ideas have since floated around in the scholarly literature on class actions in North America. The first is that class actions facilitate the adjudication of rights that would never see the inside of a courtroom if there was not an effective mechanism to aggregate small-value claims.[18] The second is that class actions can have a deterrent effect on large corporations and institutions by permitting the enforcement of laws when many people suffer a wrong too small to merit bringing a suit individually.[19] Are these ideas sustainable, and if so, do they serve to provide class action legitimacy?

There is no question that companies give due consideration to the risk and consequences of being sued collectively, and the impact of such litigation on their business and reputation.[20] Medications are regularly pulled off the market, pharmaceutical labels reformulated, contracts amended to better respond to consumer need, coupons are awarded in advance of litigation, as a form of excuse following a contractual breach. But do these e*x ante* or *ex post* corporate reactions to class litigation really matter? Do they serve to prove class action use-

17. *Ibid*.
18. See Bruce HAY and David ROSENBERG, "'Sweetheart' and 'Blackmail' Settlements in Class Actions: Reality and Remedy", (2000) 75 *Notre Dame L. Rev.* 1377, 1380-81; Stephen C. YEAZELL, *From Medieval Group Litigation to the Modern Class Action*, New Haven, Yale University Press, 1987, 877. Also see Stephen C. YEAZELL, "Group Litigation and Social Context: Toward a History of the Class Action", (1977) 77 *Colum. L. Rev*. 866, 866.
19. This remark is preliminary to an exploration of the utility of the class suit as an instrument for effective and inclusive group redress. See John BRONSTEEN and Owen M. FISS, "The Class Action Rule", (2003) 78:5 *Notre Dame L. Rev.* 1419, available at SSRN: <https://ssrn.com/abstract=895093>: "The class action enables the claims of all the individual victims to be aggregated, thereby spreading the lawsuit's costs among all class members and creating a potential recovery that is large enough to make the suit economically viable. Although each individual who is harmed wins only a small amount, the public benefit is substantial. The costs of the large public harm are borne by the person or firm responsible for it, and incentives to commit future transgressions are removed." *Ibid.*, at 1419.
20. See e.g., RAND Class Action Report, *supra*, note 8, at 467 ("all six of these class actions were associated with changes in defendants' practices, [but] in some instances those changes appeared to be a result of prior litigation or regulatory activity rather than the instant class action."), and later, at 489 ("Currently, many damage class actions are justified by their presumed regulatory enforcement effects. […] Judges should ask whether the class litigation contributed to changes in defendants' practices or in government regulations.").

fulness or legitimacy? How do we demonstrate the existence of these deterrence effects scientifically? Should we instead stop there and afford class actions legitimacy just because we have a feeling that they affect corporate behaviour? How about judicial efficiency? Is the economy of scale brought by large-scale class actions a good reason to certify the next big case? Is there truly an economy of scale when class actions are so expensive to certify? Given the complexity of procedures, the years passed filing motions to dismiss or for particulars, among others, the extensive discovery conducless and the burdensane pleadings and arguments, is the economy of scale a real one? Class actions, on average, take ten years to see a conclusion by way of monetary distributions and a closing judgment in Quebec.[21] Is this class action practice truly efficient and fair to the class members?

Enabling negative value claims, and small changes in corporate behaviour, and perhaps some bit of judicial economy (or maybe not) might not be worth the cost and burden of the expensive litigation that would not have otherwise happened. Even if we agree that class actions are justifiable because instituting an action against a big company for a $2.75-worth of damage is highly unlikely for a consumer, and a majority of consumer class actions would never see the light of day if not brought by way of a class action, my view is that the overarching principle of proportionality in procedure, evidence, and the administration of justice mandates that we consider whether these injuries should be remedied through a highly burdensome class action system.[22] Is it not true that consumers (and their lawyers – arguably!) are discovering more and more (often but not always rightful) claims against corporate and governmental entities (e.g., see *Subway Footlong* Case, above)? Are we being hypocritical by applauding each new action in the name of "Access to Justice"? Class actions were designed to provide access to justice to the public, sure, but at what price – and cost? Negative value cases may be distinguished from positive value ones, as judicial economy is irrelevant

21. Class Actions Lab Data, on file with author, Year 3 Results.
22. See e.g., Art. 18 *Code of Civil Procedure* (Quebec); *Supreme Court Civil Rules*, BC Reg. 168/2009, r. 1-3(2) (British Columbia); *Rules of Civil Procedure*, RRO 1990, Reg. 194, r. 1.04(1.1) (Ontario); *Rules of Court*, Y. OIC 2009/65, r. 1(6) (Yukon); *Federal Court Rules*, DORS/98-106 (Federal-Canada). Also see *Szeto* v. *Dwyer*, 2010 NCLA 36, at para. 53 ("For rules involving discretion, in this case the rules regarding pre-trial discovery and disclosure, this includes the application of an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact in the litigation, and its timeliness, given the nature and complexity of the litigation.").

in the former, but relevant in the latter, but even that argument does not change the fact that we are unable to appreciate the accomplishment of the traditional class action objectives without raw data about class actions.

What if there were other objectives or purposes that the class action should meet – another effect or dimension to class actions that would serve to ensure their legitimacy? Society has assumed (as have academics, for the most part)[23] that the class action procedure is here to stay, that it serves its stated purposes and has legitimacy. While many American academics have argued that the class action is declining,[24] or dead, given the evolution of the United States Supreme Court jurisprudence, Canadians have instead shown through a series of fundamental court decisions that the more stringent evidentiary approach endorsed by the U.S. Supreme Court in *Wal-Mart* v. *Dukes* has little application to Canadian class actions.[25] Class actions in Canada have been flourishing, with steadily rising numbers of actions filed, and quasi-systematic certification deci-

23. See e.g., Zachary D. CLOPTON, "Class Actions and Executive Power", (2017) *N.Y.U. L. Rev.*, forthcoming; Cornell Legal Studies Research Paper No. 16-44, available at SSRN: <https://ssrn.com/abstract=2881589> (highlighting the connection between changes in class actions and the enforcement of private law); Robert H. KLONOFF, "The Decline of Class Actions", (2013) 90 *Wash. U.L. Rev.* 729, 735 (analyzing developments in class action law that "undermine [ ] the compensation, deterrence, and efficiency functions of the class device"); Richard MARCUS, "Bending in the Breeze: American Class Actions in the Twenty-First Century", (2016) 65 *DePaul L. Rev.* 497, at 499 (highlighting the "headwinds" class actions face); Arthur R. MILLER, "The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative", (2014) 64 *Emory L.J.* 293; Linda S. MULLENIX, "Ending Class Actions as We Know Them: Rethinking the American Class Action", (2014) 64 *Emory L.J.* 399 (describing the common conception of class actions that focuses on the "effective vindication" of rights and deterrence through private enforcement).

24. See e.g., Brian T. FITZPATRICK, "The End of Class Actions?", (2015) 57:1 *Arizona Law Review* 161; MULLENIX, *ibid.*; KLONOFF, "Decline", *ibid.*; Myriam GILLES, "Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action", (2005) 104 *Mich. L. Rev.* 373, 375 (predicting that, "with a handful of exceptions, class actions will soon be virtually extinct"); Charles SILVER and Maria GLOVER, "Zombie Class Actions", Scotus Blog (accessed on January 19, 2018), online: <http://www.scotusblog.com/2011/09/zombieclass-actions/>. But see: J. Maria GLOVER, "The Supreme Court's 'Non-Transsubstantive' Class Action", (2017) 165 *U. Penn. L. Rev.* 1625, at 1626-7 (discussing Supreme Court decisions that breathed new life into the class action recently); Robert H. KLONOFF, "Class Actions Part II: A Respite from the Decline", (2017) 92 *N.Y.U. L. Rev.* 973-74.

25. See e.g., *Asselin* c. *Desjardins Cabinet de services financiers inc*. 2017 QCCA 1673 (QC C.A.); *Charles* c. *Boiron Canada inc*. 2016 QCCA 1716 (QC C.A.); *Infineon Technologies AG* c. *Option consommateurs* [2013] 3 S.C.R. 600 (S.C.C.).

sions. Additionally, in the province of Quebec, courts have gradually clarified the requirements for certification (e.g., "*authorization*") and made them more flexible than in the other provinces and the United States; they have, further, chosen to promote the prosecution of class actions and the entrepreneurialism of class lawyers.[26]

Class action legitimacy derives from many sources. As a vehicle of change in society, the class action possesses the ability to affect and impact attitudes, behaviour, and general social patterns.[27] It serves as a social barometer, in determining what a normal, acceptable behaviour is, and what is not.[28] For Professor Bryant Garth, class actions have, in time, become "charged with a political significance beyond any other institutions of civil procedure", such as to make them "politically empowering legal artifice(s)".[29] Along with the filing of a class action comes a necessary empowerment of the parties, the lawyers, and class representatives.[30]

Changing individual disputes into group disputes generates power relations.[31] Indeed, "lawyers exercise great power over defend-

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26. See e.g., *Vivendi Canada Inc.* v. *Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, para. 54 ("[…] the Quebec courts' interpretation of art. 1003(a) C.C.P. that their approach to the commonality requirement has often been broader and more flexible than the one taken in the common law provinces. The Quebec courts propose a flexible approach to the common interest that must exist among the group's members."). Also see *Sibiga* c. *Fido Solutions inc*. 2016 QCCA 1299 (QC C.A.), on entrepreneurial lawyers, at 102 (quoting Perell J., explaining that "the entrepreneurial nature of a class proceeding can be a good thing because it may be the vehicle for access to justice, judicial economy, and behaviour modification, which are all the driving policy goals of the *Class Proceedings Act*, 1992". See *Fantl* v. *Transamerica*, 2008 Ont. No. 1536, para. 49 (S.C.J.).)
27. P.A. PAUL-SHAHEEN and Harry PERLSTADT, "Class Action Suits and Social Change: The Organization and Impact of the HillBurton Cases", (1982) 57:3 *Ind. L.J.* 385, at 385. Also see: Deborah R. HENSLER, "Of Groups, Class Actions, and Social Change: Reflections on From Medieval Group Litigation to the Modern Class Action", (2013) 61 *UCLA L. Rev.* Disc. 126.
28. See generally Stephen C. YEAZELL, *From Medieval Group Litigation to the Modern Class Action*, *supra*, note 17, 24-25. Yeazell concludes that the modern class action grew out of the gradually declining importance of customary groups to society and the rise of interest-based social organizations. His fundamental message is a story of how social change shapes legal norms, institutions, and procedures.
29. Bryant G. GARTH, "Power and Legal Artifice: The Federal Class Action", (1992) 26:2 *Law & Society Review* 237, at 267.
30. Catherine PICHÉ, "The Power of Class Actions", (2009) 2:1 *Critical Issues in Justice and Politics* 77, at 80-81.
31. Catherine PICHÉ, "The Cultural Analysis of Class Action Law", (2009) 2 *Journal of Civil Law Studies* 101, 115, quoting YEAZEL, *Medieval*, *supra*, note 28 ("The

ants and the court system generally when they subject defendants to great settlement pressure. Defence lawyers similarly influence the shaping and administrating of mass torts disputes as they – along with their clients – strategize over offers to settle."[32] In addition, "the flow of data, facts and law generated by the filing of a class action lawsuit […] gives lawyers a special role, a specific power: a 'power of governance'."[33] But is power of governance – or power in general – equivalent to legitimacy? Does power give legitimacy to class actions, or does legitimacy afford power to the stakeholders? For Professor Alexandra Lahav, class actions have a significant role in the larger polity as "an element of government" in the modern state.[34]

Reflecting upon the legitimacy of the class action system, Professor Robert Bone has recently wondered why support for the class action remains so strong when its functional justifications are weak,[35] and has argued that "too often, the contending sides in class action debates frame their arguments in functional terms when the debate is better pitched at the level of legitimacy", which "confuses the normative stakes and frustrates efforts to find common ground."[36] He has explained that:

> […] [l]egitimacy in this context is concerned not so much with whether restrictive rules make the class action work better, but rather with whether they make the class action fit the institution of civil adjudication better. On this view, it is not enough that a class action promotes litigation efficiency, effective enforcement of substantive rights, and other functional goals in a fair and manageable way. *The class action must also fit what the judicial system is legitimately supposed to do, and this means that the class suit must qualify as a proper litigating unit*—the class must be sufficiently cohesive and have clearly defined boundaries and identifiable class members, and *the lawsuit must seek*

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very decision to recognize the claimants as a class–a temporary litigative entity–grants them a form of power."). Also see GARTH, *supra*, note 29, at 256.

32. PICHÉ, *Power*, *supra*, note 30, at 80, referring to R.A. NAGAREDA, *Mass Torts in a World of Settlement*, Chicago, The University of Chicago Press, 2007, ix.
33. PICHÉ, *ibid*., at. 82.
34. Alexandra D. LAHAV, "The Political Justification for Group Litigation", (2013) 81 *Fordham L. Rev.* 3193, at 3194 (Lahav's thesis is that the class action's moral legitimacy depends on the role that the class action plays in the larger political structure.)
35. Robert G. BONE, "Justifying Class Action Limits: Parsing the Debates over Ascertainability and Cy Pres", (2017) 65 *Kansas L. Rev.* 913, 916.
36. *Ibid*., at 963.

> *compensation for claimants whose legal rights have been violated*[37]. [emphasis added]

Focusing on its functional goals only, one could argue that the class action will have legitimacy when the rules and internal protections offered to absent members are respected and all legal requirements for class treatment are followed. As such, procedural fairness (accessible notices, adequate representation, the right to object and to opt-out) and substantive fairness guarantees (the right to financial compensation, for example) would legitimize the class procedure. Certification would do so as well, because of the collectivization of claims, and the definition of the class, which both provide an impression that the case is good and strong and that the claims have collective legitimacy. Professor Bone, however, rightly warns that "even if class actions are needed to effectively enforce substantive rights, they can still lack legitimacy when they involve anonymous class members and prioritize deterrence over compensation for rights violations."[38] Accordingly, for Bone, class action legitimacy hinges on the compensation achieved for class members.

The class action's social legitimacy is conceived, for some, as deriving from its users and their perception – a sentiment of confidence in the procedure, and for others, as a by-product of the class action's positive role in society. For sociologists, legitimacy relates to the conception of "obligation to obey any commands an authority issues so long as that authority is acting within appropriate limits".[39] Accordingly, a right of participation is essential for the legitimacy of a final and binding civil proceeding,[40] as is a perception of fairness of procedures.[41] Related to this approach is Professor Brian Fitzpatrick's argument that the (corporate) public's reaction to the

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37. *Ibid*., at 916. For Bone, "A functional argument focuses on the goals of the class action or the demands of due process. By contrast, a legitimacy argument focuses on whether a class action of the type requested is a proper form of procedure for courts. The class action might do a fine job of serving functional goals and be acceptable to all class members, yet still not be legitimate for the institution of civil adjudication." *Ibid*., at 922.
38. *Ibid*., at 917.
39. See generally, Tom. R. TYLER *et al*., *Why People Obey the Law,* 1990, 26.
40. Lawrence B. SOLUM, "Procedural Justice", (2004) 78 *S. Cal. L. Rev.* 181, 277–82. Also see Tom. R. TYLER, "Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform", (1997) 45 *Am. J. Comp. L.* 871, 874 ("Citizens are very forgiving of those who take the law into their own hands, since they feel that the law is not working.").
41. Deborah L. RHODE, "Class Conflicts in Class Actions", (1982) 34 *Stan. L. Rev.* 1183, at 1198 ("Parties who believe that their perspectives have been fairly

class procedure creates legitimacy, and that class actions are legitimate because they "primarily serve to deter."[42] Professor Alexandra Lahav, by contrast, questions whether class action legitimacy can be based on internal protections offered to participants, and instead asks: "[i]f […] all class members do not opt out of a settlement, and by virtue of their inaction are deemed to accept it, is this a sufficient condition for the court to say that the class action procedure was legitimate or that the outcome was just?"[43] For her, the answer is no, and legitimacy instead should derive from the role class actions play in the larger polity.[44] Perhaps the better way to approach class action legitimacy is ultimately to consider that these perceptions in fact influence each other, and that they form a part of a larger puzzle.

Class actions are efficient because they serve to solve large-scale conflicts through wide scale convictions and far-reaching indemnification of large groups of people. They are incontestably useful in negative-value cases that would not otherwise see the light of day. They force defendants to settle – at least arguably –,[45] and generate large numbers of settlements annually throughout North America. They impact the corporate world, the movement of markets, the price of shares and commodities, and the behaviour of individuals, corporate or not. There is a class action economy in itself in Canada, and elsewhere around North America, resulting from the large financial

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presented may also display more confidence in the judicial process and greater willingness to abide by its results.").

42. Brian T. FITZPATRICK, "Do Class Action Lawyers Make Too Little?", (2010) 158 *U. Pa. L. Rev.* 2043, at 2046 (invoking a "social-welfarist utilitarian perspective"). See answer from Professor Marcus: David MARCUS, "Response, Attorneys' Fees and the Social Legitimacy of Class Actions", (2011) 159 *U. Pa. L. Rev.* 155, online: <http://www.pennumbra.com/responses/02-2011/Marcus.pdf> (disputing the Fitzpatrick theory concerning maximal deterrent effect accomplished through incentivized attorney fee awards. In fact, Marcus believes that the social legitimacy of the class action device will decline sharply if Fitzpatrick's proposal is adopted; at 163-66). See further response from Professor Simard: Linda Sandstrom SIMARD, "Response, Fees, Incentives, and Deterrence", (2011) 160 *U. Pa. L. Rev.* 10, online: <http://www.pennumbra.com/responses/09-2011/Simard.pdf> (arguing that the increase in deterrence may be far outweighed by the increase in costs associated with the proposal).
43. LAHAV, *supra*, note 34, at 3196.
44. *Ibid*.
45. See e.g., Richard A. NAGAREDA, "Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA", (2006) 106 *Colum. L. Rev.* 1872, at 1879ff.; Charles SILVER, "We're Scared to Death: Class Certification and Blackmail", (2003) 78 *N.Y.U. L. Rev.* 1357, at 1361ff.; *In re Rhone Poulenc Rorer*, *Inc*., 51 F.3d 1293, 1298 (7th Cir. 1995). Also see: Gerald A. WRIGHT, "The Cost-Internalization Case for Class Actions", (1969) 21 *Stan. L. Rev.* 383.

impact of such actions. Hence, deterrence, once proven, arguably legitimizes the class action.

Professor Bone is correct to say that even if the class procedure provides a form of justice through settlement (or judgment), its legitimacy derives from the compensation provided to class members. My view is that the tremendous power of class actions serves to uncover the corresponding duty they have to help provide members with a meaningful benefit in the form of a redress or remedy. The purpose, thrust and effect of this procedural vehicle should not be frustrated by over emphasis on procedural efficiency to the detriment of fairness[46] and meaningful outcomes. That is where class action legitimacy lies.

II– THE FUNCTIONAL DIMENSION TO CLASS ACTIONS: THE TRADITIONAL OBJECTIVES OF CANADIAN CLASS ACTIONS

Class action legislation in Canada was first enacted in the primarily civil law province of Quebec in 1978, and was heavily influenced by California legislation and the United States Federal Rules of Civil Procedure.[47] Ontario, the largest province of Canada, adopted a *Class Proceedings Act* many years later in 1992, inspired by the U.S. Federal Rules.[48] Class action or "class proceedings"[49] regimes today exist in the legislation of every Canadian province, except Prince Edward Island, and even in the rules of the Federal Court of Canada.[50] The test for certification of a class action in Canada is less

46. Lou ASHE, "The Class Action: Solution for the Seventies", (1971) 7 *New Eng. L. Rev*. 1, 24, p. 22.
47. See Michael A. EIZENGA *et al.*, *Class Actions Law and Practice*, 2d ed, loose-leaf, Markham, LexisNexis. Also see: John A. KAZANJIAN, "Class Actions in Canada", (1973) 11 *Osgoode Hall L.J.* 397, at 401.
48. *Class Proceedings Act*, S.O. 1992, c. 6 (Ontario), online: <https://www.ontario.ca/laws/statute/92c06> ["Ont. C.P.A."].
49. Canadian class action legislations refer to "class proceedings" rather than "class actions" because there are two ways of proceeding in litigation in Canada (ordinary or class). While the usual means of pursuing a claim is by way of an "action", claimants may also choose to use a special procedure called an "application" where it is anticipated that it will be possible to decide the case without a trial involving live testimony. In Canada, actions and applications are collectively described as "proceedings".
50. See notably, for the three largest and most active class proceedings provinces, Ont. C.P.A.; *Class Proceedings Act*, RSBC 1996, c. 50, online: <http://www.bclaws.ca/civix/document/id/complete/statreg/96050_01> [British Columbia]; *Code of Civil Procedure*, chapter C-25.01, online: <http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-25.01> [Quebec], arts. 574ff. As for the Federal Rules, see *Federal*

rigorous compared with the American test. There is no requirement in Canada that the representative plaintiff meet the prerequisites of numerosity and predominance. In addition, defendants are not exposed to excessive punitive damages awards or to jury trials.

The Ontario C.P.A. was adopted following a growing demand for reform in the area of representative litigation, including a 1982 report from the Ontario Law Reform Commission.[51] The OLRC 1982 Report recommended class actions as a means of enhancing judicial efficiency, improving access to the courts, and generating a sharper sense of obligation to the public by those whose actions affect large numbers of people.[52] The first and prominent objective of providing access to justice embraced the fact that unitary litigation was very expensive in Canada and that even claims of significant amounts were economically hard to pursue on an individual basis.[53] These "individually non-viable claims" were held to be more logically pursued collectively. The argument was that the class action helps overcome the cost and difficulty of organizing individual members (by way of selecting a representative, agreeing to share the expenses and benefits of suing) and made the procedure appear worthwhile economically. Considering claims that were individually viable, the second policy objective was to improve judicial efficiency by avoiding repetitive litigation relating to the same events.[54] The third policy objective, of lesser importance (at least for the Law Commission), assumed that subjecting potential defendants to the risk of a class action will modify their behaviour.[55]

Those three OLRC class action policy objectives were not explicitly incorporated into the test for certification in any of the class proceedings acts throughout Canada, but they eventually served as factors in considering whether a class proceeding is the preferable

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Court Rules, SOR 98-106, online: <http://laws-lois.justice.gc.ca/eng/regulations/SOR-98-106/page-28.html, Rule 334.16ff>.

51. ONTARIO MINISTRY OF THE ATTORNEY GENERAL, Ontario Law Reform Commission, *Report on Class Actions*, Vol. 1 (Toronto: Queen's Printer, 1982), at 5 ["OLRC 1982 Report"].
52. *Ibid*., at 117.
53. *Ibid*. Also see *Vivendi, supra*, note 26, at para. 1 ("This procedural vehicle has several objectives, including facilitating access to justice, modifying harmful behaviour and conserving judicial resources"); *Hollick* v. *Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 15; *Western Canadian Shopping Centres Inc.* v. *Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at paras. 27-29.
54. *Ibid*.
55. *Ibid*.

procedure to resolve the dispute.[56] The Attorney General's Advisory Committee on Class Action Reform, however, relied heavily on the Commission's report a few years later,[57] eventually influencing the enactment of the Ontario C.P.A.[58]

A decade after the OLRC's Report, the Supreme Court of Canada commented on the growing role of class actions in Canadian society and their important purpose.[59] Reiterating the purposes set out by the Commission in 1992, it explained the class action purposes as follows:

> First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times).
>
> Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied.
>
> Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread

56. See *AIC Ltd.* v. *Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949 ("It is also common ground that to assess whether the class action would be preferable to any other alternative method of resolving the class members' claims, the court compares the competing possibilities through the lens of the goals of behaviour modification, judicial economy and access to justice, bearing in mind, of course, that the ultimate question is whether the statutory requirement of preferability has been established."), at para. 16.
57. ONTARIO MINISTRY OF THE ATTORNEY GENERAL, Policy Development Division. Report of the Attorney General's Advisory Committee on Class Action Reform (Toronto: Queen's Printer, February 1990). Also see Michael A. EIZENGA and Emrys DAVIS, "A History of Class Actions: Modern Lessons from Deep Roots", (2011) 7:1 *Can. Class Actions Rev.* 3, at 21.
58. EIZENGA and DAVIS, *Ibid*.
59. *Ibid*., at 22.

> but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation […][60]

In another seminal case forming part of a 2001 class action trilogy,[61] Chief Justice Beverley McLachlin explained the importance of interpreting the legislation generously, in the class action context: "[i]n my view, it is essential […] that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters."[62] Already, the highest court in the country was emphasizing the importance of the class action mechanism and the need to ensure that full effects are given to the Act. A few years later, the Supreme Court of Canada crystallized the idea of access to justice as access to fair outcomes, explaining that access to justice was not "a purely procedural concept", but that it required "access to just results, not simply to process for its own sake".[63]

Recently, the Ontario Divisional Court and Court of Appeal confirmed the need to refer to the recognized goals of class actions, including in the analysis of the certification criteria, and, particularly, in the Court of Appeal's consideration of the representative plaintiff's cross-application for costs.[64] The Court of Appeal endorsed the Divisional Court's view that the courts should not interpret the legislation too restrictively, but that they should instead give effect to the goals and benefits intended by the original drafters of the legislation and consider these goals and benefits at certification.[65]

In a "*Jordan* Era"[66] of constrained and limited resources, is it not fair to argue that the system can in truth *only* harbour those

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60. *Dutton*, *supra*, note 53, at paras. 27-29.
61. See e.g., Supreme Court of Canada trilogy: *Hollick, supra*, note 53; *Dutton*, *supra*, note 53*,* and *Rumley* v. *British Columbia*, 2001 SCC 69.
62. *Hollick*, *ibid*., at para. 15.
63. *Fischer*, *supra*, note 56, at para. 56.
64. *Good* v. *Toronto (Police Services Board)*, 2016 ONCA 250.
65. *Ibid*.
66. In *R.* v. *Jordan*, 2016 SCC 27, the Supreme Court of Canada recently made broad and sweeping changes to the framework that determines whether an accused has been tried within a reasonable time under s. 11(b) of the *Canadian Charter*

actions that serve to benefit the members, and that perhaps it is time to move to a sole-objective system of class actions?

Efficiency was not expressly included in the policy objectives discussed by OLRC, but it was mentioned by the Supreme Court in *Dutton*, and considered relevant, at least implicitly. Recently, in *Endean* v. *British Columbia*, the Supreme Court of Canada held that class proceedings legislation equips superior court judges with broad powers to provide class members with efficient and economic access to justice, including the discretionary ability to engage in hearings outside of their home jurisdiction.[67] In doing so, and following this process, the Court held that a video-link between the home courtroom and the out-of-province courtroom is not required. In fact, for the Court, judicial discretion to sit in another province must "be exercised in the interests of the administration of justice", and three non-exhaustive factors must be considered by the judges, including whether sitting outside of the province will create any impermissible extraterritorial effects, and what the costs and benefits of the proposed out-of-province proceeding might be.[68]

Admittedly, the three policy objectives of class actions are steadily invoked by the courts in Canada, but they have not yet been proven[69] and thereby remain entirely theoretical at this stage. Is access to justice truly enhanced by class actions, and judicial economy provided, when monstrous class actions are instituted and take more than ten years on average to conclude and generate a remedy for the members? Are defendants truly deterred? Have their behaviours changed in light of or as a result of class proceedings? Several academics have pursuasively attempted to demonstrate it:[70]

> […], although there is not a great deal of empirical evidence to support the theory for class actions, there is some, it is uncontroverted, and it is consistent with reams and reams of empirical evidence in favour of deterrence for individual law-

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of Rights and Freedoms. The decision, by a 5-4 majority, has radically altered the way that criminal cases are litigated, particularly for corporate defendants, and it has had an important impact on individual and corporate defendants in other matters, and on the administration of justice in Canada more generally.

67. *Endean* v. *British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162.
68. *Ibid*., para. 74.
69. See *supra*, argument made in Section I of this paper.
70. See Brian T. FITZPATRICK, "Do Class Actions Deter Wrongdoing?", *infra*, at 4.

suits. In short, the conventional view that the class action can be justified by the deterrence rationale alone remains sound[71].

In my view, defendants will feel deterred from acting wrongfully if they believe that acting lawfully will mean they will stay away from being sued and having to pay high costs. They will abide by the law if they feel that this will increase the chances that they will not be sued (and that they will therefore save legal fees and costs). However, in truth, since most class actions are settled or abandoned, and are not tried to the merits, there is no way of filtering those legitimate or illegitimate claims. We just do not know which cases have merits or are meritless. Accordingly, it is hard to say that class actions will have an impact on the way defendants are behaving.

As for compensation, and the accomplishment of the objective of compensating individual members through the class action, our Compensation Project at the University of Montreal's Class Actions Laboratory has served to demonstrate an average rate of compensation of 58% (out of 81 files presenting compensation data over more than 850 cases analyzed in the District of Montreal, Province of Quebec).[72] This rate represents the percentage of those members affected or injured that have received a monetary compensation. Furthermore, our data has shown that in 40% of the cases studied, 75% to 100% of the original class were compensated, if not more.[73] This latter statistic serves to demonstrate that in a great number of cases, the majority – if not totality (or more) – of the class members are receiving *something*. *Alas*, we have found that class actions do serve as a legitimate compensation tool, at least in Quebec.

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71. Fitzpatrick also writes that efficiency is unclear in class actions because "When the claims at issue in a class action are small, as they usually are in the United States, it is unlikely that any litigation efficiency is gained because there would be no individual litigation at all in the absence of the class action." *Ibid*., at 1.
72. See e.g., Catherine PICHÉ, "Quebec Class Actions as Compensation Tools – A Quantitative Portrait" (1996-2016), on file with author.
73. See e.g., Catherine PICHÉ, "Quantitative Portrait of Class Action Activity in Quebec" (1996-2016), on file with author; Catherine PICHÉ, "Quebec Class Actions as Compensation Tools – A Quantitative Portrait", *ibid.*; Catherine PICHÉ, "Class Action Value", (2018) 19:1 *Theo. Inquiries in L*. 261. But see a U.S. Study with contrary conclusions for a sample of all consumer class actions filed in the Northern District of Illinois during 2010-2012 (totaling 510) and Joanna SHEPHERD, "An Empirical Survey of No-Injury Class Actions", Emory University Legal Studies Research Paper No. 16-402, 2016, online: <http://papers.ssrn.com/sol3/papers.cfm?abstractid=2726905> [https://perma.cc/7H9E-E3JF]; Jason Scott JOHNSTON, "High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions under Federal Consumer Protection Statutes", (2017) *Colum. Bus. L. Rev.* 1.

Even if we agree that class actions do serve to compensate at least a significant proportion of the class, we cannot confirm that this compensation is fair and proportional. Indeed, in our project, we found that less than 10% of the files we examined presented data on outcomes of class actions. Meanwhile, some courts have held that the justness and fairness of the substantive outcomes of the class action for class members are what "genuinely matters".[74] In my personal view, the *Fourth Dimension* to class actions – access to a meaningful remedy – involves fair and just outcomes for sure, but also proportionate ones.[75] In addition, I will add that in order to have fair, proportionate and just outcomes in class actions, a greater effort must be made by class counsel and administrators – with enhanced incentives – to predict and anticipate those outcomes, structure collective settlements and claims distributions processes that serve to achieve those positive outcomes, and disclose the process followed and results obtained to the courts. Section III serves to develop this argument further.

III– BETTER ANTICIPATION OF CLASS ACTION OUTCOMES THROUGH ENHANCED TRANSPARENCY FOR GREATER CLASS ACTION LEGITIMACY

The class action system must trigger enhanced incentives for the actors to work towards more positive outcomes. Section III will serve to develop the idea that class action counsel and claims admin-

74. *2038724 Ontario Ltd.* v. *Quizno's Canada Restaurant Corporation*, 2014 ONSC 5812, at para. 37, quoting *Fischer*, *supra*, note 56, at paras. 24-34.

75. Few authors have expressly emphasised the need for just and proportional outcomes, as I have in my doctoral thesis: Catherine PICHÉ, *Fairness in Class Action Settlements*, Toronto, Carswell, 2011, at 204 (on producing quality settlements and respecting the class action objectives in doing so), at 271 (noting that the settlement must provide an accessible, economical, fair claims process), at 272 (fair settlements should respect the proportionality principle – considering costs, time, as compared to expected outcomes and projected compensation to class members), at 277 (recommendation of informed, transparent, economical processes) and at 280 (on need for accounting and reporting outcomes). However, other academics have highlighted fairness and proportionality as proper benchmarks to be applied in the class actions context. *See* John SORABI *et al*. (eds), *Civil Justice Ctr., Improving Access to Justice Through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions*, 2008, 51, online at : <https://www.ucl.ac.uk/laws/judicial-institute/files/Improving_Access_to_Justice_through_Collective_Actions_-_final_report.pdf>, p. 51 ("These three themes – access to justice, proportionality & efficiency, fairness – remain valid benchmarks to be applied when considering the various consultations and approaches to collective action since Lord Woolf.")

istrators must be incentivized to seek to achieve a meaningful benefit to class members. Incentives will be created if they are required to disclose their predictions of distributions at an early stage, and are supervised by the courts in the results they have achieved at the distributions stage. I will focus on the need for transparency here, and further develop the extent of disclosure in Section IV.

For Honourable Chief Justice of Canada Richard Wagner, transparency in the class action context is fundamental for access to justice to be achieved. In the 2016 *Endean* case, he writes, in concurrent reasons in his and Justice Karakatsanis' name, that "a process that is efficient and expeditious, but is "a mystery to those who participate in it […] is not a process that enhances access to justice".[76] But what exactly does transparency involve in mass litigation and class actions? In the opinion of Kenneth Feinberg, who served as Special Master of the U.S. government's September 11th Victim Compensation Fund, transparency is about affording due process, and using "technological ways to give people more of a stake in terms of outreach by letting them know, educating them not only about a settlement but about the conduct of the litigation."[77] I might add here that technologies can help us be more transparent about class actions, and class action outcomes should also be made available to the public through technological means, including class action dockets and/or online registries.[78]

In addition to informing them about class processes, people must also be educated about the outcomes of class actions. Oddly enough, the class action is one of the most "public" types of litigation, but not many members actually know what is going on in the litigation. Proposed class representatives must demonstrate that they are the most adequate persons to litigate in the name of a class of individuals with similar or identical claims, who have not expressly consented to be represented, the whole in the hopes of obtaining a

76. *Endean* v. *British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162.

77. Kenneth FEINBERG, "Transparency and Civil Justice: The Internal and External Value of Sunlight", (2009) 58 *DePaul L. Rev.* 473, at 476. See more largely on transparency: Catherine PICHÉ, « Justice Wide Open : Transparency of the Judicial Process in Modern Technological Courtrooms », in Dominique CUSTOS (dir.), *La transparence, un principe de gouvernance, Actes du XII*e *Congrès de l'Association Internationale de Méthodologie Juridique*, Bruxelles, Bruylant, 2014, at 245ff.

78. See e.g., Catherine PICHÉ, "The Coming Revolution in Class Action Notices: Technology for Enhanced Compensation", Draft paper prepared for Third Workshop on Civil Procedure, Tucson, Arizona, October 6-7, 2017, on file with author.

collective resolution. Courts will appreciate their capacity to litigate in the name of others, and address each certification criteria. Notices will be provided at every stage of the action, as will opportunities to object and to opt-out. Open court hearings will be conducted at all stages, including to approve an eventual settlement. There is complete transparency at all stages of the class action, except at its very end. A "veil of secrecy" in fact falls when the judge approves the settlement agreement, since public reporting of outcomes is only rarely required.[79]

As I, along with other academics like Nicholas M. Pace and William Rubenstein have remarked, shedding light on class actions and on their outcomes is tremendously challenging.[80] I have explained that there is a

> […] general lack of transparency about class action outcomes in the court dockets and files […], which suggests a lack of interest and/or incentives to collect and make available this kind of information […] 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. 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[81].

The lack of transparency in class action outcomes thereby leads to a true "informational blackhole", according to Pace & Rubenstein:

> Ironically, a veil of secrecy can fall over class action litigation the moment the judge signs off on the agreement. The very last entry […] in the court's official case file might simply be the order approving the settlement's terms. Only sporadically do judges require public reporting of how the settlement fund was eventually distributed to class members. In some instances, attorneys on both sides have executed nondisclosure agreements, essentially ending all outside inquiry into the resolution of the class

79. Nicholas PACE and William RUBENSTEIN, "Shedding Light on Outcomes in Class Actions", in Joseph W. DOHERTY, Robert T. REVILLE, Laura ZAKARAS, *Confidentiality, Transparency, and the U.S. Civil Justice System*, 2012, OUP, at 20-21.
80. PICHÉ, *Class Action Value*, *supra*, note 73; PACE and RUBENSTEIN, *ibid*.
81. PICHÉ, *ibid*., at 289.

> action. As a result, *little information is available to the public about how many class members actually received compensation and to what degree*. […] class actions can result in aggregate payments constituting a mere fraction of the compensation fund extolled by the parties at the time of settlement review. By this point, however, the bright light of preapproval scrutiny has been extinguished and only a handful of individuals ever know what ultimately took place. *In short, one of the most transparent and open processes in the civil justice system can collapse into an informational black hole.*[82] [emphasis added]

Troubled by the missing data, Pace and Rubenstein candidly ask:

> How can class members and government officials make informed responses to proposed notice and claiming programs without some sense of the likely distributional outcome? On what basis are judges approving settlements and awarding fees without knowing the most likely results of their orders? Who ultimately benefits from class cases? Can different forms of notice and different types of distributional programs improve claiming rates? If so, which ones? If compensation programs are unlikely to change*, should compensation remain a central feature of class actions or should the deterrent aspects be emphasized instead*? If so, how? […][83]

As stated above in Section I, my view – consistent with Professor Bone's philosophy – is that the class action is legitimate when it serves to provide a meaningful benefit to the class members. With this objective in mind, I believe that we should recognize that courts have an obligation to ensure that class members will have access to a meaningful remedy – even if it is imperfect and provides rough justice (in terms of imperfect compensation). Courts must insist upon transparency of outcomes, and they must do so at two different stages. First, they must require and be provided with information at certification demonstrating the proposed benefit to the members. This information will ensure that members are provided access to a meaningful justice. Second, they must always require and be provided with reports or accountings of distributions to class members at the close of the case, to provide assurance of the accomplishment of the action's main objective of access to a meaningful compensation.

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82. PACE and RUBENSTEIN, *supra*, note 79, at 20.
83. *Ibid*.

Throughout North America, to my knowledge, parties have not been requested or obliged to report back on class distributions, or to provide information earlier on in the case about projected distributions, at certification or otherwise. In the past few years, NYU's Center on Civil Justice has been attempting to make public data currently held privately by claims administrators. Precisely, the Center has been wanting to collect and make available closeout reports to judges who have overseen class actions.[84]

Typically, in the United States, settlement administrators send out notices and process claims without being asked to provide a final accounting of how much money has been sent to class members. Only exceptionally will judges require information about claims rates and disbursements. The United States House of Representatives passed a bill in 2017 calling for class action lawyers to submit an accounting of payouts in every case to the Federal Judicial Center and the Administrative Office of the U.S. Courts.[85] The Judicial Center would then be required to annually compile data on claims rates, total payments to class members, average and median recoveries, and (of course) payments to class counsel.[86] In addition, the bill amends the federal judicial code to prohibit federal courts from certifying class actions unless three prerequisites are met, and notably, that "in a class action seeking monetary relief, the party seeking to maintain the class action demonstrates a reliable and administratively feasible mechanism for the court to determine whether putative class members fall within the class definition and for the distribution of any monetary relief directly to a substantial majority of class members."[87] To this date, the bill has stalled in the Senate and is considered unlikely to become law.

The Canadian province of Quebec brushes a much more positive portrait of data disclosure. Since the adoption of the reformed 2016 Province of Quebec *Code of Civil Procedure* (CCP),[88] and its related court rules, class action distributions must be reported back to the court at the conclusion of every class action case.[89] This requirement

84. For further information, see the Center's website, online: <http://www.law.nyu.edu/centers/civiljustice>.
85. H.R.985 – *Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017*, 115th Congress (2017-2018).
86. *Ibid*.
87. *Ibid*.
88. *Code of Civil Procedure*, S.Q. 2016, c. C-25.01 (Can. Que.).
89. *Règlement de la Cour supérieure du Québec en matière civile* [Rules of the Superior Court of Quebec in Civil Matters], r. 0.2.1, c. C-25.01 (Can. Que.),

was integrated into the Quebec Superior Court rules of practice in early 2016, as a result of judicial training activities I have conducted through the Class Actions Lab, at the University of Montreal, as well as specific recommendations I have made to judges and court administrators in the past few years, advocating the need for a better and more systematic reporting of distributions data.[90]

Transparency in civil justice serves to inform the public, provide an explanation to actions taken and justify these actions, the whole in view of enhancing the level of trust in the judicial institutions, and promoting a greater closeness between citizens and the justice system. It is a value of tremendous importance in democratic societies. If we are to recognize that transparency is key and that we must provide citizens with ways to control and participate in public matters, including class actions, then in practice, the State must recognize that 1) citizens may request to have access to public information (including reports on class distributions, for example), 2) the State has an obligation to generate information and make it available to citizens in manners that allow for broad access (proactive transparency), and 3) citizens are empowered to require that the state comply with its obligations.

Transparency in class actions, at the two critical stages of certification and distributions, will prove to have positive effects on society and to legitimize the class action. Mandatory disclosure of outcomes will incentivize class counsel and claims administrators – even if implicitly – to make greater efforts at the distributions stage, and to ensure that those injured are provided a meaningful benefit. With this enhanced compensation will come additional – or stronger – deterrence of inappropriate behaviour.[91] Access to justice – in the form of compensation – will then evidently have been provided.

Rule 59 (translated by author) (emphasis added):

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

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

90. PICHÉ, *Class Action Value*, *supra*, note 73, at 6-7.
91. See e.g., Russell M. GOLD, "Compensation's Role in Deterrence", (2016) 91 *Notre Dame L. Rev.* 1997.

In the end, it is my perception that if we can utilize the class action properly in a way consistent with the substantive law and with due regard for procedural and substantive fairness to the rights of those absent class members, the procedure will continue to be able to cultivate those fundamental procedural values "by overcoming extremely high transaction costs to the enforcement and implementation of substantive rights".[92] Those members who were originally meant to be served by the action will in fact benefit from it.

IV– TRAVELING IN TIME TO BETTER UNDERSTAND THE FUTURE: REVITALIZING COST-BENEFIT APPROACHES TO CLASS ACTIONS

In the novel *The Time Machine*, published in 1895 by British author H.G. Wells, a scientist invents a machine that lets him travel to different eras, including the future.[93] The past is often consulted in attempts to predict the future, albeit with uncertain conclusions.[94] In this section, I too will seek to time travel, to breathe new life into an older class action objective that has recently been somewhat revived by the Supreme Court of Canada, but yet remains ignored legislatively.

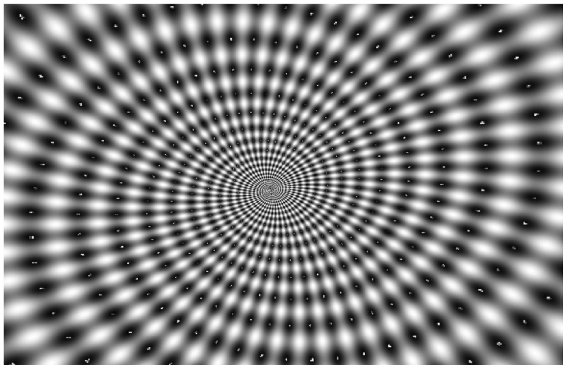

Fig. 1: "Optical Illusion Time Machine" (digital artwork), by Sumit Mehndiratta, 2012[95]

92. 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 457.
93. H.G. WELLS, *The Time Machine*, 1895, William Heinemann.
94. Edward H. COOPER, "The (Cloudy) Future of Class Actions (Symposium: Courts on Trial)", (1998) 40:3 *Ariz. L. Rev.* 923, at 963.
95. Online: <https://fineartamerica.com/featured/optical-illusion-time-machine-sumit-mehndiratta.html>.

Common knowledge links the class action's origins to Medieval England and English group litigation in the Middle Ages, but the reality is that none of the prior forms of group litigation bound absent litigants who lacked a prelitigation substantive legal connection to the named parties.[96] Originally, only those in charge of established groups could represent members in court and bind them. Importantly, until 1873, representative actions existed only in the Court of Chancery, and that court, as a court of equity, only provided certain relief such as an accounting, injunctive relief, or specific performance.[97] The common law courts could award compensatory damages but they did not recognize representative suits. With the *Supreme Court of Judicature Act*, 1873[98] fusing the courts of law and equity, Rule 10 of the Rules of Procedure codified the representative procedure that Chancery had been developing, thereby opening the representative action to common law courts.

Today, class actions are instituted by class representatives often unaware of the action's technicalities, led by entrepreneurial lawyers.[99] In fact, the class action of the new millennium does not resemble its original, distant cousin.

In the face of the veil of secrecy regarding class distributions outcomes, of the lingering complexities of attorney-client-class relationships, of the numerous and ongoing procedural puzzles and class action dilemmas,[100] of the spiralling costs of litigation and presence of external players – notably third-party funders –, of the ethical challenges generally, the *Fourth Dimension* in class litigation relates to the fact that the class action actually serves an additional objective. Indeed, I will argue here that one "lost" objective – an obscure

96. REDISH, *supra*, note 92, at 456-7.
97. YEAZELL, *Medieval*, *supra*, note 28. Also see more generally, Zechariah CHAFEE Jr., *Some Problems of Equity*, 1950, 200-201.
98. 36 & 37 Vict., c. 66 (UK).
99. See e.g., John C. COFFEE, Jr., "The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action", (1987) 54 *U. Chi. L. Rev.* 877; J.C. COFFEE, Jr., "Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions", (1986) 86 *Colum. L. Rev.* 669; J.C. COFFEE, Jr., "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working", (1983) 42 *Md. L. Rev.* 215; Jonathan R. MACEY and Geoffrey P. MILLER, "The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform", (1991) 58 *U. Chi. L. Rev*. 1.
100. See e.g., Catherine PICHÉ, « L'emprise des cinq doigts de Frankenstein », (2016) 2 *RIDC* 291.

dimension – of class litigation is the cost-benefit analysis, which requires that class settlement terms be monitored and compared to alternatives in a broader context. Precisely, my view is that until the big three original class action justifications are proven, we need to subject class actions to a fourth "justification", pursuant to which the costs and benefits of class litigation are weighed by the courts both at certification and at settlement approval.

Certain criteria help inform whether the class action is the most suitable way to proceed judicially. Under U.S. Rule 23(b)(3), the court must find that a class action is superior to "other available methods for the fair and efficient adjudication of the controversy." Except for Quebec's 4-criteria test for authorization under the *Code of Civil Procedure*, class action legislation in Canada includes a requirement that the action be "preferable" to other procedural alternatives in order to be certified.[101] In practice, courts often consider whether the adverse effects of the action on the class members, the court or the public outweigh its benefits. Whether merits-based or cost-benefit considerations must be included at certification is controversial,[102] at least in Canada.

In June 1982, Attorney General Roy McMurtry announced to the Ontario legislature the issuance, by the OLRC, of its 900 pages Report on Class Actions, after six years of deliberation. The Report, widely recognized as one of the most comprehensive treatments of the subject, addressed almost every aspect of class actions in exhaustive detail. Interestingly, the Commission made several controversial recommendations in it, including a recommendation that another part of the onerous certification test involve a "cost-benefit" test, distinct from the "superiority" test:

> Another part of the onerous certification test would involve a "cost-benefit" test, which would be different from the "superiority" test (also a requirement); this would allow the court to embark on a wide-ranging enquiry into whether the impact of the litigation on the administration of justice would be outweighed by the compensatory or deterrent value of the suit […][103]

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101. See e.g., Ont. C.P.A., s. 5(1)(d).
102. See Rachael MULHERON, *The Class Action in Common Law Legal Systems – A Comparative Perspective*, Portland, OR, Hart Pub., 2004, at 143.
103. OLRC 1982 Report, *supra*, note 51, at 411-417.

Over the years since, access to justice has become the greatest challenge facing the Canadian (and perhaps North American) legal system. Physical access to the courts often is not sufficient to ensure true access to justice. Access is sufficient only if it ensures that citizens will obtain appropriate remedies. Accordingly, the law must provide individuals with "meaningful access to independent courts", capable of granting "appropriate and effective remedies".[104] In the class action context, meaningful access has been interpreted as access to an appropriate and effective remedy.

In the cornerstone decision of *AIC Limited* v. *Fischer*, the Supreme Court of Canada set out a new approach for the certification of class actions, applying the preferable procedure test for certification of class actions to a case in which the Ontario Securities Commission reached a settlement with mutual fund managers about the controversial practice of market timing.[105] The Court thereby revisited the cost-benefit test envisaged by the OLRC. The issue at stake was whether certification should be denied due to results already obtained (i.e., a significant sum paid over) in a non-litigation proceeding before the OSC, by virtue of a settlement agreement.[106] In that case, Cromwell J. emphasized the need to look at "non-litigation alternatives", because "court procedures do not necessarily set the gold standard for fair and effective dispute resolution processes".[107] He further noted the need for a rigorous analysis of their process and substance:

> There is no doubt that access to justice is an important goal of class proceedings. But *what is access to justice in this context? It has two dimensions, which are interconnected.* One focuses on process and is concerned with whether the claimants have access to a fair process to resolve their claims. *The other focuses on substance — the results to be obtained — and is concerned with whether the claimants will receive a just and effective remedy for their claims if established.* They are interconnected because in many cases defects of process will raise doubts as to

104. Also see *R.* v. *Domm* (1996), 111 C.C.C. (3d) 449, 455 ("individuals must be provided with meaningful access to independent courts with the power to enforce the law by granting remedies to those individuals whose rights have been violated.").
105. *Fischer*, *supra*, note 56.
106. *Ibid.*, at para. 17.
107. *Ibid*., at paras. 20 and 37.

> the substantive outcome and defects of substance may point to concerns with the process[108]. [emphasis added]

Regarding procedure, Cromwell considered that significant procedural access to justice concerns existed, given the regulatory nature of and the limited participation rights for investors in the OSC proceedings, as well as the absence of information about how the OSC assessed investor compensation.[109] As for substance, the Court noted the expert evidence to the effect that only a fraction of the sums claimed by the plaintiffs had been secured through the regulatory process. Applying an explicit cost-benefit analysis of class proceedings at the preferability analysis, the Court concluded that it had been convinced that "the class action proceeding would overcome access to justice barriers that subsisted after the completion of the OSC proceedings and that a cost-benefit analysis supported the conclusion that the class proceedings were the preferable proceeding for the investors to pursue their claims."[110]

Fischer arguably opened the door to some degree of inquiry into the merits of the case at certification, thereby contradicting the Supreme Court's reasoning in *Hollick* that this stage is "decidedly" not meant to be a test of the merits of the action.[111] Courts around the country appear to have followed suit and expressly included a cost-benefit analysis at certification.[112] Only rarely do they sepa-

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108. *Ibid*., at para. 24.
109. *Ibid*., at para. 55.
110. *Ibid*., at para. 61.
111. *Hollick*, *supra*, note 53, para. 16 ("the certification stage is decidedly not meant to be a test of the merits of the action"). See *Fischer*, *ibid*., at para. 21: "In order to determine whether a class proceeding would be the preferable procedure for the 'resolution of the common issues', those common issues must be considered in the context of the action as a whole and 'must take into account the importance of the common issues in relation to the claims as a whole': *Hollick*, at para. 30. McLachlin C.J. in *Hollick* accepted the words of a commentator to the effect that in comparing possible alternatives with the proposed class proceeding, 'it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court'. The Court in *Fischer, ibid.,* later explains that "The certification application, and particularly the preferability aspect of it, is not an appropriate point in the proceedings to engage in any in-depth analysis of either the merits of the plaintiffs' claims or the likely quantum of recovery." *Fischer*, *ibid*., at para. 64.
112. Lower courts have applied cost-benefit considerations at certification: *LBP Holdings Ltd.* v. *Hycroft Mining Corporation*, 2017 ONSC 6342 (CanLII), at para. 81 ("A costs benefits analysis indicates that little benefit is added by subjecting the individual claims to the procedure of a class action."); *Paradis*

rate the approach weighing the class action against other procedural alternatives from the costs-benefit test considering the litigant's interests – the "not worth it" test.[113] Accordingly, with the advent of *Fischer*, a consideration of whether the likely costs to the defendants and to the judicial system at large are "worth" the likely benefits to class members deriving from certification is warranted. While related, this cost-benefit approach is distinct from the certification judge's obligation to consider proportionality (at least in Quebec), that is, the balance between litigants, the good faith of the parties, costs of procedure, outcomes, etc. — when assessing whether the representative is adequate, and whether there are enough members with personal causes of action against each defendant.[114] As Professor Rachael Mulheron rightly explains, "[…] certain principles which were previously espoused as class action objectives, namely, proportionality and not perfection, the goal of judicial economy, and

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Honey Ltd. v. *Canada*, 2017 FC 199 (CanLII), para. 96; *R.G.* v. *The Hospital for Sick Children*, 2017 ONSC 6545 (CanLII), at para. 168 ("In the case at bar, in my opinion, the circumstance that complex individual issues are inevitable takes the case into the territory where the individual issues would completely overwhelm the common issues and make the case unmanageable. [58] A costs benefits analysis indicates that little benefit is added by subjecting the individual claims to the delay of a class action's common issues trial. This harsh truth also reveals that the current class actions regime is not a panacea for all access to justice barriers."); *Finkel* v. *Coast Capital Savings Credit Union*, 2017 BCCA 361 (CanLII) (BC Court of Appeal), at para. 25; *Warner* v. *Smith & Nephew Inc*, 2016 ABCA 223 (CanLII) (Alberta C.A.), at para. 108 ("[…] the class proceeding is not a universal panacea."); *Coffin* v. *Atlantic Power Corp*., 2015 ONSC 3686 (CanLII), at para. 145; *Canada (Royal Mounted Police)* v. *Canada (Attorney General)*, 2015 FC 1372 (CanLII) (Fed. Court of Canada), at 54 ("I have adopted a practical cost-benefit approach to this procedural issue, and considered the impact of a class proceeding on class members, the defendant, and the Court, looking at all reasonably available means of resolving the claims."); *Marshall* v. *United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050 (CanLII) at para. 230; aff'd 2015 BCCA 252 (CanLII); leave to appeal dismissed [2015] S.C.C.A. No. 326 (S.C.C.). Also see: *Jeffrey* v. *Nortel Networks*, 2007 BCSC 69 (CanLII), para. 28 (applying a cost-benefit analysis at settlement approval); *Tiemstra* v. *Insurance Corp. of British Columbia* (1997), 1997 CanLII 4094 (BC C.A.), 38 B.C.L.R. (3d) 377 (C.A.) ("[10] Where does that leave the individual claimants? I am bound to say that they would not be much better off than at present; they would still have to press their separate claims against a reluctant insurer. Under the plan of action proposed in the certification application the members of a class would still face the same cost-benefit analysis that deterred them in the first place: will it be worth the trouble and expense?").

113. MULHERON, *supra*, note 102, at 143.

114. *Bank of Montreal* v. *Marcotte,* 2014 SCC 55, [2014] 2 S.C.R. 725, at para. 45. Also see, para. 47 ("This Court's flexible approach to authorization in *Infineon* and *Vivendi* supports a proportional approach to class action standing that economizes judicial resources and enhances access to justice.").

the concept of judicial activism, management and control […], tend to warrant the express inclusion of a cost-benefit analysis as a commencement criterion for class proceedings."[115]

The U.S. view regarding merits-based and costs-benefit approaches at certification has been much more restrictive. The U.S. Civil Advisory Committee's initial proposal to encourage judges to consider cost-benefits of class litigation at certification was rejected by the authors of the quintessential RAND Class Action Report.[116] For the Report's authors, encouraging judges to deny certification when believed that the possible benefits of class action litigation are not "worth" the likely costs is problematic, because it is such a subjective decision:

> […] depending on what one believes are the appropriate benefits to consider—a substantive decision—and depending on what features of the class action claims one focuses on, any one of the class action lawsuits we studied might or might not pass a "just ain't worth it" test. […]
>
> […] once one moves beyond the rhetoric surrounding these class action lawsuits to a close analysis of their facts, which cases "just ain't worth it" and which are becomes a lot less distinguishable. Without adjudication of the legal merits—not part of the certification decision under current law—we do not think it is at all certain that we could depend on judges who have different social attitudes and beliefs to arrive at the same assessment of the likely costs and benefits of lawsuits such as these.[117]

Deciding which benefits to consider might indeed be difficult and extremely subjective and variable, from one case to another. However, my impression is that the cost-benefit analysis, akin to – but still distinct from – a proportionality test, directly serves our civil justice system in providing a reality check and close boundaries to often careless entrepreneurial lawyers. Similar to proportionality

115. MULHERON, *supra*, note 102, at 143.
116. RAND Class Action Report, *supra*, note 8 ("The effort to amend Rule 23 to include a cost-benefit test for certification foundered on disagreement about the social value of class actions, particularly lawsuits involving small losses to class members. But the committee also stumbled over the difficulty of crafting language that would provide clear guidance to trial court judges on how to implement such a test.").
117. RAND Class Action Report, *supra*, note 8, at 473-4.

tests in procedural law, cost-benefit approaches in this context are admittedly difficult to define and apply.[118] They are a matter of good administration of justice, of good practices, of common sense, of reasonableness, of practicality. In a class action system such as ours, where abuses are commonplace, delays systematically unreasonable, and costs skyrocketing, proportionality and costs-benefit tests are necessary for managerial judges with experience in class actions, and not only at certification, but also at settlement approval.[119]

CONCLUSION

The Fourth Dimension to class actions mandates that we consider whether a meaningful benefit was provided to the class members. At certification, courts will need to anticipate what benefit will be provided to the members by the class action, using a costs-benefit approach that includes a wide-ranging enquiry into whether the impact of the litigation on the administration of justice might be outweighed by the compensatory or deterrent value of the action. Transparency will be critical at this preliminary stage, and will continue to be critical until the end of the proceedings, in order to ensure class action legitimacy.

118. See e.g., Catherine PICHÉ, "Figures, Spaces and Procedural Proportionality", (2012) 1 *Int'l J. Proced. L.* 145.
119. See e.g., PICHÉ, *supra*, note 75, at 264ff. (proposing a new test of settlement fairness).