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PUBLIC FINANCIERS AS OVERSEERS OF CLASS PROCEEDINGS

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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? And if we must prefer public financing above private forms of financial assistance, how must we ideally conceive such a public system?

In the past few decades, the volume of class action litigation has steadily risen around the world, such that significant amounts of capital are required to prosecute these actions, provide access to justice, and reduce the funding gap between plaintiffs and defendants. The funding issue is thus fundamental. However, it also threatens some of the core values of our system such as client confidentiality and the preservation of attorney–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 either of the two existing public funds. While third-party litigation funding (TPLF) remains somewhat controversial, its existence is publicly acknowledged, and TPLF agreements have been judicially approved in some jurisdictions like Canada. 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, and argues that financing class actions publicly through assistance by entities such as the Canadian province of Quebec's *Fonds d'aide aux recours collectifs* (the assistance fund for class action lawsuits; the *Fonds*) is a most appropriate and effective way to finance class action litigation, 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 serve as a model for reform of other legal systems. I argue that for the objectives and pub-

1. 3 Jeremy Bentham, The Works of Jeremy Bentham 19 (1843).

lic policy purposes of class actions to be fulfilled, successful cases must be used to help finance unsuccessful ones. 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 assist class plaintiffs in a neutral manner helps provide access to worthwhile cases. As such, the very structure and functioning of Quebec's public class action assistance fund immunizes it from potential conflicts of interest and solves the risk of agency cost in representative actions.

I.
Contextualizing the Argument: The Conversion Charges Class Action

In 2014, the Canadian financial industry saw the end of three gargantuan class proceedings involving millions of class members suing nine Quebec financial institutions 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—twenty-five dollars per class member—for failing to disclose the conversion charges. 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 thirty-four days, constitutional arguments were made, hundreds of exhibits were filed, and collective recovery eventually was ordered for more than $184 million, in addition to punitive damages and interest, for a total

2. *See* Bank of Montreal v. Marcotte, [2014] 2 S.C.R. 725 (Can.); Amex Bank of Canada v. Adams, [2014] 2 S.C.R 787 (Can.); Marcotte v. Fédération des Caisses Desjardins du Québec, [2014] 2 S.C.R. 805 (Can.). Precisely, these fees should have been included in the credit rates and should not have been disclosed in variable credit conventions.

condemnation of roughly $300 million.[3] The final value of recovery was revised after the appeal at the Court of Appeal and the Supreme Court of Canada at some $56 million.[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 of 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 approved the agreement, highlighting 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] 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 plaintiffs 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 plaintiffs firms in financing class litigation and contextualizes the issue of class financing. It highlights the fact that many of the larger, more significant class proceedings in Canada and Quebec would not be feasible without external financing. Furthermore, it 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 class action financing process by approving the agreements entered into with financiers. Finally, it

3. Marcotte c. Banque de Montréal, 2015 QCCS 1915, para. 22 (Can.).
4. *Id.* at para. 35.
5. *Id.* at para. 11–12.
6. *Id.* at para. 48.
7. *Id.* at para. 42, 50.
8. *See infra* notes 22–28 and accompanying text.

highlights the importance of the *Fonds*, which helped to finance an important class action that would eventually make law, even if minimally.[9] Thus, one idea I further develop below is that leadership in assistance means financing cases that will ultimately serve to develop the law. The *Marcotte* case is one such case of tremendous importance and meaning in Canadian law: it is a pioneer case in the area of litigation funding!

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 also 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, thereby constituting a significant cost exposure to the representative plaintiff and a 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]—as certification costs awards are capped in Quebec. In Ontario and the rest of Canada, a trend of more predictable, and potentially lower,

9. *See* Marcotte c. Banque de Montréal, 2015 QCCS 1915 (Can.). The *Fonds* paid $172,837 in lawyer fees and another $112,064 in various expenses. *Id.* at para. 51.

10. Ontario Class Proceedings Act, S.O. 1992, c. 6, § 31 (Can.).

11. Article 579 (1) 6) Code of Civil Procedure, C.Q.L.R., c. C-25.01 [hereinafter New Code] (This article's subsection (1) 6) provides that the notice published or notified to class members should state "that no class members other than the representative plaintiff or an intervenor may be required to pay legal costs arising from the class action"); *see also* Desgagné c. Québec, 2010 QCCS 4838, para. 567 (Can.).

12. *See e.g.*, Buonamici c. Blockbuster Canada Co., 2007 QCCA 468, para. 25-29 (Can.); A.P.A. v. Canadian Honda Motors Ltd., [1980] R.P. 331, EYB 1980 137554 (Protonotary Mercier), confirmed by J.E. 81-1019 (C.S.), EYB 1981-138919 (Justice Pheland) (where the court limited the amount of costs payable to $253 instead of $650–675 stating that the estimated value of the litigation is undeterminable pursuant to the costs tariff regulation).

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]

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–2010*,[16] a report commissioned by the U.K.

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13. Rosen v. BMO Nesbitt Burns Inc., 2013 ONSC 6356, para. 1 (Can.); *see also* Crisante v. DePuy Orthopaedics, 2013 ONSC 6351 (Can.); Dugal v. Manulife Financial, 2013 ONSC 6354 (Can.); Brown v. Canada (Att'y Gen.), 2013 ONSC 6887 (Can.); Sankar v. Bell Mobility, 2013 ONSC 6886 (Can.). In these decisions, Belobaba recommended 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. The Trustees of the Drywall Acoustic Lathing & Insulation Local 675 Pension Fund v. SNC Group Inc., 2013 ONSC 7122, para. 18 (Can.).

14. In Quebec, the class action proponent representative may apply for assistance as provided under An Act Respecting the Fonds D'aide Aux Actions Collectives, R.S.Q., c. R-2.1 (Can.). I will study the procedure below. *See infra* notes 93–102 and accompanying text. 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. Law Society Act, R.S.O. 1990, c. L.8, § 59.4(1) (Can.). 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). *Id.* § 59.4(2). However, a defendant who is entitled to make an application may not recover any part of the costs award from the plaintiff. *Id.* § 59.4(3); *see also* Garland v. Consumers' Gas Co., [2004] 1 S.C.R. 629 (Can.).

15. Fehr v. Sun Life Assurance Co. of Canada, 2012 ONSC 2715, para. 53 (Can.).

16. Rupert Jackson, Review of Civil Litigation Costs: Final Report 117–125, 464 (2010).

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 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 economic 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

17. *Id.*

18. *See, e.g.*, Deborah R. Hensler, *Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?*, 63 DEPAUL L. REV. 499 (2014) [hereinafter Hensler, *Third-Party Financing*]; Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306 (2011) [hereinafter Hensler, *Future of Mass Litigation*]; Deborah R. Hensler, *Financing Civil Litigation: The US Perspective*, *in* NEW TRENDS IN FINANCING CIVIL LITIGATION IN EUROPE: A LEGAL, EMPIRICAL, AND ECONOMIC ANALYSIS 149 (Mark Tuil & Louis Visscher eds., 2010); JOHN BEISNER ET AL., U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES (2009); *see also* David Collins, *Public Funding of Class Actions and the Experience with English Group Proceedings*, 31 MANITOBA L.J. 211 (2005); Michael 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*, 30 CIV. JUST. Q. 52 (2011); NAT'L ASS'N OF MUT. INS. COS., THIRD-PARTY LITIGATION FUNDING: TIPPING THE SCALES OF JUSTICE FOR PROFIT (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*, 3 CONCURRENCES J. 13 (2014) (Can.); Jasminka Kalajdzic et al., *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 AM. J. COMP. L. 93, 113 (2013).

20. *See, e.g.*, Hensler, *Future of Mass Litigation*, *supra* note 18; Kalajdzic, *supra* note 19; 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 United States 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." Hensler, *Third-Party Financing*, *supra* note 18, at 500.

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 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 cham-

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22. Buday v. Locator of Missing Heirs Inc. (1993), 16 O.R. 3d 257, 262–63 (Can. Ont. C.A.) (quoting 9 HALSBURY'S LAW OF ENGLAND, at para. 400 (4th ed. 1974)); *see also* Sarah Northway, *Non-Traditional Class Action Financing and Traditional Rules of Ethics: Time for a Compromise*, 14 GEO. J. LEGAL ETHICS 241, 243 (2000).

23. Fehr v. Sun Life Assurance Co. of Canada, 2012 ONSC 2715, para. 73 (Can.).

24. Piché, *supra* note 19, at 17–18; H. Patrick Glenn, *The Irrelevance of Costs Rules to Litigation Rates: The Experience of Quebec and Common Law Canada*, *in* COST AND FEE ALLOCATION IN CIVIL PROCEDURE: A COMPARATIVE STUDY 99, 104 (Mathias Reimann ed., 2012) [hereinafter Glenn, *Irrelevance of Costs Rules*]; *see also* H. Patrick Glenn, *L'echo double du champart: y a-t-il des tracegls en droit civil Québécois?*, *in* MÉLANGES JEAN PINEAU 713, 713–14 (Benoît Moore ed., 2003) (Can.).

25. Glenn, *Irrelevance of Costs Rules*, *supra* note 24, at 106.

26. McIntyre Estate v. Ontario (Att'y Gen.) (2002), 61 O.R. 3d 257, 268 (Can. Ont. C.A.).

perty 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 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 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 Quebec and in the other common law Canadian provinces have approved TPLF agreements that are dis-

27. Poonam Puri, *Financing of Litigation by Third Party Investors: A Share of Justice?*, 36 Osgoode Hall L.J. 515, 528–30 (1998); Piché, *supra* note 19, at 17.

28. Kaladjzic, *supra* note 19, at 119.

29. See, for example, Nantais v. Telectronics Proprietary (Canada) Ltd., [1996] O.J. No. 5386 (Can. Ont. Gen. Div.) (QL), where the representative loaned money to the class counsel on a contingency basis.

30. *See, e.g.*, Poulin v. Ford Motor Co. of Canada Ltd., [2007] O.J. No. 4988 (Can. Ont. Sup. Ct. J.) (QL).

closed 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.[33]

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 Action Pioneer in Canada

Quebec's class action provisions in the newly-reformed *Code of Civil Procedure* (C.C.P.),[34] similar to other legislation adopted throughout Canada[35] and United States Rule 23 of the *Federal Rules of Civil Procedure,*[36] 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

31. *See, e.g.*, Marcotte v. Fédération des Caisses Desjardins du Québec, [2014] 2 S.C.R. 805 (Can.); Bank of Montreal v. Marcotte, [2014] 2 S.C.R. 725 (Can.); Stanway v. Wyeth Canada Inc., 2014 BCSC 931 (Can.); Dugal v. Manulife Financial Corp., 2011 ONSC 1785, para. 33 (Can.).

32. Fehr v. Sun Life Assurance Co. of Canada, 2012 ONSC 2715, para. 89–90 (Can.) ("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. Marcotte c. Banque de Montréal, 2015 QCCS 1915, para. 22 (Can.).

34. Code of Civil Procedure, C.Q.L.R., c. C-25.01, §§ 571–604 (Can.). The New Code has come into force on January 1, 2016 and seeks to make the civil justice system more accessible, while protecting the rights of all parties to state their claims before a court.

35. *See, e.g.*, Ontario Class Proceedings Act, S.O. 1992, c. 6, § 2(1) (Can.); British Columbia Class Proceedings Act, R.S.B.C. 1996, c. 50, § 2(1) (Can.).

36. Fed. R. Civ. P. 23.

class.[37] Quebec, a civilian jurisdiction, was the first province to introduce class action legislation in 1978.[38] 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."[39] 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."[40] Importantly, preoccupied by the accessibility of the class action as a procedural tool for litigants regardless of their resources,[41] the Quebec legislature established a governmental agency for the distribution of public funds to potential class action representatives: the *Fonds*.[42]

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37. Statutory authority for class action proceedings in Quebec was codified in the Code of Civil Procedure, R.S.Q., c. C-25, §§ 999–1052 (Can.), and in An Act Respecting the Class Action, R.S.Q., c. R-2.1 (Can.), which have been replaced by the New Code in sections 571 to 604. In particular, see section 571.

38. An Act Respecting the Class Action, S.Q. 1978, c. 8 (Can.) [hereinafter ARCA], *enacting* Code of Civil Procedure, R.S.Q., c. C-25, §§ 999–1052 (Can.). For a further discussion of the history of the Canadian class action, see SHAUN FINN, CLASS ACTIONS IN QUEBEC: NOTES FOR NON-RESIDENTS (2014); Andrew Borrell, *The Evolving Evidentiary Standard for Certification in Canada*, 26 CLASS ACTION REP. 1, 3 (2005); Garry D. Watson, *Class Actions: The Canadian Experience*, 11 DUKE J. COMP. & INT'L L. 269 (2001); W.A. Bogart, *Questioning Litigation's Role–Courts and Class Actions in Canada*, 62 IND. L.J. 665 (1987); Neil J. 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). See generally CATHERINE PICHÉ, FAIRNESS IN CLASS ACTION SETTLEMENTS (2012), for a discussion on the Canadian class action settlement law.

39. Catherine Piché, *The Cultural Analysis of Class Action Law*, 2 J. CIV. L. STUD. 101, 118 (2009); *see also* Pierre-Claude Lafond, *Le recours collectif : entre la commodité procédurale et la justice sociale*, 29 REVUE DE DROIT L'UNIVERSITÉ DE SHERBROOKE [R.D.U.S.] 3, 24 (1998) (Can.) (explaining how the procedure was adopted at a time of great social change).

40. Piché, *supra* note 39, at 117–18.

41. Yves Lauzon, *Le recours collectif Québécois: description et bilan*, 9 CAN. BUS. L.J. 324, 335 (1984) (Can.).

42. The Fonds has become the "Fonds d'aide aux actions collectives" with the New Code, and as per the *Act Respecting the Fonds d'aide aux Actions*

In the rest of Canada, class action reform followed in 1982, with the publication of the Ontario Law Reform Commission Report on Class Actions.[43] The impetus for modern class action legislation in Canada effectively arose out of the recognition by the Supreme Court of Canada in *Naken* 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.[44] Since then, all of the Canadian provinces except one (Prince Edward Island) gradually enacted class proceedings statutes[45] The legislative schemes adopted across Canada drew on United States rules and class action experience, but with a more liberal approach to certification. In 2001, a trilogy of Supreme Court of Canada class action cases officially recognized the critical importance of class actions in Canada.[46] In another Supreme Court of Canada trilogy of class action cases, issued in 2013, Canada's highest court has made it clear that the more stringent evidentiary approach as endorsed in the United States Supreme Court in *Wal-Mart v. Dukes*[47] has little application to Canadian class actions.[48] As such, the long-awaited class certification rulings realigned the ground rules for the certification of consumer class actions in Canada.

Importantly, the Supreme Court of Canada outlined the three important advantages class proceedings have over a multiplicity of individual suits.[49] First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Sec-

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Collectives, chapter F-3.2.0.1.1, sanctioned on April 1, 2016. *See* Piché, *supra* note 19.

43. ONTARIO LAW REFORM COMM'N, MINISTRY OF THE ATT'Y GENERAL, REPORT ON CLASS ACTIONS (1982) (Can.).

44. G.M. (Canada) v. Naken, [1983] 1 S.C.R. 72, 105 (Can.).

45. *See, e.g.*, Class Proceedings Act, S.O. 1992, c 6 (Can.); Class Proceedings Act, R.S.B.C. 1996, c 50 (Can.).

46. Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534 (Can.); Hollick v. Toronto (City), [2001] 3 S.C.R. 158 (Can.); Rumley v. British Columbia, [2001] 3 S.C.R. 184 (Can.).

47. 131 S. Ct. 2541 (2011).

48. Infineon Technologies AG v. Option consommateurs, [2013] 3 S.C.R. 600 (Can.); Sun-Rype Products Ltd. v. Archer Daniels Midland Company, [2013] 3 S.C.R. 545 (Can.); Pro-Sys Consultants Ltd. v. Microsoft Corporation, [2013] 3 S.C.R. 477 (Can.).

49. *Western Canadian*, 2 S.C.R 534, para. 27–29.

ond, 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.[50] Unfortunately, it is difficult to confirm whether these objectives are being met one way or another, due to the dearth of empirical work in this area in Canada.[51]

Class actions are provincial in Canada and thus very few cases are ever initiated and heard in 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.[52] Article 575 of C.C.P. sets out four criteria by

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50. *See id. See also* Fehr v. Sun Life Assurance Co. of Canada, [2012] O.J. No. 2029 (Ont. Super. Ct. J.) [*Fehr*], 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.

51. I have attempted to provide empirical data in the area of class actions with my doctoral work on class action settlements: see PICHÉ, supra note 38; 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 collecting data on Quebec class action take-up rates.

52. New Code § 574.

which a judge is to assess whether the class should be authorized.[53] Pursuant to Article 576 of 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 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 to co-ordinate informally to achieve judicial economy.[54]

IV.
Comparison of the Canadian and American Class Action Systems

Key distinctions exist between the Canadian and American class action regimes, which I outline below to better contextualize the North American class action and clarify the strategic choices that need to be considered when designing a class action system.

Class action procedures have been implemented by the great majority of the Canadian provinces and territories,

53. 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.

54. There are nonetheless three Canadian protocols that address multijurisdictional 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 United States Multi-District Litigation.

through their specific rules and legislation, and in the Federal Court of Canada, by amendment to its rules of practice.[55] While the substantive and procedural class action laws are similar among the nine common law provinces and three common law territories, and even in the principally civil law province of Quebec, the details of the certification tests differ within the jurisdictions. The five general criteria that must be met are the following: the pleadings must disclose a cause of action, there must be an identifiable class, the proposed representative must be appropriate, there must be common issues, and the class action must be the preferable procedure.[56] The "preferability" requirement is one great example of the differences between the Canadian jurisdictions' class action laws. In Quebec, there is no specific mention of preferability. There is, however, an express requirement that the action raise identical, similar, or related questions of law and fact, and that the composition of the group makes joinder difficult or impracticable.[57]

The test for certification of class actions in Canada is lower than in the United States. Canadian courts may certify an action even if there is one common material issue that will move the proceeding forward. In this way, some of the important restrictions to certification found under the United States *Federal Rules of Civil Procedure* do not have equivalents in Canadian law. For example, in Ontario there is no requirement that common issues of fact or law predominate over individual issues. In addition, Canadian law does not rigorously apply the concept of typicality. Furthermore, 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 ones. Proportionality considerations are nonetheless relevant at certification.[58] Further, as I have mentioned, Canadian courts (excluding those of Quebec) consider the preferability of a class action for certification—in particular, whether the proposed action will promote

55. Bogart, *supra* note 38, at 684–700.
56. *See* Class Proceedings Act, S.O. 1992, c. 6, s. 5 (Can.).
57. New Code § 575.
58. Vivendi Canada Inc. v. Dell'Aniello, [2014] 1 S.C.R. 3, para. 67–68.

access to justice, judicial economy and behaviour modification.

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."[59] 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).[60] Indeed, a single common question is enough to justify a class action if it provides a "not insignificant" benefit to all of the class members.

There are enormous differences between the provinces in the rules concerning the payment of legal costs by unsuccessful class action litigants. The reality 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 nonetheless remains, to this date, insufficient to finance all worthwhile class action cases, even in Quebec. I will further discuss the *Fonds'* assistance below.

By way of comparison, 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."[61] As far as TPLF is concerned, there appear to be three main models in the United States: loans made to lawyers or law firms, nonrecourse loans that benefit plaintiffs directly, and investment in complex and commercial actions.[62] While the country has had a

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59. Infineon Technologies AG, [2013] 3 S.C.R. 600 (Can.); *See also* 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"* 68 SUP. CT. L. REV. 77, 110 (2015).

60. *Id. Infineon*, 3 S.C.R. 600, R72

61. Janet Cooper Alexander, "An Introduction to Class Action Procedure in the United States," Presented Conference: Debates over Group Litigation in Comparative Perspective, Geneva, Switzerland, (July 21–22, 2000).

62. Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273 (2012); Maya Steinitz, *Whose Claim is this Anyway?: Third Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011); Steven Garber, *Alternative Litigation Financing in the United States*, RAND INSTITUTE OCCASIONAL PAPER, 13, 23 (2010); John Beisner et al., *Selling Lawsuits, Buying*

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* would face resistance in the United States. Essentially, there could be a cultural problem here: Quebec's public fund is socially-focused and seeks to promote recovery and access to justice over and above any material objectives. By way of comparison, the American TPLF actors are funders that exclusively finance litigation and primarily seek to raise capital. Interesting litigation oversight models with mostly altruistic objectives have nonetheless been forcefully argued for by academics: the guardianship model,[63] the financier monitor model,[64] and more recently, the public agency oversight model.[65]

All in all, the Quebec class action has evolved into an innovative procedure that allows class members to be indemnified for a wide variety of harms.[66] The specificity and uniqueness of this procedural tool is, in part, the possibility of assistance in financing class litigation through a public entity called the *Fonds*.

V.
Funding One Third of All Quebec Class Action Cases[67]: Who is the *Fonds d'aide aux recours collectifs?*

A. *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

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Trouble: TPLF in the United States, U.S. Chamber Institute for Legal Reform (Oct. 2009).

63. Northway, *supra* note 22, at 257.

64. Burch, *supra* note 62, at 1276–77 ("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").

65. John C. Coffee, Jr., Entrepreneurial Litigation: Its Rise, Fall, and Future (2015).

66. Piché, *Cultural Analysis*, *supra* note 39, at 102–103, 137–38; Shaun Finn, *In a Class All Its Own: The Advent of the Modern Class Action and Its Changing Legal and Social Mission*, 2 Can. Class Action Rev. 333 (2005).

67. Fonds d'Aide aux Recours Collectifs, Rapport Annuel 2013–2014, at 13 (June 2014), http://www.farc.justice.gouv.qc.ca/doc/RapportAnnuel2013-2014.pdf (In its 2013–2014 report, the Fonds acknowledged that it had financed 35% of all 453 active class action cases).

meaningfully addressed the issue and true challenge of litigation funding in Canada, with Quebec having the more ambitious and successful approach.[68] The existence of the *Fonds,* a legal person established in the public interest,[69] 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.[70] 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 Quebec annually audits the *Fonds'* books and accounts.[71] The object and mandate of the *Fonds* is to ensure the financing of class actions in the first instance or on appeal and to disseminate information respecting the exercise of such actions.[72]

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.[73] 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.[74] As I will discuss in further detail below, the *Fonds* can assist

68. For a discussion of the problems with the Ontario Fund, see Garry D. Watson, Address at the Osgoode Hall Law School of York University Annual National Class Actions Symposium: Fee Shifting in Ontario Class Actions and the Failure of Ontario's Class Proceedings Fund to Meet Its Intended Purpose (2001) (on file with author). For a detailed review of the Quebec Fonds' operations, see Claude Desmeules, Address at the Osgoode Hall Law School of York University Annual National Class Actions Symposium: Public Funding of Class Actions in Quebec (2001).

69. ARCA, tit. II, ch. II, art. 6.

70. ARCA, tit. II, ch. II, art. 8.

71. ARCA, tit. II, ch. II, art. 19.

72. ARCA, tit. II, ch. II, art. 7.

73. *See generally*, FONDS D'AIDE AUX RECOURS COLLECTIFS, RAPPORT ANNUEL 2010–2011 (October 2011), http://www.farc.justice.gouv.qc.ca/doc/RapportAnnuel2010-2011.pdf.

74. FONDS D'AIDE AUX RECOURS COLLECTIFS, RAPPORT ANNUEL 2014–2015, (June 22, 2015), http://www.faac.justice.gouv.qc.ca/doc/RapportAnnuel2014-2015.pdf.

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 is 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.

B. *The* Fonds *as a Self-Sustainable Assistance Provider*

Since its creation, the *Fonds* has been financed by 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.[75] Unfortunately, over the course of the years 2005 until 2013, total Government subsidies have fallen drastically from $724,800 to $416,800.[76] 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 2015 and $1,117,012 in 2014–2015.[77]

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75. Fonds d'Aide aux Recours Collectifs, Rapport Annuel 2010–2011, at 24, (October 2011), http://www.farc.justice.gouv.qc.ca/doc/RapportAnnuel2010-2011.pdf.

76. See the annual reports of the Fonds for years 2005–2006 until 2014–15. Fonds d'Aide aux Recours Collectifs, Rapport Annuel, http://www.farc.justice.gouv.qc.ca/.

77. See the annual reports for these years at http://www.farc.justice.gouv.qc.ca/.

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.[78] 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.[79] 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 Act respecting the *Fonds d'aide aux actions collectives* and the *Regulation respecting applications for assistance for a class action*.[80] By this mechanism, the *Fonds* may seek and obtain a percentage of the balance from collective recovery or of individual recoveries.[81] 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* [hereinafter Percentage Regulation].[82]

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 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

78. ARCA, tit. II, ch. II, art. 25, art. 30.

79. ARCA, tit. II, ch. II, art. 30.

80. Regulation respecting applications for assistance for a class action, c. R-2.1, r. 1, (Can.).

81. According to Article 38(a) 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." ARCA, tit. II, ch. II, art. 38(a).

82. Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives, COLR c. F-3.2.0.1.1, r. 2 (Can.) [hereinafter Percentage Regulation].

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.[83] 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).[84]

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.[85] Accordingly, its mission and incentive in providing assistance to litigants is not to make money as with other third-party private financiers. Rather, its objective is to promote recovery and provide access to justice.

By way of comparison, the Ontario government established the Class Proceedings Fund right after its class proceed-

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83. New Code § 597.

84. Percentage Regulation, art. 1.

85. ARCA, tit. II, ch. II, art. 43. The Fonds 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. *Id.*

ings legislation came into effect in 1992 and contributed $500,000 to establish the fund.[86] While counsel fees are not recoverable, Ontario funding covers approved disbursements and adverse cost awards,[87] and is provided based upon several factors including the strength of the claim and the public interest involved. When the Fund finances an unsuccessful action, the defendant is entitled to apply to the Fund for recovery of the defendant's costs.[88] 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.[89] 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.[90] The Ontario Fund remains, to date, vastly underused with only about ten percent of all cases being funded annually.[91] This failure of lawyers to apply for funding may be due to the difficulties in meeting the criteria for assistance, or to the significant levy of ten percent 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 (2012-2013) in Quebec is tremendously revealing.[92]

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86. Law Society Act, R.S.O. 1990, c. L.8, s. 59.1(1) [hereinafter LSA]. See also the Class Proceedings Fund's Website, *Class Proceedings Fund*, THE LAW FOUNDATION OF ONTARIO, (Apr. 11, 2016) http://www.lawfoundation.on.ca/class-proceedings-fund/.

87. LSA §§ 59.3, 59.4.

88. LSA § 59.4(1).

89. LSA § 59.4; O. Reg. 771/92 § 8.

90. Ontario Regulation, *supra* note 89, § 5. *See also* LAW FOUNDATION OF ONTARIO, CLASS PROCEEDINGS FUND 20 YEARS IN REVIEW (2012) http://www.lawfoundation.on.ca/wp-content/uploads/CPF-Brochure-2013.pdf.

91. *Id.* at 1.

92. *See* FONDS D'AIDE AUX RECOURS COLLECTIFS, RAPPORT ANNUEL 2013–2014, (May 2013), http://www.farc.justice.gouv.qc.ca/doc/RapportAnnuel2013-2014.pdf.

C. *The* Fonds *as a Preliminary Screener of Class Action Cases*

According to Section 20 of An Act Respecting the Class Action (ARCA), every representative and every person intending to be ascribed such status may apply in writing for assistance from the *Fonds*, outlining the 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.[93] 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.[94]

Importantly, the criteria the *Fonds* will consider in its decision to assist or not is whether the class action may be brought or continued without such assistance, the probable existence of the right intended to be asserted, and the probability that the class action will be brought.[95] Article 23 reads as follows:

> 23. The Fonds shall study the applicant's application and it may, for that purpose, meet with the applicant or his attorney and allow him to present observations.
>
> In order to determine whether to grant assistance, the Fonds shall assess whether the class action may be brought or continued without such assistance; in addition, if the status of representative has not yet been ascribed to the applicant, the Fonds shall consider the probable existence of the right he intends to assert and the probability that the class action will be brought.
>
> Where the representative or a member requesting to be substituted for him intends to appeal the judgment which decides the questions of law or fact dealt with collectively, the Fonds, in order to determine whether to grant or terminate assistance, shall assess whether the action may be continued without such assistance and whether the appeal is likely to succeed if brought. . . .

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93. ARCA, tit. II, ch. III, art. 21.
94. *Id.*
95. *Id.*, art. 23.

The fact that the *Fonds* assesses the viability of the proposed action and considers the probable existence of the right alleged may serve to deter frivolous suits. When applications are denied, class attorneys have to fund the actions themselves or are alternatively forced to abandon the potential class claim. The prospect of having a third entity help fund the action serves to encourage well-structured and legally founded class actions. Even after having consulted with the *Fonds* about this hypothesis, it is unfortunately impossible to verify it and whether there truly is such an incentive present leading to more worthwhile class action cases being brought in Quebec.

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.[96] In any event, reasons for a decision to refuse or defer assistance must be provided,[97] as well as the conditions for assistance.[98] A negative decision may be contested by the applicant in front of the Administrative Tribunal of Quebec.[99]

When 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 expert and attorney's fees of the recipient, the recipient's costs and other court expenditures including costs of notification, and any other expenses related therein.[100] The payment of attorney's fees, unfortunately, is insignificant as compared to the market rate, being of maximum one hundred dollars per hour for senior lawyers and maximum forty dollars per hour for juniors. Meanwhile, expert fees are often significant. Furthermore, an agreement may be made to indemnify representative plaintiffs for adverse costs awards.[101] Importantly, the 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.[102]

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96. *Id.*
97. *Id.*, art. 24.
98. *Id.*, art.25.
99. *Id.*, art. 35, 37.
100. *Id.*, art. 27, 29.
101. *Id.*, art. 29.
102. *Id.*, art. 30. In addition, Article 31 provides that:

VI.
Public Financiers as Overseers of Class Proceedings

The *Fonds* is a primary source of financial assistance to initiate class actions in Quebec, assisting about one third of all such actions annually. This prominence of the *Fonds*, 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 interest. The *Fonds* is, however, much more than a public financier: it 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 statistics.

In my view, the *Fonds'* official mandate 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 as a whole would become more transparent, to the benefit of all litigants.

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 has been 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 have been astounded to realize how very little data is actually available in that regard in court files, and how obscure the litigation process truly is.

Class litigants in Quebec and in the rest of Canada have no obligation to report on class action administration per se,

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"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."

other than where the court has ordered a report to be filed or an accounting issued. Nor are class action administrators requested to provide such information. There is, however, a duty to inform the *Fonds*, and the responsibility for providing the information lies with the class action lawyers who are obligated to provide copies of all documents and procedures. The files that we consulted at the *Fonds*, however, were incomplete in that they allowed us to draw definite conclusions about the outcome of class actions in less than forty cases of the several hundred files consulted.[103] I thus agree with authors Pace and Rubenstein that although "[c]lass actions are among the most public forms of civil litigation," "a veil of secrecy can [ironically] fall over class action litigation . . . and ultimately, little information is available about how many class members actually received compensation and to what degree."[104] There is a real problem here. Transparency being a fundamental issue in the Quebec and Canadian justice system,[105] 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* considers applications based upon the need for financial assistance, and 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. In addition, this screening function has a temporal permanence as the *Fonds* may grant funds on a continu-

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103. *See* Catherine Piché, Draft Report, *The Class Action as a Compensatory Device* (on file with author).

104. Nicholas M. Pace & William B. Rubenstein, *How Transparent are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data* (Rand Inst. for Civil Justice, Working Paper No. WR-599-ICJ, 2008).

105. CANADIAN BAR ASSOCIATION, SYSTEMS OF CIVIL JUSTICE TASK FORCE REPORT 19 (Aug. 1996) (on file with author) ("[A]ccountability 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").

ing basis throughout the litigation. In terms of incentives, the *Fonds* is—even if only implicitly—motivated to finance 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 sent to the legal community and to the parties that the case is well worth litigating.[106]

Of course, there is a 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.[107] The *Fonds'* involvement, however, is continual throughout the litigation and as such it gives lawyers incentives to continue to handle the case responsibly and diligently in light of an eventual future or additional 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.[108] One additional 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 2014–2015, the *Fonds* had a significant surplus of $13,387,117,[109] which could well be invested in enhanced funding to a great number of additional cases, or to existing funded cases, for greater access to justice.

Furthermore, pursuant to Section 7 of ARCA, the *Fonds'* objective and mandate is not only to provide financial assistance, but also, "to disseminate information respecting the ex-

106. *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.

107. *Infineon Technologies AG,* [2013] 3 S.C.R. 600 (Can.); Similar comments are found in the Supreme Court case of *Dell'Aniello v. Vivendi Canada Inc.*, [2014] 1 S.C.R. 30 (Can.) ("[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.").

108. Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534 (Can.).

109. See Fonds d'Aide aux Recours Collectifs, Rapport Annuel 2014–2015, at 13 (June 2014), http://www.farc.justice.gouv.qc.ca/doc/RapportAnnuel2014-2015.pdf.

ercise of [class] actions." In fact, the initial financing objective was enlarged in 1984 to include an educational information objective.[110] 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* continues to publish one annual report with lesser statistics and simpler data, and it informs the public merely on an individual basis by answering telephone calls made to its head office. Resources available to fulfil the informational objective are meager.

If additional government resources were made available, the *Fonds* could beneficially assume a much more important role of providing information, ideally in collaboration with the Superior Court of Quebec, which has exclusive jurisdiction over class actions, and eventually, with the Ontario Class Proceedings Fund, and/or with my *University of Montreal* 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 in the courts. 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.[111]

Empirical data is critically important to researchers, of course, but also to the legislature, to the courts, and to the public in general. One way of providing this information would be to contribute to the existing Quebec class action reg-

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110. Deraspe c. Fonds d'aide aux recours collectifs, EYB 2007-120152 (Que. Sup. Ct.), para. 24. *See* Yves Lauzon, *Le financement des recours collectifs*, *in* ALAIN PRUJINER & JACQUELINE ROY, (ED.), LES RECOURS COLLECTIFS EN ONTARIO ET AU QUÉBEC: ACTES DE LA PREMIÈRE CONFÉRENCE YVES PRATTE, Montreal, Wilson & Lafleur, 1992, 65, 74.

111. More extensive statistics were published by the *Fonds* up until the year 2007–2008.

istry, 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, related judgments, etc.,[112] or alternatively, to the *Canadian Bar Association National Class Action Database*.[113]

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 for reform of the class action rules and regulations. As a public guardian, and granted it does not conflict itself out,[114] the *Fonds* could seek to protect the interests of absent class members.[115] 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.[116] In the years 1979–1980, 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.[117] These requests were granted and the amendments were made to the regulations. They became measures of great social importance in Quebec class action law. Later on, the *Fonds* made representations in the

112. *See* website at www.tribunaux.qc.ca. *See also Toure 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.

113. *See, e.g.*, Class Action Database, CANADIAN BAR ASSOCIATION, http://www.cba.org/ClassActions/main/gate/index/ (last visited Apr. 16, 2016).

114. It is better to envision the Fonds as a neutral and independent body, uninvolved with the members or their interests.

115. 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*, 64 EMORY L.J. 451, 465 (2014).

116. *See* most recently Option Consommateurs v. Banque nationale du Canada, 2015 QCCS 4380 (Can). *See also* Samy Elnemr, *Le Fonds d'aide aux recours collectifs : trente ans plus tard*, 327 SERVICE DE LA FORMATION PERMANENTE DU BARREAU, DÉVELOPPEMENTS RÉCENTS EN RECOURS COLLECTIFS 3 (2010).

117. Elnemr, *supra* note 116, at 4.

courts in several instances, often successfully.[118] 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 recognized its right to make representations, holding that the correct application of the *Percentage Regulation* is fundamental as a tool allowing the *Fonds*' self-sustainability without losing priority over the compensation of class members.[119]

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.[120] Indeed, in addition to increased efforts to involve the courts in the class action process and provide greater judicial oversight, which I have advocated for elsewhere,[121] 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.[122] 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"[123] or a "trafficker of litigation."[124] Its main incentive is to be mostly self-sustainable, and to do so it must recuperate its investment, limit its risks in litigation, and

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118. *Fonds d'aide aux recours collectifs v. Syndicat des employés d'entretien et de garage de transport de la C.U.M.*, C.A., EYB 1995-94504, 27 juillet 1995; *Clavel v. Productions musicales Donald K. Donald inc. et al*, EYB 1996-84725, 1994 (Cour d'appel du Québec).

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

120. Samuel Issacharoff, *Litigation Funding and the Problem of Agency Cost in Representative Actions*, 63 DePaul L. Rev. 561, 579–84 (2014).

121. Piché, *supra* note 38, at 276–77.

122. *See, e.g.*, Issacharoff, *supra* note 120, at 580. *See also* Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 Va. L. Rev. 1627 (1999).

123. Issacharoff, *supra note* 120, at 581.

124. Christopher Hodges, Stefan Vogenauer & Magdalena Tulibacka, The Costs and Funding of Civil Litigation 212 (Camille Cameron 2010).

see the *Percentage Regulation* applied.[125] 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, could be allowed to make representations on their behalf notably at settlement fairness hearings,[126] albeit cautiously in light of conflicts of interest considerations.

In addition, the presence of a strong class action overseer 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 leads to enhanced transparency and to greater efforts being made to divulge and assure collective compensation. As for the rights of absent class members more specifically, an enhanced presence by the *Fonds* would lead to a greater protection; with greater information would come increased participation in the class action litigation. The involvement, eventually, of the *Fonds* in class settlements would make proceedings beneficially more adversarial.[127] Nonetheless, to underscore 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. Truly, the *Fonds* does not have any conflicts of interest; it does not and cannot strip plaintiffs of their control and direction over the litigation. It does not charge a "fee" for the provision of assistance and the risk

125. See, notably, the Fonds' Report of Years 1992–1993, at 6 (on file with author) ("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.").

126. *See, e.g.*, PICHÉ, *supra* note 38.

127. *See id.*

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, encourage unethical behaviour as they are repayable over and above class counsel fees, rather than deducted from that amount, thereby depriving class members of benefits.[128] Furthermore, the required distance between the financier and the plaintiffs firm is often difficult to maintain when the potential financial gains are so significant.

Ultimately, I must conclude that the *Fonds* has shaped class action litigation in Quebec. While the idea of a public financial litigation assistance entity such as the *Fonds* has supporters around the world, such as in Hong Kong,[129] Australia,[130] and the State of Victoria,[131] the *Fonds* remains unique among all class action systems. It has helped provide access to

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128. *See* Marcotte C. Banque de Montréal, 2015 QCCS 1915 (can.).

129. THE LAW REFORM COMMISSION OF HONG KONG, CONSULTATION PAPER: CLASS ACTIONS 18183 (November 2009) http://www.hkreform.gov.hk/en/docs/classactions_e.pdf.

130. THE LAW REFORM COMMISSION, GROUPED PROCEEDINGS IN THE FEDERAL COURT, REPORT NO. 46, at 126 (1988). 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. *See also* Kaladjzic, *supra* note 19, at 98.

131. *See* VICTORIAN LAW REFORM COMMISSION, CIVIL JUSTICE REVIEW, REPORT NO. 14, at 614 (2008). 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. *See also* RUPERT JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT 131, 334–36 (2009), https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf (recommending experimentation with a public financing scheme funded by a tax against successful class actions, modeled after the Ontario class action fund). In addition, and by way of comparison, there is a public fund for financing class actions, established by the State of Israel, to assist potential representative claimants to bring applications for approval where the claim carries public and social importance. *See* Class Actions Regulations (Aid in Funding Applications for Approval and Class Actions), 5770-2010 (Isr.); Class Actions Regulations (Work Procedures of the Fund for Funding Class Actions), 5770-2010. (Isr.). *See also* AMICHAI MAGEN & PERETZ SEGAL, THE GLOBALIZATION OF CLASS ACTIONS NATIONAL REPORT: ISRAEL, http://globalclassactions.stanford.edu/sites/default/files/documents/Israel_National_Report.pdf.

justice and judicial economy to Quebec litigants, 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.[132]

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. Perhaps one ideal way to litigate collectively might be to not only have the State finance class litigation, but also 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, they would bridge the existing gap between the class action bar and the government regulators. Perhaps only then would we be able to solve the ultimate class action dilemma, and the public policy objectives of the class action would finally win over its financial gain objectives.[133]

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132. *See, e.g.*, Stuart Kugler & Robert Kugler, *Quebec: The Class Action Haven,* 1 CAN. CLASS ACTION REV. 155 (2004)

133. *See, e.g.*, DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 471–500 (RAND Corp., 2000) http://www.rand.org/pubs/monograph_reports/MR969.html.