Class Actions: How can take-up rates be improved?

RESEARCH REPORT

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Option consommateurs

MISSION

Option consommateurs is a non-profit organization whose mission is to promote and defend the rights and interests of consumers and ensure that they are respected.

HISTORY

Option consommateurs has been in existence since 1983, when it arose from the *Associations coopératives d'économie familial* movement, more specifically, the Montreal ACEF. In 1999 it joined forces with the Association des consommateurs du Québec (ACQ), which had already pursued a similar mission for over 50 years.

PRINCIPAL ACTIVITIES

Option consommateurs helps consumers experiencing difficulties, provides budget consultation and conducts sessions on budgeting, indebtedness, consumer law and the protection of privacy. We also make free visits to low-income households in order to improve energy efficiency in their homes.

Each year we produce research reports on important consumer issues. We also work with policy makers and the media to denounce unacceptable situations. When necessary, we institute class action suits against merchants.

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In its quest to bring about change, Option consommateurs is active on many fronts: conducting research, organizing class action suits, and applying pressure on companies and government authorities. You can help us do more for you by becoming a member of Option consommateurs www.option-consommateurs.org

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- Professor Jasminka Kalajdzic, University of Windsor
- Mr George Iny, APA (Automobile Protection Association)
- Mr Norman Caron MÉDAC (Mouvement d’éducation et de défense des actionnaires)

Summary

A class action is a procedure by means of which a person or an organization can institute legal recourse against one or more defendants in their own name and on behalf of a class. Whenever a favourable judgment is reached on a class action request, or when the court approves an amicable settlement agreed upon by the parties, a claims process is set in motion to permit class members to apply for compensation.

Generally, only a fraction of those who are eligible actually claim compensation. This fact raises the question of the effectiveness of the class action suit as a means of ensuring compensation. The aim of our research was to determine how to improve the claim rate, or "take-up rate," of class actions. Our results demonstrate that the factors affecting the take-up rate are manifold, as consequently, are the solutions.

Our literature search on the current legal frameworks in Canada, Australia, Brazil, the United States, and the European Union as well our as discussions with several experts allowed us to determine the criteria to be taken into account when analyzing data collected and to identify the best practices with regard to distribution protocols.

The focus groups we held in Montreal and Toronto showed us how Canadians perceive the factors that might affect their decision to file a claim when a distribution of funds to class members is announced.

Finally, we compiled a list of the class actions for which a distribution protocol has been developed over the past five years and for which an individual distribution took place in Canada. This task proved to be difficult, since there is no mandatory register in which this information is recorded. Moreover, many attorneys denied us access to data related to their take-up rates.

Our results demonstrate that there are many factors affecting the class action take-up rate. Among these are the notices to members, which should be clear and concise, the claims process, which ought to require fewer steps and supporting documents, and the judges' use of their discretionary powers.

Our research shows that barriers still exist today when it comes the availability of class action data in Canada. As long as all the information, including that related to the take-up rate, continues not to be made public, it will be difficult to clearly establish the factors likely to affect the take-up rate. In addition to significantly reducing access to justice, such a process runs counter to the rationale behind collective action.

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1. Introduction

A class action suit, or class action, is a legal procedure by means of which a person or an organization can institute legal recourse against one or more defendants in their own name and on behalf of a class [1]. This procedural means is unique in that its conclusion, whether in the form of a final judgment or settlement, involves the rights of numerous people without their having participated in it directly or even without their being aware of its existence.

Whenever a favourable judgment is reached on a class action request, or when the court approves an amicable settlement agreed upon by the parties, a claims process is set in motion to permit class members to apply for compensation. In such cases, the terms are defined by a court-approved distribution protocol. This protocol can be specified in the judgment granting the request, in the "transaction" describing the settlement, or in a separate document.

The number of members who claim compensation under such a process is generally well below the number covered by class action. This raises the question of the effectiveness of class action as a means of compensating members.

In our research, we were interested in the factors that may affect the take-up rate at the time of distribution. We focused on the following questions:

- What are the characteristics and terms of distribution protocols that result in the highest rates of individual claims? Are there any lessons to be drawn from the individual distribution of compensation for certain class actions?
- What is the legal framework in Canada and abroad? Could the laws or practices be improved to increase the class action take-up rate?
- What are the characteristics and terms of the distribution protocols that consumers identify as most likely to encourage them to submit a claim?

To answer these questions, we first conducted a literature search on factors that could affect the take-up rate. We also talked to several lawyers practicing in the field of class action, as well as some law professors. This allowed us to determine the criteria that should be considered when analyzing the data and to get their opinions on distribution protocol best practices.

We then studied the current legal framework in Canada and in the following jurisdictions: Australia, Brazil, the United States and the European Union.

Also, in order to determine Canadians' perceptions of the factors that might influence their decision to make a claim in the context of a distribution to class members, we conducted four focus groups: two in Montreal and two in Toronto.

[1] In Québec, see the *Code of Civil Procedure*, RLRQ c. C-25.01, art. 571 (hereinafter CCP).

Finally, we compiled a list of the class actions for which a distribution protocol has been developed over the past five years and for which an individual distribution has taken place in Canada. This task proved to be difficult, since there is no mandatory register in which this information is recorded. Moreover, several attorneys denied us access to data relating to their take-up rates. We then proceeded to search for relevant judgments and selected a random sample of 16 class actions. In order to establish the take-up rate in each, and to further our analysis of the distribution protocol, we attempted to collect all our data from documents found on the Internet and by contacting the firms of lawyers who represented the plaintiffs.

2. The context

Class action originated in English law of the seventeenth-century[2]. At that time, representative action was created by the Court of Chancery[3] to make it possible to extend the scope of a judgment to a large number of people. Representative action was first used by the defence, that is to say, a small number of defendants were required to defend on behalf of all the members of a class[4]. The objective was mainly to improve the efficiency of procedures; the court wished to avoid defendants having to present the same case repeatedly.

Representative action was later used by request in *Chancey v. May*[5]. In this case, two people were authorized to bring an action of account against the former managers of a company on their own behalf and that of 800 other people who were also shareholders in the company. Again, the collective nature of the proceedings was justified by considerations of efficiency, the court ruling that dealing with each of the parties separately was, in this case, impracticable[6].

The rules relating to representative action were then codified[7]. Later developments in English law, however, resulted in a restrictive interpretation of the representative action[8]. As Lafond observes:

> [TRANSLATION] After a short period marked by an attempt at encouragement by the House of Lords, the rule of representation quickly came to be considered a statutory rule due to its

[2] John A. Kazanjian, "Class Actions in Canada," *Osgoode Hall Law Journal 11.3*, 1973, p. 397-436, Pierre-Claude Lafond, "Class Action: Between Procedural Convenience and Social Justice", 1998-1999, *Journal of Law of the University of Sherbrooke*, Vol. 29, p. 3-37. Shaun Finn, *Le recours singulier et collectif : redéfinir le recours collectif comme une procédure particulière*, Éditions Yvon Blais, Cowansville, 2011, 210 p.
[3] See Kazanjian, *supra,* note 2, and Lafond, *supra,* note 2. At that time, Common Law Courts heard cases between civil parties under the law proper, while the Court of Chancery heard cases that could have had a wider impact than just on the parties before it; its jurisdiction was more over matters of equity.
[4]Lafond, *supra, note* 2, p. 7.
[5] *Chancey v. May* (1722) Prev. Ch 592. 24 ER 265.
[6] Lafond, *supra,* note 2, p. 8.
[7] Ibid., note 2, p. 11.
[8] *Markt & Co. v. Knight Steamship Co*., [1910] 2 KB 1021.

> codification, and therefore received a restrictive interpretation in accordance with tradition. The liberal approach of the Court of Chancery was abandoned in favour of the far more conservative approach of the Court of Appeal, which was based on a literal interpretation of the rule[9]. (Citations omitted)

In Canada, the rules pertaining to representative action were imported into the common law provinces in the late nineteenth century, along with their interpretation, which remained restrictive for many years. The Supreme Court of Canada ruling in *General Motors of Canada Ltd. v. Naken*[10] provides a good illustration of this.

Québec differs from other Canadian provinces by virtue of its civil law, which is of French origin. Under Québec law, no association may initiate legal proceedings for the benefit of its members[11]. Class action is an exception to this principle. It is also an exception to the principle that one person may not plead on behalf of another[12].

In 1979, the *Class Action Act*[13] came into force. The *Code of Civil Procedure* was modified to include articles that determine the set of rules governing this procedural means. These new rules are considered among the most progressive in Canada and the Commonwealth[14]. They grew out of a context of social change aimed at providing improved access to justice[15]. NB: A few months before the Act came into force, le *Fonds d'aide aux recours collectifs* (FARC)[16], was established. This fund has the mandate of providing financial support to anyone bringing a class action.

Several years later, in 1992, Ontario also adopted a law on class actions[17]. Other Canadian provinces later adopted similar laws, with the exception of Prince Edward Island[18].

There are three major objectives of a class action[19]. First, it conserves resources at the judicial level, which benefits both parties to the legal system[20]. Indeed, the fact that the requests of

[9] Lafond, *supra,* note 2, p. 12.
[10] *General Motors of Canada Ltd. v*. Naken, [1983] 1 SCR 72.
[11] *Owners Association of Taché Gardens Inc. v. Dasken Enterprises Inc*. [1974] SCR 2.
[12] See Article 59 of the former *Code of Civil Procedure* and Finn, *supra,* note 2, p. 64.
[13] *The Class Action Act*, SQ 1978, c. 8
[14] Finn, *supra, note* 2, p. 52.
[15] Lafond, *supra, note* 2, p. 24-25.
[16] Now Le Fonds d'aide aux actions collectives (FAAC)
[17] 1992 Class Actions Act, SO 1992, c. 6
[18] Finn, *supra, note* 2, p. 40.
[19] *Western Canadian Shopping Centers v. Dutton*, [2001] 2 SCR 534, p. 549. Ontario Law Reform Commission, "Report on Class Actions," Ministry of the Attorney General, Toronto, 1982, p. 118 and following.
[20] Ontario Law Reform Commission, *supra,* note 19, p. 118.

each of the class members are heard collectively avoids a multiplication of judicial requests related to the same facts[21] and reduces the risk of conflicting decisions[22].

Secondly, class action facilitates access to justice[23]. This is particularly the case when the value of individual claims is too low to encourage individuals to initiate proceedings[24] or when the cost of bringing individual actions is too high[25], which is often the case in consumer law[26]. However, one single favourable judgment or settlement can allow a very large number of people to be compensated[27].

The third objective is a deterrent: class action can be used to modify behaviour[28]:

> (...) 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 but individually minimal harm might not take into account the full costs of their conduct, because for any one defendant 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 [29].

This objective of deterrence was reconfirmed by the Supreme Court of Canada in *Infineon Technologies AG* v. *Option consommateurs* [30].

Since the introduction of legislative provisions facilitating the institution of class actions in Québec and the common law provinces, class action has continued to develop and is a major procedural means today. This fact is acknowledged by Chief Justice Beverley McLachlin of the Supreme Court of Canada:

> The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of

[21] *Western Canadian Shopping Centers v. Dutton*, *supra,* note 19, p. 549.
[22] Gary D. Watson, "Class Action: The Canadian Experience," *Duke Journal of Comparative and International Law, 2001, Vol. 11.2,* p. 269-288.
[23] *Western Canadian Shopping Centers v. Dutton*, *supra,* note 19, p. 549.
[24] Louise Rozon,"Class Action Promotes Access to Justice for Consumers," *Revue de droit de l'Université de Sherbrooke*, 1998-1999, Vol. 29, p. 62. Watson, *supra,*, footnote 22, p. 269.
[25] *Western Canadian Shopping Centers v. Dutton*, *supra,* note 19, p. 549.
[26] Pierre-Claude Lafond, *Le recours collectif comme voie d'accès à la justice pour les consommateurs*, Carswell, Montreal, 1996, 835 p.
[27] Rozon, *supra,* note 24, p. 59.
[28] Catherine Piché and Andrew Lespérance, "L'action collective comme outil de prévention, d'évitement et de dissuasion," *National Conference on Class Actions: Recent Developments in Québec, in Canada and in the U.S*, Barreau du Québec, Service de la formation continue, 2016, Vol. 410, p. 61-98.
[29] *Western Canadian Shopping Centers v. Dutton*, *supra,* note 19, p. 560.
[30] *Infineon Technologies AG v. Option consommateurs*, [2013] 3 SCR 600.

> shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large class of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated *vis-à-vis* the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties. [31].

There is no central register containing an exhaustive list of every class action instituted in Canada. In Québec, Art. 573 CCP states that the Superior Court shall maintain a central register of class actions; it lists all those instituted since 2009[32]. Also, the Canadian Bar Association publishes a class action database on the Internet[33]. However, since registering a file in the database is optional, the content is not exhaustive, making it very difficult to assess how many class actions take place in Canada each year.

In Québec alone, FAAC reported 461 active class actions in its 2015-2016 annual report[34]. It is this province and Ontario that report the most class actions.

Civil procedure comes under the jurisdiction of provincial legislatures. Due to its French roots (in Québec) and its British roots (in other provinces), class action procedure is not identical in every Canadian province. There are, however, important similarities[35]. Accordingly, for the purposes of this research, we will present an overview of the steps in class action procedure in Canada, without dwelling on the details that distinguish one legislative scheme from another, including the criteria relating to authorization or certification. To learn more about the procedures, we refer the reader to the relevant laws in each province, as well as the rules of practice of the Federal Court[36].

The first step in a class action is authorization (in Québec) or certification (in other provinces). Overall, the court must ensure that there is an issue in common to the class, that there is a cause of action and that the representative is able to adequately defend the interests of the class members[37]. This first stage serves as a kind of filter[38]. However, the Supreme Court of

[31] *Western Canadian Shopping Centers v. Dutton*, *supra,* note 19, p. 548.
[32] Online: http://services.justice.gouv.qc.ca/dgsj/rrc/Accueil/Accueil.aspx
[33] Online: http://www.cba.org/Publications-Resources/Class-Action-Database?lang=fr-CA
[34] Fonds d'aide aux actions collectives, *2015-2016 Annual Report*, p. 16.
[35] Watson, *supra,* note 22, p. 272.
[36] Alberta: *Class Proceedings Act*, SA 2003, c. C-16.5 and *Rules of Court*; British Columbia: *Class Proceedings Act*, RSBC 1996, c. 50; Manitoba: *The Class Proceedings Act*, CCSM c. C130 and *Court of Queen's Bench Rules*, Man. Reg 553/88; NB: *Class Proceedings Act*, RSNB 2011, c. 125; Nova Scotia: *Class Proceedings Act*, SNS 2007, c. 28 and the *Civil Procedure Rules*, *Royal Gaz*. Nov. 19, 2008; Ontario *Class Proceedings Act*, 1992, SO 1992, c. 6 and *Rules of* Civil Procedure, RRO 1990, Reg. 194; Québec *Code of Civil Procedure*, RLRQ c. C-25.01; Saskatchewan's *Class Actions Act*, SS 2001, c. C-12.01 and *The Queen's Bench Rules*, *Sask. Gaz.* December 27, 2013; Newfoundland and Labrador: *Class Actions Act*, SNL 2001, c. C-18.1; Federal: *Federal Courts Rules*, SOR / 98-106.
[37] Warren K Winkler, et al, *The Law of Class Actions in Canada,* Canada Law Book, Toronto, 2014, p. 22-23.

Canada requires that the authorization (or certification) criteria should be interpreted flexibly in order to favour access to justice[39].

Authorization and certification have the effect of linking class action class members to each other by default[40]. It is possible for one member who does not wish to be part of the class action to opt out. This person must then send an exclusion (or opt-out) notice within the time and in the manner prescribed by the court[41]. By excluding themselves from a class action, members may institute their own legal proceedings if they so desire. However, should a favourable judgment or settlement of a class action be reached, they will not be entitled to it.

Once a class action is authorized or certified, the legal process will run its course until the court renders its judgment on the merits. Should the judgment be favourable to members, the court will determine how the money will be recovered and distributed.

At any time during the class action procedure, the parties may come to an amicable agreement. However, since the effects of such an agreement are not limited to the parties in the case, it must first be approved by the court[42].

At different stages in the class action procedure, notices must be published in order to keep members informed of their rights. This is particularly the case when it is time to allow members who so desire to opt out of the class action, to inform them that a settlement agreement is to be submitted to the court for approval, and when a claims process is established. The court may also order the publication of a notice at any time it deems necessary.

In 2009, the Supreme Court emphasized the importance of notices to members by writing:

> In a class action, it is important to be able to convey the necessary information to members. Although it does not have to be shown that each member was actually informed, the way the notice procedure is designed must make it likely that the information will reach the intended recipients. The wording of the notice must take account of the context in which it will be published and, in particular, the situation of the recipients. In some situations, it may be necessary to word the notice more precisely or provide more complete information to enable the members of the class to fully understand how the action affects their rights. These requirements constitute a fundamental principle of procedure in the class action context. [43].

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[38] *Infineon Technologies AG v. Option consommateurs*, *supra,* note 30, p. 623.
[39] *Western Canadian Shopping Centers v. Dutton*, *supra,* note 19, p. 556; *Infineon Technologies AG v. Option consommateurs*, *supra,* note 30, p. 623.
[40] Watson, *supra,* note 22, p. 273. David Cuming. *L'accès à la justice. Comment y parvenir ?* Union des consommateurs, 2004, p. 55
[41] Isabelle Durand and Stephanie Poulin, *Notices to members of class action suits: overhaul needed to improve access to justice*, Option consommateurs, 2009, p. 16; CCP art. 576 para. 3
[42] Watson, *supra, note* 22, p. 274.
[43] *Canada Post Corporation v. Lépine*, [2009] 1 SCR 549, p. 572.

Whether the recovery is collective (when the defendants are required to pay a lump sum) or individual (when members have to make a claim individually)[44], the challenge is considerable: how to ensure that members actually receive the result of the class action?

In cases when the identity of the members is known, compensation may take place fairly smoothly –for example, for the customers of a financial institution[45]. But in other cases, the pitfalls are numerous: the claim forms may be complex[46] or the notices to members may be difficult to understand or improperly distributed[47]. Also, as Jasminka Kalajdzic writes:

> The nature of mass wrongs necessarily creates barriers in distributing judgments or settlement funds. Class members may not be known to either party, as the case of purchasers of defective products or indirect purchasers in price-fixing conspiracies. Or, it may be prohibitively expensive to administer a distribution of nominal damages to a large class [48]. "(Citation omitted)

The accountability procedure that follows distribution takes place in court. But again, since there is no central register, it is very difficult or impossible to obtain a complete picture of the situation.

However, the effectiveness of a distribution process is an important issue for the courts:

> [TRANSLATION] The Court considers that, to achieve its purpose, a successful class action must aim for the adequate compensation of the largest possible number of members, even when these number in the hundreds of thousands. Harsh criticisms are heard when only a small percentage of members invoke the amounts available for satisfy claims. Some go as far as to argue that class actions serve only to enrich lawyers. Class actions put the public credibility of the judicial process at stake [49]. " (Citation omitted)

In such a context, our basic question remains: how can we improve the take-up rate in the distribution process?

[44] David Stolow and Robert Kugler, "L'étape du recouvrement en matière de recours collectif : les enjeux et les objectifs sociaux," *National Conference on Class Actions: Recent Developments in Québec, in Canada and in the U.S*, Barreau du Québec, Service de la formation continue, 2016, Vol. 410, p. 307, p. 307.
[45] Maxime Nasr, "Remettre l'argent aux membres – Le défi de la distribution dans le contexte d'une action collective – Guide pratique inspiré de l'expérience DRAM," *National Conference on Class Actions: Recent Developments in Québec, in Canada and in the U.S,* Barreau du Québec, Service de la formation continue, 2016, Vol. 410, p. 153
[46] Isabelle Durand, *Class action claim forms: when exercising your rights becomes too difficult,* Option consommateurs, 2010, 128 p..
[47] Durand and Poulin, *supra,* note 41.
[48] Jasminka Kalajdzic, "Consumer (In) Justice: Reflections on Canadian Consumer Class Actions," *Canadian Business Law Journal,* 2010, Vol. 50, p. 356 and 369.
[49] *Infineon Technologies AG* v. *Option consommateurs, supra,* note 30, para. 114.

3. Legal framework

In class action proceedings, precise rules have to be respected. To familiarize ourselves with these, we studied the legal framework in Canada and in three Canadian provinces. We also studied the applicable legal framework in other countries, since knowing what is done elsewhere might help us improve what is done here.

3.1 Foreign jurisdictions

3.1.1 The United States

Each of the 50 states has its own class action laws. However, there exist provisions of a federal nature[50] that must be applied in cases of interstate class actions, i.e. those that affect members residing in more than one jurisdiction, or those in which the amount requested as compensation exceeds $5 million. With few exceptions, state procedural rules are quite similar to the rules that apply at the federal level. Only class actions involving securities are governed by different rules[51].

In the U.S., all class actions must go through a certification procedure[52] in which the judge determines whether the class members share common interests, whether the parties being sued present the same defence, whether the plaintiffs' representative is able to protect the interests of the class and whether it is impracticable to address the cause of each class member individually[53].

The U.S. class action system contains an opting-out clause, which entails that all class members are automatically included in the action and bound by the outcome of the case (judgment or amicable settlement) unless they clearly express their wish to be excluded from it.

In cases when the class action is settled out of court, the judge has the power to approve or reject the settlement and the terms of distribution. To approve, the judge must ensure that everything is fair and adequate[54]. If the judge determines that this is the case, the class members will then be notified of a fairness hearing. During that hearing, they will have the

[50] *Federal Rules of Civil Procedure*, Rule 23. Online: http://www.uscourts.gov/sites/default/files/rules-of-civil-procedure.pdfand Class Action Fairness Act of 2005, Public Law 109-2-FEB. 18, 2005. Online:https://www.gpo.gov/fdsys/pkg/PLAW-109publ2/html/PLAW-109publ2.htm
[51]Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737. Online:https://www.gpo.gov/fdsys/pkg/PLAW-104publ67/html/PLAW-104publ67.htm
[52] *Federal Rules of Civil Procedure*, *Supra, note* 50, Rule 23 (c)
[53] Ibid., note 50, Rule 23 (a)
[54] Ibid., note 50, Rule 23 €

opportunity to be heard and state whether they are for or against the settlement. Final approval of the settlement takes place only after the hearing has been held[55].

Because of the risks and costs associated with a long and complex trial, the vast majority of U.S. class actions end with a settlement.

A peculiarity of American law is that it permits defendant class actions[56], that is to say, the defendants can unite against a plaintiff or plaintiffs. This type of class action is very rare, and must respect the same criteria as regular class actions; it requires that a particular member be chosen to represent the class and obtain certification from a judge.

3.1.2 Australia[57]

Australia has three legal regimes governing class action: a federal regime [58](1992) and two state regimes, those of the State of Victoria (2000) and of the State of New South Wales (2011). Both state regimes are substantially identical to the federal system.

For a class action to be brought in Australia, a minimum of seven people must have a claim against the same defendant. It also requires that such claims arise from the same circumstances and lead to at least one common legal or factual problem[59].

Only members of the action are authorized to represent the class, either individually or in small groups. However, the class membership is not limited to natural persons. Legal persons may also be included.

Like the Canadian system, the Australian regime follows an opt-out model, meaning that all potential class action members automatically become members of the class unless they voluntarily decide to exclude themselves from it[60].

Unlike Canada and the United States, however, Australian class actions do not have to be subject to licensing/certification before they can be brought. Rather, it is incumbent on the defendants to prove that the basic conditions have not been met, which is rare because these

[55]Janet Cooper Alexander, "An introduction to Class Action Procedure in the United States" Debates over Group Litigaiton in Comparative Perspective, Geneva, 2000 p. 9.
Online:www.law.duke.edu/classlit/papers/classactionalexander.pdf
[56] *Federal Rules of Civil Procedure*, *supra, note* 50, Rule 23 (b) (1)
[57] This section of the report draws heavily on the text of the Honourable Judge Bernard Murphy: "The Operation of the Australian Class Action Regime," Bar Association of Queensland, 2013. Online at the Australian Federal Court website: http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-murphy/murphy-j-20130309
[58] Instituted by Part IVA of the *Federal Court of Australia Act* 1976 (Cth). Online :http://www.austlii.edu.au/au/legis/cth/consol_act/fcoaa1976249/
[59] Ibid., s. 33C
[60] *Ibid.,* s. 33J

conditions are usually easy to satisfy (at least seven members, a common defendant, and at least one common issue of law or fact arising from the same circumstances).

Australian judges have several powers. For example, they can stop a class action, especially when the class has less than seven members, when the cost of distributing compensation is disproportionate to the amount of these benefits or when the interests of justice so require [61].

Australia has a surprising mechanism for financing class actions: third-party litigation funding. In fact, since 2006, it has been possible for a third party to finance plaintiffs. These third parties are not subject to any regulation except for the requirement to establish an adequate process of managing conflicts of interest. This means that anyone can finance a class action, with the exception of attorneys involved in the case[62]. Third party funding is so common in Australia[63] that it has radically altered the class action landscape. For example, by agreeing to fund only actions in which members have entered into a funding agreement, third-party "funders" have literally transformed the formal opting out regime into an opting-in regime.

Most Australian class actions end with a settlement.

3.1.3 The European Union

Class action suits as we know them in North America do not exist in Europe. In fact, it is not possible for an individual in Europe to represent the collective interest of several citizens or consumers. However, groups and consumer associations may institute an injunctive order to put a stop to misleading representations or to practices deemed to be unfair or false.

3.1.4 Brazil[64]

Class actions are regulated at the federal level; the law is uniform in the 26 states of the Brazilian federation[65]. In addition, whenever a class action commences, notification is sent to the Attorney General, who is invited to participate in the proceedings to ensure that the interests of absent members are well represented.

[61] *Federal Court of Australia Act* 1976 (Cth), *supra,* note 58, ss. 33L and 33M

[62] Allens Linklaters, "Class Actions in Australia," 2016
Online:www.allens.com.au/pubs/pdf/class/papclassaug16-01.pdf

[63] So far, 19.7% of Australian class actions have received private funding; 49.5% of these in the last 6 years. Vince Morabito. "An Empirical Study of Australia's Class Action Regimes, Fourth Report, Facts and Figures on Twenty-Four Years of Class Actions in Australia" Monash University - Department of Business Law and Taxation, 2016, p. 8. Online:https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2815777

[64] Largely inspired by the lecture of Professor Patricia Galindo da Fonseca of the Universidade Fluminense Federa, given as part of the GREDICC Summer School in Consumer Law, Montreal, July 2016.

[65] Antonio Gidi, "Class Actions in Brazil: A Model for Civil Law Countries," *American Journal of Comparative Law, 2003, Vol. 51*, p. 333.

In the Brazilian system, there are two types of class action: those designed to prevent harm to the collective interest of consumers and those that seek to rectify harm. The first type is aimed at stopping practices such as the use of unfair contractual clauses or the dissemination of misleading advertising. The second type aims at providing compensation to aggrieved consumers. Mixed actions are possible, because the Brazilian legal system considers the two actions as complementary. For example, an action could be brought against a merchant to request that a contractual clause be nullified, that consumers who signed contracts containing that clause receive compensation, or that a court order be issued requiring the removal of the clause from the contract.

This system was established in 1985 when the *Public Civil Suit Act* (Law No. 7.347) came into force. In 1990, the existing provisions were strengthened by the introduction of the *Consumer Protection Code*.

In addition, unlike the situation in Canada, the Brazilian system requires no authorization or certification procedure prior to instituting the action. The judge must simply determine whether the conditions for bringing a class action have been met.

Class members can be represented by a private group such as a consumer association, by legal aid or by a general public institution such as a public ministry, a government consumer protection agency, a municipality or one of the States of the Federation[66]. All these officials have the legal capacity to bring one or another of the remedies. Brazil's *Civil Procedure Code* even allows a judge to notify these representatives to suggest that a class action be brought when several similar individual cases must be heard[67]. Individuals, however, do not have the ability to represent a class.

Brazil's *Code of Civil Procedure* provides that all legal proceedings, including class actions, must pass through the preliminary stage of conciliation or mediation unless both parties agree to waive this step[68].

Brazilian judges are expected to play a major role in class actions and they are vested with broad powers. For example, they can reverse the burden of proof in favour of consumers whose claims are credible, or who are economically vulnerable[69].

[66] *Code of Consumer Defense and Protection*, Law Nº 8.078 of September 11, 1990, Art. 82. English translation by Autarquia de Proteção e Defesa do Consumidor do Estado do Rio de Janeiro, 2014. Online: http://www.procon.rj.gov.br/procon/assets/arquivos/arquivos/CDC_Novembro_2014_Ingles.pdf
[67] *Code of Civil Procedure*, Law Nº. 13.105, March 16, 2015, Art. 139. Online: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13105.htm. Amaral De Andrade, Tito et al. "Class/Collective Action in Brazil: Overview," Machado Meyer Sendacz Opice Advogados, updated on January 1, 2017. Online: https://content.next.westlaw.com/9-617-6649?__lrTSs=20170427151930511&transitionType=Default&contextData=(sc.Default)&Firstpage=true&Bhcp=1
[68] Ibid.

If the class action is dismissed, individual class members are not denied the right to institute their own individual suit based on the same facts[70]. Furthermore, when a class action is won or settled, individual members must generally register or take steps to obtain the compensation awarded.

In both Brazilian and Canadian law, the costs of the winning party are usually paid by the losing party. However, in the case of class actions, defendants are exempt from paying this fee if they lose. If the defendants win, however, Brazilian courts usually grant attorneys fees equal to 10% or even 20% of the amount awarded to members[71].

As regards settlement, the Brazilian legislator is silent on the procedure to be adopted. Indeed, amicable settlement of a class action is virtually absent from Brazil's legal landscape, as attorneys do not believe they have the power to dispose of the rights of the class they represent[72]. In addition, Brazilian law considers that *res judicata* binds only the class for whom the outcome of the suit is favourable. When the outcome is unfavourable, each member is free to sue on their own behalf[73]. Under these conditions, it is hard to see how an amicable agreement, which involves negotiation and waivers by both parties, could be binding on any member of a class action.

As regards claims, in the event of a victory by the plaintiffs, Brazilian law provides that each class member has to submit their own claim [74]. In cases of protection of "diffuse rights" - when the victims of a violation of the law are difficult to identify or are unidentifiable - Brazilian law provides that compensation shall be paid into a fund to be used to protect the rights and interests of groups of similar alleged victims. It may be remarked that this approach has several similarities with our *cy-près* compensation (indirect cost recovery - see point 4.9). Moreover, a victory by the members can result in a declaration that, for example, a practice is illegal.

3.2 Canadian jurisdictions

What are the legal rules governing class actions in Canada? Can the courts, through the powers vested in them, have a direct influence on the take-up rate? If so, how? These are the questions we shall focus on here. In doing so, we will address two main issues, the publication of notices and the distribution and complaint process. Indeed:

> [TRANSLATION] [...] enforcement of the judgment is the capital phase of the class action. We cannot reasonably talk about access to justice without an effective measure to redress the

[69] *Code of Consumer Defense and Protection*, *supra,* note 66, Art. 6.
[70] Ibid., Art. 103.
[71] Amaral de Andrade, *supra,* note 67.
[72] Gidi, *supra,* note 65, p. 342-343.
[73] Ibid., p. 389.
[74] Ibid p. 333.

> damage. A judgment or a settlement that is favourable to the class but is unenforceable in practice or whose execution remains very partial, represents little more than a symbolic victory[75]".

To date, 9 of the 10 provinces[76] have legislation governing class action. In addition, the Federal Court of Canada allows a class action to be brought at the federal level in certain cases based on federal law that involve the federal government.

We have chosen to analyze only the laws of three provinces: Québec, Ontario and British Columbia. These provinces are the most relevant to our purposes, as they are considered leaders in the area of class action. In addition, the majority of class actions in our sample took place in these provinces.

We find great similarities in the law of the three provinces, yet there are also differences.

Before being formally introduced, class actions in Québec must be authorized by the court, which determines[77]whether the action is being brought by an identifiable class with common issues among class members, whether the facts alleged appear to justify the conclusions sought, whether the use of the mandate or joinder is difficult or impracticable and whether one or more representative(s) of the class are able to ensure adequate representation thereof. Class actions in Ontario and B.C. must, for their part, be subject to "certification," the criteria for which are more demanding than those for authorization in Québec. The authorization and certification mechanisms, however, are derived from the same basic idea, which is to filter out frivolous or unfounded requests.

Canadian provinces have chosen to adopt an opting-out regime, which means that all alleged victims are automatically members of the class and are bound by the settlement or final judgment, unless they have expressly indicated their desire to be excluded[78].

Also in Canada, judges are considered to be the protectors of absent members, which is one of the reasons why they enjoy such broad discretion.

3.2.1 Québec

In Québec, class actions are governed by Articles 571-604 of the *Code of Civil Procedure* (CCP), which permits legal persons established for a private interest, corporations, associations or other groups to represent the class[79].

[75] Pierre-Claude Lafond, *Le modèle québécois de recours collectif : Une procédure originale et adaptée à la réparation des dommages*, Mélanges, Éditions Thémis, 2012, p. 147.
[76] Prince Edward Island is the exception to the rule.
[77] These criteria are set forth in Art. 575 CCP, *supra,* note 1.
[78] Ibid., Art. 591; *Class Proceedings Act* SO 1992, c.6 s. 27 (3); *Class Proceedings Act* [RSBC 1996] c. 50, s. 16.

The CCP accords Québec judges broad powers. These cover every stage of the class action, from authorization to recovery of claims. Several of these powers may be used to increase the take-up rate. The Québec judge is also considered [TRANSLATION] "the administrator of the implementation of his decision"[80] and as the guardian of the interests of absent members.

Among the powers arising from the duty to ensure the sound management of cases and their orderly conduct [81]are the power to simplify and expedite proceedings[82]. In the context of class action, one can easily see the utility of this, since class actions that are concluded quickly will be more likely to get good take-up and compensation rates than class actions that drag on.

It is also the judge who has the power to order the publication of notices[83]. He can control the type of notice used and how it is published (an individual notification, an abbreviated notice published in a newspaper, on the web, on TV, etc.) or ensure that their form and content[84] are clear and concise[85]. For example, we have already seen judges issue orders regarding font size[86], the inclusion of a notice within the members' monthly billing[87], send notifications by email[88], etc. The judge may also order the creation of a website designed to inform members[89].

It is up to the judge to choose the claim procedures. He must decide whether to impose collective or individual recovery[90] and, in the case of a collective recovery, to decide the mode of distribution[91]. Specific performance is possible, though uncommon. NB: Collective recovery is the norm; individual recovery is usually unsuccessful and amounts to enabling the defendants to keep the money they pocketed illegally[92].

Finally, it is also the judge who appoints the claims administrator[93] and decides how to dispose of the remaining balance, if any[94].

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[79] CCP, *supra,* note1 art. 571.
[80] Pierre-Claude Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice – impact et évolution*, Cowansville, Éditions Yvon Blais, 2006, p. 189.
[81] CCP, *supra,* note 1, art. 19.
[82] *Ibid.*Art. 158.
[83] Ibid., Art. 576, 581 and 599.
[84] Ibid., S, 579 in fine.
[85] Ibid., s. 581.
[86] *Gauthier v. Fortier*, JE 2000-1107 (SC).
[87] *Consumers Union v. Bell Canada*, JE 2003-620 (SC).
[88] *Tsukc v. General Motors of Canada Limited and General Motors of Canada Inc. 2008* QCCS 353.
[89] CCP, *supra,* note 1, art. 576 para 2.
[90] Ibid., Art. 595.
[91] Ibid., Art. 597.
[92] Lafond, *supra,* note 75, p. 153.
[93] CCP, *supra,* note 1, art. 596 para 2.
[94] Ibid., Art. 596.

In Québec, 85% of class actions that have a favourable outcome for the claimants are settled amicably[95]. Consequently, it is most pertinent to mention that any transaction or settlement must be approved by the court.

Moreover, in this era of globalization, we see a lot of multi-territorial class actions, especially when the class includes residents of several provinces. In this regard, the Québec legislature established new rules in 2016 obliging judges to whom foreign transactions or judgments are submitted for approval, to ensure not only that the published notices are sufficient but that members who are Québec residents benefit from the exercise of rights equivalent to those they would have enjoyed if the action had been brought in Québec[96].

The judge has the role of protecting the interests of absent members and should keep this in mind when exercising the powers vested in him by the CCP: [TRANSLATION] "The court has to remember that the reparation stage is the crux of the entire process and that an inappropriate form of compensation can lead to a denial of justice[97]."

Pierre-Claude Lafond also states: [TRANSLATION] "The judge must help achieve the objectives of the class action: that the greatest number of members may be effectively informed of their rights and reap the potential benefits of the final judgment. His legal responsibility in this regard is huge[98]."

Finally, the Québec judge has the authority to decide remuneration for the counsel for the class members' representative, taking into consideration the interest of members[99]. For example, we can imagine that in Québec law, judges have the power, in certain circumstances, to tie attorneys' fees to the take-up rates. This practice can be observed in the United States, particularly in the context of amicable agreements in which defendants offer the class valid coupons for a new purchase instead of cash compensation.

Unlike a conventional trial, in which judges are removed from the case as soon as their judgment is rendered, in class actions, the judges' role extends until the end of execution of the judgment. Moreover, the powers conferred on them by the CCP leave a lot of room for discretion, both as regards notices and claim procedures. Several authors therefore call upon judges to use their imagination to take the most appropriate measures, however original they may be, in order to safeguard the interests of the class and, as a corollary, to ensure that they increase the claim and/or compensation rate.

[95] Pierre-Claude Lafond, *École d'été en droit de la consommation,* July 2016.
[96] CCP, *supra,* note 1, art. 594.
[97] Lafond, *supra,* note 75, page 164.
[98] Pierre-Claude Lafond, "L'énigmatique article 1045 C.p.c. : un espace de créativité pour le juge gestionnaire d'un recours collectif," *Revue du Barreau du Québec, Volume 73*,spring 2014, p. 10.
[99] CCP, *supra,* note 1, art. 593, para. 2.

3.2.2 Ontario

In Ontario, the rules governing class actions, are mainly set forth in the *Class Proceedings Act* (CPA Ontario)[100]. There are also class action provisions in other laws, including the *Consumer Protection Act*[101] and the *Rules of Civil Procedure*[102] (RCP).

As already mentioned, the class action laws of Ontario and Québec law are similar in many respects. One major difference, however, is that in Ontario, it is impossible for a corporation or an association - for example, a consumer association or another class - to represent the interests of members. But the prestige and financial means of certain groups or corporations could influence the take-up rate. In this regard, Ontario could learn from Québec.

As regards the provisions that may be used to improve claim or compensation rates, the Ontario law grants broad powers and discretion to the class action judge.

However, unlike Québec's CCP, Ontario's CPA goes into far more detail about the possibilities available to the court. With regard to the notice of certification, for example, while the Act permits the judge discretion to proceed in ways not specifically laid down in the provisions[103] , it goes into great detail about what constitutes a notice, the information that should be in it and the ways it should be distributed[104]. In addition, the Act expressly provides that the court must approve the notices before they are published[105], thereby permitting judges to ensure that their instructions have been followed.

Another difference is in the lack of a second notice. In fact, Québec's CCP requires a second notice to be issued when a judgment is rendered[106]. The Ontario law does not require this. At most, it requires the judge approving the settlement to consider whether it would be appropriate to publish one[107].

The CPA accords the judge great latitude once more with regard to distribution methods, In fact, the court may order any distribution method it considers appropriate[108]. At the judge's discretion, this may take the form of class or individual recovery. In addition, the Ontario law allows a collective distribution to be ordered, even if it benefits non-members or members who

[100] 1992, SO 1992 c. 6.
[101] 2002, SO 2002, c. 30, Sched. A, section 8.
[102] RRO 1990, Regulation 194, section 12.
[103]" Any other relevant matter" s. 17 (3) (f), "by any means or combination of means that the court considers appropriate" s. 17 (4) (d), "give any other Information the court considers appropriate" s.17 (6) (i)
[104] CPA Ontario, *supra, note* 100, sections 17-21.
[105] Ibid., s. 20.
[106] CCP, *supra,* note 1, art. 591 para 2.
[107] CPA, *supra, note* 100, section 29 (4).
[108] Ibid., s. 26 (1).

have already been compensated[109]. However, before making his decision, the judge must always consider which form of distribution will be most practicable[110].

In Ontario and Québec, a significant proportion of class action suits end with a settlement. But while the CPA gives judges the discretion to approve settlements, it gives them little or no guidance on the criteria they should follow in deciding whether a settlement is in the interest of class members. Case law indicates that judges give a strong presumption of fairness in the settlements submitted to them[111].

As in Québec, since the law leaves room for judicial creativity, some authors argue that judges should be less conservative and more imaginative with the ultimate aim of better serving the interests of class members. In Ontario, as in in Québec, the court is the guardian of the interests of absent members[112].

The fees for the plaintiffs' attorneys must be approved by the court[113]. Although the CPA states that the fees must be reasonable[114] it says nothing about what actually constitutes a reasonable fee. The Ontario law recognizes certain criteria to consider in making this assessment, including the percentage of the final compensation that the fees represent, the choice of the right multiplier[115], the way in which the fees charged compare with the fee that would be payable under the fee agreement with the defendants and the incentive they provide for attorneys[116].

The Ontario court remains seized with the action even after the settlement, since it oversees the execution of the judgment and distribution[117]. Accordingly, it has the power to demand information such as the take-up rate. Although this is far from the norm, it has already occurred[118].

[109] Ibid., s. 26 (6) and Lafond, *supra, note* 80, p. 198.
[110] Ibid., s. 26 (3).
[111] Kalajdzic, Jasminka, "Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario", University of Toronto Master of Laws, 2009, p. 102-103.
[112] Kalajdzic *supra,* note 111, p. 101.
[113] CPA Ontario, *supra, note* 100, s. 32 (2).
[114] Ibid., s. 33 (8).
[115] The multiplier is a number (typically between 1 and 5) by which the court calculates counsel fees (hours worked x hourly rate). This varies according to risk, the quality of the legal work and the complexity of the case. We often speak of the "Lodestar" method, named after the American case in which this approach was first employed.
[116] Kalajdzic, *supra,* note 111, p. 153.
[117] CPA Ontario, *supra, note* 100, section 26 (7).
[118] *Wilson v. Servier Canada Inc*, (2005), 252 DLR (4th) 742 (SCJ) at para.99, cited by Kalajdzic, *supra,* note 111, p. 133 ..

3.2.3 British Columbia

British Columbia adopted a class action regime in 1996. The rules governing this are to be found in the Class Proceedings Act (CPA BC)[119]. We will deal only briefly with this regime because of its similarity to the Ontario regime.

In British Columbia, as in Québec and Ontario, it up to the judge to ensure the best interests of the class.

As elsewhere in Canada, the class action application must be certified before it can be formally brought, and the majority of causes certified are subsequently settled out of court[120]. In such cases, the trial judge must determine whether the settlement is fair, reasonable and in the best interests of members[121].

The British Columbia legislature gives courts the power to issue any order and impose the terms that it considers appropriate to ensure a fair and expeditious settlement of the case[122].

Like the Québec law, the British Columbia law provides for the publication of notices at two key moments: when the class action is certified[123] and when a judgment is reached on the members' common issues[124].

The judge may find it appropriate not to publish the notice of certification[125]. However, when he does choose to publish such a notice, he must consider the following eight points: the cost of the notice, the nature of the remedy sought, the size of individual members' claims, the number of members, the existence of sub-classes of members, the probability that members could opt out of the class action, the members' place of residence and other relevant information[126].

The judge also has the freedom to determine the means by which the notice is disseminated; this may differ according to type of member[127]. As in Ontario, BC's CPA specifies the minimum information that must be contained in the notice, leaving the court discretion to include any other information it deems appropriate[128].

[119] [RSBC 1996] Chapter 50.
[120] *Class actions in British Columbia*, The Canadian Bar Association British Columbia Branch, April 2015. Online: http://www.cbabc.org/for-the-public/dial-a-law/scripts/credit-debt-and-consumer/233
[121] CPA BC, *supra,* note 119, s. 35.
[122] Ibid., s. 12.
[123] Ibid., s. 19.
[124] Ibid., s. 20.
[125] Ibid,s.19 (2).
[126] Ibid., s. 19 (3).
[127] Ibid., ss.19 (4) and (5).
[128] Ibid., s. 19 (6).

Finally, the court must approve the form and content of notices before they are published[129] to enable the court to ensure compliance with its orders and the law.

Thus, in the laws of the three provinces analyzed, it appears that the legislature intended to leave room for the judges' creativity, it can be used to find original ways to use the notice to members in order to increase the rate claim and/or compensation.

As stated earlier, any settlement must be approved by the court as it deems fit[130]. Again, we believe this formulation provides judges with the latitude they require to define what is appropriate in order to protect the interests of the class.

The BC court can only order collective recovery (aggregate award). However, the following conditions must be met: monetary compensation must be claimed by some or all class members, no further questions of law or fact should remain to be determined other than those relating to the amount, it must be possible to reasonably determine the amount without the members being required to produce proof[131]. There seems to be no individual recovery in British Columbia. However, given the low take-up rates generated by this type of recovery, we can assume that this is not a bad thing.

Following the collective recovery, however, the aggregate award may be divided among individual class members. In these cases, the CPA gives the class action judge explicit authority to authorize the use of individual grievance forms, to order the production of affidavits or other documentary evidence and even audit a sample of claims[132]. Such powers are not explicitly specified in the laws of Ontario and Québec. However, it can be presumed that the wide discretion granted to ensure good case management gives the same powers to the judges in these provinces.

As during the proceedings themselves, the British Columbia court is accorded considerable discretion in the way it manages the distribution of the amounts of compensation to be awarded. In fact, BC's CPA mentions several means of distribution, including a lump sum, a reduction in price or credit on future bills. The CPA also states that distribution can be made by any means authorized by the court, once more opening the way for judicial creativity[133].

Finally, the legislature accords the court considerable discretion with regard to the fees for the defendants' attorneys. To be enforceable, a fee agreement must be approved by the court[134]. Although it does not define the criteria that should guide the judge in approving such an agreement, the CPA states that he has the power to decide when the agreement should not be

[129] CPA BC, *supra,* note 119, s. 22.
[130] *Ibid.* s. 35.
[131] Ibid., s. 29 (1).
[132] Ibid., s. 32 (3).
[133] CPA BC, *supra,* note 119, s. 33.
[134] *Ibid.*, s. 38 (2).

approved, the amounts to be paid to attorneys and the way these amounts are determined. In addition, the court may make any order it thinks appropriate[135]. So we can imagine situations in which the judge considers it appropriate to use the take-up rate as a factor to be considered in determining the counsel's fees and even make these dependent on the take-up rate.

4. Incidental factors

Our literature review and the interviews we conducted with experts[136] permitted us to single out certain factors that may affect the take-up rate. These factors are interrelated, which complicates the task of providing Canadians with better access to justice in class action matters. These factors are as follows:

4.1 Knowledge

The first factor that may affect the take-up rate is knowledge of class actions currently under way. To facilitate dissemination of such information, a comprehensive register of class actions should be made available to the public.

At present, there are two major records in Canada. The first is the Québec Superior Court's registry of class action[137], which this court is obliged to maintain by virtue of the *Code of Civil Procedure*[138]. The second is a database presented on the Canadian Bar's website[139].

The first lists every class action in the province since January 1, 2009. This is an extremely arid site in which it is difficult to locate specific information.

The second only contains records of class actions submitted on a voluntary basis, with all the gaps that this entails. Some authors suggest that this database be developed further, in particular to provide for the inclusion of claim forms, which would help keep track of the take-up rate[140].

4.2 Publicity and communication with members

Between the time when the class action takes place and the time when members receive compensation, there are several stages at which it is essential to communicate with members.

[135] *Ibid.*s. 38 (7) (d).
[136] The list of experts consulted is in Appendix 5.
[137] Online : http://services.justice.gouv.qc.ca/dgsj/rrc/Accueil/Accueil.aspx
[138] CCP, *supra,* note 1, art. 573.
[139] Online : http://www.cba.org/Publications-Resources/Class-Action-Database
[140] Ward Branch and Greg McMullen, "Take-Up Rates: The Real Measure of 'Access to Justice,'" Branch MacMaster LLP, 2011, p. 12.

The types of communication used and the way in which the information is conveyed are of paramount importance here.

4.2.1 Notices

In Ontario, it is the judges who have the power to order the publication of notices[141]. In Québec, publication of notices is not mandatory, even though it is done almost systematically. That said, Ontario courts are less and less inclined to order the publication of notices in newspapers[142]. According to Jasminka Kalajdic, some judges have begun to voice their skepticism about the effectiveness of publishing "traditional" notices, especially in newspapers or on defendants' websites[143].

> [...] class counsel are paying greater attention to the effectiveness of proposed notice programs in their certification and settlement approval material, including hiring experts to design such programs and provide the court with sworn evidence about the expected penetration levels of various forms of notice.[144]

However, they have to insist that notices be sent directly to members, whenever possible.

The notice must clearly state who may make a claim and how[145]. In Québec, notices must also be distributed in such a way as to reach the greatest possible number of class members. Mtre Pierre-Claude Lafond, an expert in consumer law and author of several books on class actions, suggests that certain methods of sending out notices are being underutilized. In particular, it would be in the interest of the members if the Internet and social networks were utilized more than at present. The notices could also appear on invoices and even on the packaging of consumer products[146].

In the U.S. the law requires the publication of the best possible notice under the circumstances, including individual notices to every member who can be identified through reasonable effort. Authors Wright and Brasil assert that best practices require notices to be mailed directly to members. They also assert that, for effective communication, it would be wise to call on firms specializing in mass mailings that can "clean up" the contact lists (in order to maximize the scope of the mailing) and to track any mail that is returned to sender[147].

[141] CPA Ontario, *supra*, note 100, s. 17.
[142] Kalajdzic, *supra,* note 111, p. 146.
[143] Ibid., p. 125.
[144] Ibid., p. 126.
[145] Charles M. Wright, and Luciana P Brasil,. "The Importance of 'Schedule F': How Real Access to Justice is Diven by Notice and Claim Forms," Canada, 2008, 14 p 2. Online: http://www.branchmacmaster.com/storage/articles/The_Importance_of_Schedule_F.pdf
[146] Lafond, *supra*, note 98, p. 13.
[147] Wright and Brasil, *supra* note 145, p. 3

According to several experts, putting a notice in a newspaper is the worst way to communicate with class action members, except perhaps when a population is concentrated in a specific region, in which case, a notice in the local newspaper would be appropriate[148]. Newspaper notices are in fact often "hidden" in the advertising pages or among classified ads, not to mention their less-than-attractive appearance for the reader.

In Québec, notices must be designed to be understood by those outside the legal profession. They should be short and written in plain language. Québec's *Code of Civil Procedure* requires that clear and concise terms be used when drafting notices[149]. The Québec Bar Association has issued a publication to assist practitioners and the judiciary in writing notices[150].

In the rest of Canada, such obligations do not exist. In the United States, on the other hand, notices must be composed "clearly and concisely," in "plain and easily understood language"[151].

4.2.2 Means of communication

The higher the budget allocated to communications, the more creativity is possible.

Using TV, radio and social media to inform class action members usually produces good results. For example, in *Infineon Technologies AG* v. *Option consommateurs*, a class action against a company selling random access memory (DRAM), for which Option Consommateurs was the representative, Justice Pierre-C. Gagnon of the Québec Superior Court authorized a communication plan with a budget of $1million aimed at improving the take-up rate. This led to the creation of a website dedicated to this class action and to the broadcasting of advertisements on television and radio, in French and English, at prime time. Several journalists became interested in the action and published articles in major newspapers. The result was that over one million claims were made, more than 900,000 of which were approved[152].

An ambitious communications plan was also developed in the context of the Indian Residential Schools class action; it included a notice translated into at least 14 native languages and dialects, aimed at every province and territory in Canada. The notice was delivered by mail, email and in person (when the members were known and reachable) and through local organizations and media (native media outlets, radio, television and print media)[153].

[148] According to Normand Painchaud and Marie-Anais Sauve, class action lawyers. Interviews conducted by Alexandre Plourde, October 14, 2016.
[149]CCP, *supra,* note 1, art. 581.
[150]Barreau du Québec "Action collective: Guide sur les avis aux membres " March 2016, p 13. Online :http://www.barreau.qc.ca/pdf/publications/guide-avis-membres-action-collective.pdf
[151] *Federal Rules of Civil Procedure*, 2014, s. 23 (c) (2) (B).
[152] *DRAM Claim Processing Report*, October 30, 2015.
[153] *In re Residential Schools Class Action Litigation Settlement Notice Plan Phase I – Hearing Notice Phase II – Opt-Out/Claims Notice.* Prepared by Hilsoft Notifications, 2007. 69 pages. Online :http://www.residentialschoolsettlement.ca/French/Notice_Plan.pdf

Sometimes it is also possible to use intermediaries to transmit the information. For example, in the case of a class action concerning an unsafe drug, the notice could be distributed to doctors who could then transmit information to patients[154].

It is sometimes possible to find original ways to reach the target audience. For example, in the context of a class action against insurance companies that failed to compensate victims of the 1998 ice storm in Québec, videos were posted on YouTube[155]. As part of the class action against the Montreal's *Agence de métropolitaine de transport* for damage resulting from service interruptions, sandwiches men were posted at Metro stations informing customers how to make their claim[156].

To achieve results, it is always important to pay careful attention to communications with members and to avoid the use of overly technical legal terms. One should also avoid including statements in the claim form that could be construed as legal intimidation, such as that members are liable to prosecution for perjury.

To ensure the most effective possible communication, one should consult experts, especially experienced claims managers.

> In the United States, the larger claims administration companies employ individuals who have developed expertise designing notice programs. Those persons will consult with counsel and will often give evidence to a court concerning the design of the notice program and its relative effectiveness[157].

It should be remembered that Canada is a bilingual country. We must therefore pay particular attention to the quality of the translations of communications to members, which can affect the take-up rate[158].

Finally, it is important that throughout the claim process, members have access to a resource person who can answer their questions, whether by telephone or online.

The take-up rate is also affected by a variety of behavioural factors. Errors such as mailing notices to the last known address based on information dating back several years, sending the notice and claim form in two different mailings, contacting only members who are still customers of the company, all these can seriously compromise the take-up rate.

[154] Kalajdzic, *supra,* note 111, p. 126, citing *Andersen v. St. Jude Medical Inc*. (March 3, 2005) Court file no. 00-CV-196906CP (Ont. SCJ).
[155] https://www.youtube.com/watch?v=qYe85PW9_hA, Posted September 11, 2013.
[156] Normand Painchaud and Marie-Anais Sauve, class action lawyers. Interviews conducted by Alexandre Plourde October 14, 2016.
[157] Wright and Brasil, *supra, note* 145, p. 8.
[158] Durand, *supra,* note 46, p. 50-51.

4.3 Class

The nature and composition of the class members may also have an impact on the take-up rate. Classes may be composed of sick, elderly, vulnerable, handicapped people, or those who speak neither English nor French. It becomes immediately obvious that it may be difficult to reach these people and communicate with them effectively.

The composition of the class can also be a problem, especially when its members are located in several jurisdictions, provinces or states. In travel-related cases, for example, the class may be composed of Canadian citizens and foreign nationals. This was the case in a class action suit brought against British Airways and Virgin Atlantic Airways in 2007[159], which involved alleged collusion in artificially inflating the price of fuel. A member was defined as: "Any person who, from August 2004 to February 2006, bought in Québec a plane ticket for a long-haul flight operated by one of the defendants or any person linked to them and where the origin or the final destination is located in Québec." In a case such as this, contacting class members poses particular challenges.

This clearly implies that in communicating with members of a class action, the content of the message and the development of the claims process must be designed based on the particular composition and nature of the class. What works for one class may be a total failure for another.

In many cases, the target class is large, but the take-up rate is low, due to only a small percentage of potential members actually suffering damage. For example, in the case of the class action against Maple Leaf involving meat products contaminated by listeriosis, the class consisted of all those who had purchased or consumed the recalled products. On the other hand, only those who had experienced physical symptoms associated with listeriosis were compensated[160].

Although the entirety of the funds dedicated to compensating victims was spent, only those members who had suffered damage obtained compensation, resulting in a low take-up rate. Examples such as this show that the take-up rate depends on several parameters.

4.4 Area of law

Certain areas of law can have a definite influence on the take-up rate. For example, the take-up rate in a nuisance case may be far higher than in a case on competition law, in which members can be difficult to identify, and therefore to contact.

[159] Option consommateurs joined this lawsuit as claimant in July 2009.
[160] *Option consommateurs and Marie-Josée Bonneau v. Maple Leaf Foods inc.*, Settlement Agreement, December 17, 2008, http://spavocats.ca/wp-content/uploads/2017/02/373-2008_maple-leaf_settlement-17-12-08.pdf

4.5 Lengthy procedures and actions and other delays

The duration of the class action is likely to influence the take-up rate. The longer it takes to resolve a case, the harder it will be to contact members. For example, in such cases, the members may have forgotten that they were affected ... or may even have died (think of actions against tobacco or drug companies whose members are elderly). It is usually far more complex to make a claim on behalf of the estate than for the members themselves.

After an appreciable lapse of time, it will also be more difficult to collect any necessary documentary evidence. The members may simply have lost the evidence (especially when it was on paper).

That said, a too-short claim period may also have the effect of reducing the number of claims. In the U.S., the National Association of Consumer Advocates (NACA) believes that this period should never be less than 90 days[161]. Stakeholders consulted by Option consommateurs in 2009 generally regard periods of 90 days to 6 months as most conducive to maximizing the number of claims[162].

4.6 Forms and procedures to follow

It is well known that the complexity of the process constitutes an obstacle to class members filing a claim. The general view is that for any class member, the cost of participating in the claims process, such as having to fill in forms or provide supporting documentation, should be lower than the amount of the claim. Wright and Brasil (2008) summarize this view as follows:

> […] defendants will not want to "access justice" if that translates into a net cost for them, whether monetary or personal. Excessively complex forms, insignificant personal benefit or a cumbersome claims process could all push the cost-benefit analysis into the negative realm and deter defendants from making valid claims [163].

If members are not to be discouraged along the way, the simplicity of the procedures involved in the claims process needs to be ensured, especially in the following three areas:

First, the procedures and the number of steps that members have to deal with in order to make a claim should be kept to a minimum. With this in mind, it is better to avoid compulsory oaths, unnecessary inquiries and unnecessary requirements – it is not uncommon, for example, to require class members to fill in a form using ink of a specific color or to sign their initials on each

[161] National Association of Consumer Advocates. *Standards and Guidelines for Consumer Litigation and Settling Class Action* (3rd Edition), 2014, p. 72.
Online:http://www.consumeradvocates.org/sites/default/files/NACA%20Class%20Action%20Guidelines%20Updated%20May%202014.pdfhttp://www.consumeradvocates.org/sites/default/files/NACA%20Class%20Action 20Guidelines%%% 20May% 202014.pdf 20Updated
[162] Durand, *supra, note* 158, p. 48.
[163] Wright and Brasil, *supra, note* 145, p. 8.

page or after each question on a form[164]. Also, the need to produce documentary evidence should be avoided as far as possible. If members are required to include documents that are several years old (bills, medical records, etc.), we can realistically expect a drop in the take-up rate.

Second, when members do have to complete claim forms, these should be as simple and esthetically pleasing as possible, even if this involves hiring writing experts, linguists and/or graphic designers to help the lawyers in their work[165]. Also, several authors suggest that, whenever appropriate, two claim forms should be offered to members: one basic form, very simple and easy to fill in that would allow them to get basic compensation, and another more complex form to be filled in only on the other consumers likely to get additional compensation[166].

Third, the means members use to make their claims should be simple and adapted to modern technologies. This especially involves the use of digital processes. As Branch and McMullen (2011) point out: "Settlements must move into the Internet Age. We are doing electronic banking and shopping, but for some reason, we are doing "paper and pen" class action settlements. This is shameful."[167] Today, we see no reason why this option should not be available. Wright and Brasil even argue that in this age, parties who decide not to use the Internet should be required to justify this in court[168]. This could be the beginning of a debate.

In short, the cost/benefit ratio for the member of a class action must be positive – as Ward Branch and Greg McMullen rightly say: "Keep it simple, stupid."[169]

4.7 Defendants and attorneys

The large number or undue complexity of the procedures imposed on class action members is sometimes intentional. In fact, it is a recognized tactic aimed at reducing the number of claims. In the context of our research on claim forms, several attorneys and authors in numerous jurisdictions brought up this problem[170].

[164] Wright and Brasil, *supra, note* 145, p. 9.
[165] In this regard, we refer the reader to two research reports published in 2010 and 2012 by Option consommateurs: Durand, *supra, note* 158 and Stephanie Poulin and Elise Theriault, *Class Action Suits: Model Claim Forms to Facilitate Access to Justice. A Case Study*, Option consommateurs, 2012, 273 pages. Online :https://www.option-consommateurs.org/documents/principal/fr/File/oc_ic02_formulaire_rc_rapport_2012.pdf
[166] Wright and Brasil, *supra, note* 145, 14 p.
[167] Branch and McMullen, *supra, note* 140, p. 16.
[168] Wright and Brasil, *supra, note* 145, 14 p.
[169] Branch and McMullen, *supra, note* 140, p. 14.
[170] National Association of Consumer Advocates. Standards and Guidelines for Litigating and Settling Consumer Class Action (3rd Edition), 2014, p. 70-71. Online :http://www.consumeradvocates.org/sites/default/files/NACA%20Class%20Action%20Guidelines%20Upd

> […] the defendant will be hoping to avoid a large payout and could demand stricter verification of each claim or limit the notice and often the clarity and prominence of the information. The plaintiff lawyers who have negotiated the settlement are often unwilling to make too many demands on the claim process for fear of losing a deal that will pay them a certain fee regardless of how many class members are paid. (….) The parties negotiate accessibility of the claim form, knowing that ease of access will dramatically increase claims rates[171].
>
> And in the settlement context, where defence counsel may exert considerable influence in how the notice is crafted, there may be little incentive for either party to craft the best notice practicable[172].

The appointment of an independent, professional claims manager plays a key role in ensuring a high take-up rate. This is also the conclusion that Mtre Catherine Piché of the Law Faculty of the University of Montreal, arrives at: [TRANSLATION] "efficient, effective, tight management of recovery by the manager/administrator results in higher participation and compensation rates"[173].

4.8 Type collection and distribution

The type of recovery (class, individual or mixed) ordered at the conclusion of the class action and the type of distribution (direct vs. indirect – *cy-près*) can also affect the take-up rate.

4.8.1 Collective, individual, or mixed recovery

Collective recovery is the norm. In these cases, defendants are obliged to deposit a lump sum in order to compensate members. Individual recovery is somewhat the exception. It allows the defendant to [TRANSLATION]"keep the monies owed in his bank account and grant relief only on presentation of a valid, formal claim"[174]. Mixed recovery is also rare. It may be ordered in special cases in which some portions of the amounts to be distributed are better suited to collective recovery while others require individual recovery. For example, in the same case, physical harm may only apply to one individual, whereas punitive damages will require collective

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ated%20May%202014.pdfhttp://www.consumeradvocates.org/sites/default/files/NACA%20Class%20Action 20Guidelines%%% 20May% 202014.pdf 20Updated. Wright and Brasil, *supra, note* 145, p. 10. Federal Judicial Center. *Manual for Complex Litigation* Fourth, §21.66, 2004. Online: https://public.resource.org/scribd/8763868.pdf

[171]Hilsee, Todd B. and COYLE Hilsee, Barbara. "Analysis of Effectiveness of Class Action Claim Forms" The Hilsee Group LLC, 2010, p. 5-6.

[172]Kalajdzic *supra,* note 111, p. 125.

[173] Catherine Piché, "Le recouvrement et l'indemnisation des membres dans l'action collective," *The Canadian Bar Review*, 2016, Vol. 94, p. 194. Online:http://droit.umontreal.ca/fileadmin/droit/documents/PDF/Publications/Recouvrement_Piche2016.pdf

[174]Ibid., p. 183.

recovery. According to Catherine Piché, it is collective recovery that results in the highest rates of participation and compensation.[175]

With collective recovery, members are generally compensated individually, whether directly or otherwise. At this stage, there is no advantage for the defendant if individual class members do not receive compensation. With individual recovery, however, the defendant obviously benefits financially if the take-up rate is low.

In the case of individual recovery, some authors assert that the payment of a lump sum for every member is likely to increase the take-up rate. In contrast, when proof of damage is required, in which case the manager might reject non-compliant claims, the take-up rate may be relatively low. Indeed, this second type of recovery provides defendants with an incentive to complicate the steps[176].

4.8.2 Direct or indirect distribution

The funds in a collective recovery may be distributed directly or indirectly.

Indirect distribution, also known as *cy-près*, does not allow for the determination of a rate properly speaking; otherwise, it could be argued that this rate is 0%, even though the full amount is distributed. In fact, this form of distribution involves paying the total sum recovered, not to class members, but rather to a third party whose aim, directly or indirectly, is to ensure the interests of members. It can occur when the costs of individual compensation exceed the total value of benefits, when it is impossible to know the identity of the members, or when there is a balance remaining after compensation is paid. This type of distribution is the subject of much criticism, particularly as regards access to justice.

Direct distribution permits each member to be compensated individually. This can take many forms, but we will single out two main ones here. The first is “passive distribution,” which is a form of automatic distribution. In the opinion of all the experts we contacted or whose views we read, this is the form of distribution that results in the highest take-up rate that gets compensation to every member of a class. Members are not required to take any action; it is entirely passive. This method assumes that the identity of members and their contact information are known, which is often the case in the context of class actions in which the defendant (a merchant) has the list of victims and still has a relationship with them. This method of distribution has been used effectively in the context of class actions in which financial institutions had to pay back sums of money they had illegally required their credit card customers to pay.

This method of compensation cannot be used in all class actions, since the identity of the members is so often unknown. For example, in competition law actions, it is difficult to know

[175] Ibid., p. 196.
[176] Wright and Brasil, *supra, note* 145, p. 13.

who bought such and such a product or component, the price of which had been set by a cartel. Such situations call for "active distribution." This means that despite the recovery being "collective," each class member must take concrete steps to produce their own claim: they must be aware of the class action, must identify themselves to the class and personally carry out the steps in order to be compensated. It is particularly in this context (and that of individual recovery) that the quality of communication and the number of steps to be taken can greatly influence the take-up rate.

Added to this is the fact that in some class actions, class members may be divided into several classes. For example, in the Maple Leaf case (on meat products contaminated by listeria), it was impossible to know the identity of all those who purchased and/or consumed contaminated products. The settlement reached with Maple Leaf divided the class into four "levels" of psychological distress and 8 "levels" of personal injury[177]. Members were asked to identify themselves and the class they belonged to and make the corresponding claim. Furthermore, because their claims involved physical and/or psychological damage, members had to produce relevant evidence (medical records) in order to receive compensation. Since variables such as these complicate the proceedings, they had a definite impact on the take-up rate.

4.9 Type and amount of compensation

The type of compensation dispensed to members can seriously affect the take-up rate. Indeed, compensation may take the form of a sum of money to compensate the damage, payments in kind - repair or replacement of property - or even discount coupons or credits to apply to a future purchase[178].

Coupons and credit have certain drawbacks. They oblige the class member to enter into a new contractual relationship with a merchant with whom he has lost confidence. In addition, in order to use the coupons, members must spend money; it may also be the case that they cannot afford to use them. This situation is a major obstacle to claims. Indeed, in the United States, certain settlements involving coupons have had an extremely low take-up rate[179].

[177] Settlement Agreement of December 17, 2008, *supra, note* 160.
[178]Option consommateurs. "Les règlements coupons : la justice devient-elle un programme de fidélisation? "2007, 91 p. Online :https://www.option-consommateurs.org/documents/principal/fr/File/rapports/recours_collectifs/oc_reglements_coupons_20 0706.pdf
[179] Respectively *In re Cuisinart Food Processor Antitrust Litigation*, CCH-1983-2 Trade Cas. 65.680 (D. Conn. 1983) and *Perish v. Intel Corp*., No.CV-75-51-01 (Cal Super. Ct. Santa Clara Co. June 22, 1998, cited by Justice Thomas A. Dickerson and Brenda V, Mechmann. "Consumers Class Actions Settlements and Coupons: Are Consumers Being Shortchanged?" *Advancing The Consumer Interest, Vol 12*, 2000. online.:www.classactionlitigation.com/library/dcoupon.html

In the U.S., the legislature requires "judicial scrutiny of coupon settlements"[180] and, to this end, the Federal Judicial Center has issued a recommendation of prudence to judges faced with such settlements because of their *prima facie* potential for injustice[181].

As for the amount of compensation, it is obvious that a small amount may inspire less enthusiasm than a very large amount. The lawyers we consulted,[182] however, told us that this is not the only factor to be considered. In fact, a small compensation amount can have a very good take-up rate if the steps to obtain it are simple. For example, in the case *Infineon Technologies AG* v. *Option consommateurs*, the amount involved for each defendant was only $20, yet the publicity campaign related to the settlement resulted in a high take-up rate. If the steps involved are long and complex, however, they may discourage many members from making a claim, even if the expected benefit is quite high.

In every case, the compensation must be brought to the attention of the members so that they can decide whether or not to engage in a claims process.

4.10 Modes of counsel remuneration

The way that attorneys are remunerated may affect the take-up rate. Indeed, when the fees accorded to them are dependent on this rate, attorneys have more incentive to ensure that members demand their due.

Moreover, this is the assumption underlying the following rule from the U.S. *Class Action Fairness Act* (CFAA) relating specifically to coupon settlements that are deemed particularly incompatible with the best interests of members:

> If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed[183].

It would probably be a good idea to apply part of this principle to other types of recovery. In fact, a "bonus" or a supplemental fee payable only in return for conclusive results could be used as an incentive. This is also what Justice Cumming of the Ontario Court did in *Wilson v. Servier*, when he decided to remain seized with the matter during the recovery period, since he considered it appropriate for the court to know whether the process was going well for the

[180] *Class Action Fairness Act*. *Public Law* 109-2-Fwb. 18, 2005, 28 USC s. 1712 (e).
[181] Barbara J. Rothstein and Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges Third Edition*, Federal Judicial Center, 2010, p. 17-18. Online :https://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf
[182] Interview with Mtre Shaun Finn of BCF lawyers, conducted by Alexandre Plourde, October 28, 2016.
[183] *Class Action Fairness Act*, *supra,* note 180, s. 1712 (a).

plaintiffs, to know the take-up rate, and to have an overall picture of the distribution process before determining the final amount of the fees for the class counsel[184].

4.11 Participation of other stakeholders, groups and associations

Several jurisdictions, including Québec[185] allow a corporation, partnership, association or other class to represent class action members under certain conditions.

In the U.S., there is a tradition[186] that advocacy organizations, whether private or public, may launch a class action or object to settlements they view as unfair to, or inadequate for, the class. Their intervention is generally well-regarded by the courts:

> Generally, government bodies such as the FTC and state attorneys general, as well as nonprofit entities, have the class-oriented goal of ensuring that class members receive fair, reasonable, and adequate compensation for any injuries suffered. They tend to pursue that objective by policing abuses in class action litigation. Consider allowing such entities to participate actively in the fairness hearing[187].

We believe that the involvement or participation of these organizations in class actions may positively influence the take-up rate, including allowing members to receive higher - therefore more attractive – compensation, by substantially improving communication with them and by facilitating claim procedures. Indeed, as a consumer rights association, Option consommateurs gets involved in class actions and plays a much more active role than any single individual. It employs its expertise to ensure that members' interests are well represented.

4.12 Members' personal satisfaction or fears

The personal satisfaction that class members upon being awarded compensation is not to be overlooked as a factor that could influence the take-up rate. If members perceive that the compensation will not bring them satisfaction, or have the impression that justice will not be done, they may be discouraged from making claims to which they are entitled. Beyond the money, there is sometimes an issue of ethics or "principle" involved. So when a settlement is concluded, one should not only consider the actual damage sustained by members, but also what they themselves consider to be just, in the widest sense of the word, with a capital "J."

It may happen that class members feel apprehension. For example, some may see compensation as "too good to be true." Some members who have not followed the case since its inception and who learn only at the end that they are entitled to compensation may worry whether there is deception or fraud involved. For example, in the Infineon case we have already

[184] *Wilson v. Servier* [2005] OJ No. 1039 (SCJ), para. 99, quoted by Kalajdzic, *supra,* note 111, p. 164.
[185]CCP, *supra,* note 1, art. 571 al.3.
[186]Kalajdzic *supra,* note 111, p. 108-109.
[187]Rothstein and Willging, *supra, note* 181, p. 17.

discussed, Option consommateurs and attorneys did everything in their power to simplify the claims process to ensure that almost every Canadian was entitled to their $20, provided they made the request on the claims administrator's website. In our focus group, however, some participants said they had seen the seen ads for it on the Internet but were worried it might have been phishing.

4.13 Power of judges

Judges have considerable powers when it comes to class actions. Prudent use of these powers can have a tangible impact on the take-up rate because, ultimately, judges are expected to give their approval to every aspect of the claims process that might affect its progress.

We discussed the powers of the court in the section on Québec and Canadian law. It needs to be understood that these powers are mostly supervisory in nature. Although they are set out in broad terms, we believe that judges can and should use them to require parties to make very specific corrections if they feel that this may expedite the claim process, increase the take-up rate and thereby facilitate access to justice.

For example, the court in Québec has the authority and the responsibility to determine the characteristics of the notices that are published,[188] approve transactions,[189] ensure that counsel's fees are reasonable,[190] and direct how the money will be distributed[191]. Moreover, Article 49 of Québec's *Code of Civil Procedure* is very clear to the effect that both trial and appeals court judges have all the powers needed for the exercise of their jurisdiction.

So in order to promote access to justice, judges have the authority to order that measures be taken to promote a high take-up rate. As recommended in 2010[192], they may require that claim forms are drafted or revised by a writing expert or that the take-up rate is monitored so that additional communications measures can be undertaken, if necessary.

Authors Ward Branch and Greg McMullen believe that Canadian judges should play a more active role in monitoring the progress of class action and enforcement, particularly to ensure that compensation actually gets to consumers. In their view, a compilation of the take-up rate should be mandatory in every class action case, and the role of judges should not end when the settlement is approved. They believe that judges should refuse to endorse settlements that do not require follow-up, and demand a satisfactory explanation for each additional question or step leading to compensation[193].

[188] CCP, *supra,* note 1, art. 579, 581, 594 and 599.
[189] Ibid., Art. 590.
[190] Ibid., Art. 593.
[191] Ibid., Arts. 595-597.
[192] Durand, *supra,* note 46, p. xii.
[193] Branch and McMullen, *supra, note* 140, p. 11 and 17.

4.14 Unknown factors

The take-up rate in certain class actions has remained inexplicably low, despite the amounts involved and the efforts expended in the communication plan.

By way of illustration, we cite a U.S. study carried out in 2005 on 118 class actions in the securities field. The average take-up rate for these actions was around 28%[194]. The reason this rate was so low is that many class members did not make a claim because they believed this task was up to their financial institution. It would have been in the interest of the financial institutions to have made these claims, incidentally, especially since the steps involved were relatively simple. They would have had satisfied clients, and the money recovered would probably have been reinvested, which would have benefitted the institution.

About this study, Ward Branch and Greg McMullen aptly remark:

> [...] The other 72 % abandoned claims with an average value of $850,000. These numbers challenge stereotypical notions of unsophisticated or lazy class members not understanding claim forms or not bothering to fill the forms out.
>
> [...] We know that small claims are less likely to be collected than large ones, but even class members who are supposedly purely rational economic actors are failing to collect[195]. (Emphasis added)

Which returns us to the original question: what are the factors likely to influence the take-up rate? Some cases seem simply inexplicable.

5. Results of the focus groups

5.1 In context

To understand how consumers perceive class actions and in an attempt to identify the factors that might influence their participation in the claims process, we held four focus groups, two in Montreal (in French) and two in Toronto (in English), with a total of 40 participants. The participants' sociodemographic profile is presented in Appendix 1 and the session discussion guides used in Montreal and Toronto are reproduced in Appendices 2 and 3.

Participants were asked several questions about the class actions; these were divided under four headings. First, to establish the participants' level of knowledge about class actions, they were

[194]James D. Cox and Randall S. Thomas, "Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements," *Stanford Law Review, Vol. 58*, p. 411-424. Online :https://papers.ssrn.com/sol3/papers.cfm?abstract_id=655181

[195] Branch and McMullen, *supra*, note 140, p. 9.

asked to define in their own words what a class action is, to discuss recent examples and relate their personal experiences, if any. Second, participants were asked about the communication channels used to inform consumers about class actions currently under way, such as notices and advertisements in newspapers or online postings. Third, participants were asked to discuss issues related to the claims process, such as what information they are willing to disclose while making a claim and once the claims process has begun. Fourth, they were asked questions to determine their degree of confidence in the class action as an instrument of justice.

5.2 Summary

First, the participants showed themselves to possess a good knowledge of class actions. They were able to define what they represent and to provide various examples, mainly by referring to cases that have been settled in the past five years. Participants who had been class action members had a variety of experiences, which tinged their responses. Some said that simple or automatic claim processes had led them to have a positive experience. Others stated that the long delays in obtaining the claim and the large amount of information they had to supply did not justify the amounts claimed.

The vast majority of participants said they got their information through the Internet and social networks. They felt that notices and ads publicizing class actions should be posted on these communication channels. Several, however, said they were suspicious whenever presented with monetary offers on the Internet, fearing that a supposed class action notice might be fraudulent advertising. In general, participants felt that the use of a diverse range of media, such as mainstream television and radio, was better a better means of contacting those concerned by the class action. On the other hand, they believed that notices published in newspapers are unlikely to reach targeted consumers. Few participants were aware of the existence of online registers, but perceived them as potentially helpful tools. The participants' overall assessment was that they are not sufficiently informed about the existence of class actions.

The participants' preference for web technologies, including social networking, was also observed with regard to the claims process. A large majority felt better about submitting a form over the Internet than by mail. Participants said that their two favourite ways of claiming an amount in a class action are using web-based forms and automatic reimbursement.

Moreover, the level of financial compensation was not their main motivation in participating in the claims process. Participants indicated rather than the prospect of being able to "teach them a lesson" when an organization caused them significant harm was reason enough to claim the money through a class action. On the other hand, participants said that when the compensation levels are too low, the effort required is not justified.

The participants were ready to transmit general information, such as contact information, to participate in the claims process. They thought that additional required information should be related to the subject of the action, for example medical records in the case of an action whose

members have a health problem. On the other hand, participants asserted that they would under no circumstances reveal their social insurance number. Finally, the participants considered it useful to receive outside assistance, especially when the claims process is complex.

The vast majority of participants had a favourable perception of class actions. They viewed them as an imperfect but necessary means of obtaining justice. Participants also gave a high approval rating to the practice of distributing remainders to organizations or foundations related to the case.

5.3 Analysis

5.3.1 Consumer knowledge

At the start of the focus groups, we asked the participants to define what class action meant for them. A large majority were able to give a logical, consistent definition. The concepts that came up most often were “class” or “cause” and “harm,” For example, participants defined a class action as a “class of individuals with a common cause against a company,” or a “group of several dissatisfied persons” or simply a “group with a cause.” Some were able to provide more comprehensive definitions, such as this one, given in one of the Toronto groups: “A group of people with a common complaint who get a lawyer and split the profits and are suing an entity/ person/ company for a particular reason.” One participant, however, expressed a negative perception of class action, defining the process as ”a procedure initiated by lawyers to make money.”

All the participants were able to name class action suits or companies against which an action had been brought. Most of the class actions named by participants were ones that have obtained a judgment in the last five years or ones currently under way that have featured in headlines in the past year. The fields of law referred to with regard to class actions were very varied, ranging from consumer rights to civil liability. Among the class actions most frequently cited in the two focus groups in Montreal, were *Croteau v. Société de transport de Montréal*, *Option Consommateurs v. Volkswagen Group Canada Inc.*, *Option Consommateurs v. Bank of Montreal* and *Option consommaters v. National Bank*. Generally, the causes mentioned by the Montreal focus group differed from those mentioned by the Toronto class. Finally, only a minority of participants indicated interest in a class action that is currently under way.

The participants were then asked about the source of their information on the class actions they had mentioned. Most of them said their information came from the mainstream media (television, radio, newspapers), through advertising, newsletters or public affairs programs[196]. Few participants knew someone close to them who was involved in a class action. Finally, only

[196] For example, in the Radio Canada’s *La Facture*.

one person mentioned having consulted the Québec Superior Court's class action registry to obtain information.

When asked if they had taken part in a class action, responses differed between the Montreal and Toronto focus groups.

In Montreal, a majority of the participants said they had been class action members, most often because they had claimed an amount upon receiving a letter from a company or because they received an automatic credit on their credit card. Others reported having made a claim after seeing ads that made them think they qualified as plaintiffs. The most-often cited causes are those related to credit card fees[197] and dynamic random access memory (DRAM)[198]. In the latter case, participants said they found out that they could claim as a result of seeing an ad on social media or on a website specializing in computer equipment.

In the Toronto focus groups, only a minority of participants reported taking part in a class action. These participants said they learned that they were concerned in a class action through a letter they received in the mail.

The participants' experiences as class members were mixed. Some expressed rather negative views because the legal proceedings stretched out over such a long period, because the amounts were paid several years after their claim or because the claims procedures were cumbersome and complex. In contrast, other participants said they appreciated their experience, because the forms were simple to fill out or because the refund was automatic.

Finally, the majority of participants reported they had never failed to present a claim when they knew they qualified. Instead, they said that the only reason they did not participate was because they had insufficient information or were unaware of the action.

Three recent examples of class action were presented to participants of the Montreal focus group: the DRAM, Danone Yogurt and Maple Leaf Foods class action suits. When asked whether they would have participated in these actions, a majority said they would, as they regularly consumed these products. Other participants said that their participation would depend on the difficulty of the claims procedures.

5.3.2 Information on class actions

The presenter handed out various examples of class action notices published in newspapers. He then asked the participants if they had seen similar notices. A slight majority of participants responded negatively. Also, a very large proportion felt that newspaper notices are not a good way to inform citizens of the existence of a class action. In their opinion, social networks and

[197] *Option consommateurs v. Banque de Montréal*, 2007 QCCS 6026; *Option consommateurs v. Banque Nationale*, 2015 QCCS 4380.
[198] *Infineon Technologies AG* v. *Option consommateurs*, *supra,* note 30.

Internet notices are more likely to reach a larger number of consumers. In one of the Toronto groups, a participant said: “I don’t really know anyone who uses a newspaper.” Even the ones who read a newspaper regularly said that they did”not pay any attention to that stuff “or that they”never got as far as the ads section. “

Only 4 of the 40 participants in the focus groups were aware of the existence of class action notices available online. A majority of participants felt that these sites might be useful to them and said they appreciated the official nature of the information they contained. Some participants indicated that they would visit such a website before purchasing a product from a company to ensure that it was not the target of a class action. However, some participants expressed reservations, saying they did not believe that they would consult such websites on a regular basis. Participants also felt that it could be long and complicated to search through the registry for every organization targeted by a class action.

When asked what would be the best communication channels to reach them, many participants suggested advertising on the Internet and social networks. The other consensus that emerged was that more channels should be used, including major media such as television, radio and newspapers. On several occasions, the participants expressed the view that under certain circumstances, companies should, if possible, communicate directly with those involved in class actions. Another idea put forward by participants was to publish information in the offending company’s product sales locations.

5.3.3 Claims Process

The presenter began the series of questions on the claims process by asking participants what they considered to be the best way for them to claim. They had four choices:

- Fill out a form on the Internet;
- Fill out a paper form and send it by mail;
- Make a statutory (or sworn) declaration, verbally and in person;
- Receive money automatically, without having to take any steps

In three of the four groups, a consensus was quickly established around the first and fourth options. Participants considered online forms and automatic cash payment as the simplest claim methods. Mailing in a paper form was considered a laborious process. One participant said: “Payout needs to be substantial enough for members to go and mail the letter.“ In the third group, submitting a form by Internet or by mail were seen as equivalent claims methods. Some participants said they would be willing to fill out a form if they got higher monetary compensation.

Participants were asked what might change their willingness or unwillingness to participate in the claims process.

A majority said they would file a claim in a case of significant damage. For example, one participant said: “If it’s a significant impact to me, if it's debilitating or affecting my life, then I will pursue it. “In this regard, several indicated that their motivation for participating in the claims process was not necessarily related to the amount of compensation. Rather, the participants were motivated to “teach the company a lesson”; they also said that “if no one claims, the companies will continue their bad practices.”

Later, when participants were asked what might cause them to abandon the claims process, the majority pointed to the weight and complexity of the process. For example, a form that would take too long to fill out was seen as a major constraint. Several participants added that if they received only negligible compensation, it would not justify the time required to fill out the form. During one of the sessions in Toronto, a participant also drew attention to the impact of procedures that are spread out over time: “The more time goes by, the less likely I would be to fill out a claim.”

Finally, we asked participants to state whether one area of law in particular was more likely than another to motivate them to participate in the claims process. Four types were given as examples: competition, misrepresentation, health problems and loss of money. A large proportion of participants identified health problems as the legal domain that would most motivate them to claim. The second option, which participants mentioned a few times, was class actions related to the competition domain, involving practices such as price fixing.

We asked participants in two of the four groups what would be a reasonable amount of time to make a claim through class action. The replies varied greatly, from a few months to no delay at all; the most common response being one year. Several participants indicated that the length of the claim should be linked to the severity of the case; more time should be allocated to more serious cases.

When asked about what information it is legitimate to request from class action defendants, a consensus rapidly developed in the Montreal sessions around contact information, including home address, phone number and email. However, participants were quick to assert that in no case should anyone ask them for their social insurance number.

The other consensus that emerged from the four focus groups was that the required information must be related to the cause of the class action, especially when proof of purchase is needed or when the medical record is required for reasons related to health problems. Also, during the discussions in Toronto, the idea was expressed that greater financial compensation might justify having to provide more information.

A large majority of participants considered that outside assistance would be useful in cases when the claims process is particularly complex. Some gave examples such as cases related to medical problems, which typically require more information. Others felt that assistance might be needed to support more vulnerable consumers, such as those who have no Internet access, or younger, less experienced consumers. Among the types of assistance that participants

thought most likely to be useful were the opportunity to consult lawyers or organizations such as Option consommateurs specializing in class actions, or the availability of a hotline to answer questions.

5.3.4 Consumers' perceptions

The majority of participants were confident about receiving their money if they enrolled in the class action claim process. Some, however, said that the steps were likely to be complicated by the many details to be provided during the process or that the period between filing the claim and receiving compensation could be as long as several years.

Most participants did not associate the class action process with fraud, but said it required vigilance on the part of consumers, especially in cases when the advertisements promised fabulous amounts of compensation. In such a context, the group members said that the presence of a logo or emblem that was familiar to consumers, such as those of federal or provincial governments, was likely to improve confidence in the process.

When participants were told that sums left over at the end of class actions were sometimes distributed to foundations or organizations related to the cause, a very large majority (93%), expressed support for this way of distributing money. They considered that this obliged the company "to pay for everything and keep none of the money," and was a way of respecting the goal of reparation enshrined in the judicial process. In this way, class actions achieve their goal of reprimanding the company. A minority of participants expressed reservations, believing that the surplus amounts are a way for companies to avoid compensating members.

A large majority of participants felt that class action is an effective means of obtaining justice. Several said that the process, while not perfect, is the best means currently available to consumers. In particular, participants felt that "strength in numbers" is essential and that the consequences of a judgment may be considerable given the bad publicity that the offending company could face. One participant summed it up by saying, "The amount that the company has to pay out probably doesn't affect their bottom line, but it makes customers more aware and to not blindly trust companies." One participant In Toronto said he was disillusioned with the process and found that although class actions are a good system politically, it is the consumers who end up paying, because, ultimately, the companies will just increase the price of their products.

6. Data on take-up rates

6.1 The context

While the number of class actions has increased over the past 30 years in Canada and the United States, only a limited number of empirical studies have so far focussed on take-up rates and

what determines them. Fitzpatrick and Gilbert's review of the literature in 2015[199] found a grand total of 124 observations; these, however, are often reported in aggregate, making it difficult to compare rates in different studies.

In general, there is wide variation in the take-up rates reported in the literature. In the United States, Branch and McMullen (2011)[200] and Fitzpatrick and Gilbert (2015) report claims rates ranging from 2 to 40% and 1 to 70% respectively. In a survey of companies that participated in class actions in Canada, by Kalajdzic (2009)[201], one rate reported ranged from 1 to 100%. Finally, closer to home, the preliminary results of a study by Piché and Lespérance (2016)[202] cite [TRANSLATION] "extremely revealing variations, in the order of less than 1% to over 70%."

All of the studies reviewed in this section underline the difficulty researchers face in obtaining complete, reliable information on take-up rates. Since data on the number of members and defendants is generally not publicly available, researchers often have to fall back on internal data (Branch and McMullen, 2011), or even conduct their own surveys on the parties involved (Kalajdzic, 2009). Comparing the take-up rate between class actions is further complicated by the fact that the number of members in the class is uncertain or was simply not previously recorded in the claims process.

The fragmentary, incomplete nature of the information, together with the small size of the samples in the literature greatly limit the conclusions that researchers have until now been able to draw from the successes and failures of various claims process. However, despite repeated calls from specialists to establish transparent accountability processes and set up a standardized database, the situation continues. Recently, Piché and Lesperance (2016) carried out a study of approximately 345 class actions that manages "to establish member participation and compensation rates in about 40 cases," i.e. only about 12%. The authors added, [TRANSLATION] "It was difficult for the authors of the study to disentangle the factors and clues and arrive at the conclusion that there was some kind of deterrent involved, either in the class action itself or directly associated with to the repercussions (or anticipation) of the collective dispute. "

As explained in the following sections, this research echoes prior empirical studies, since the process of obtaining data from companies has been particularly difficult, limiting the number of cases in our sample. The following sections present a description of the methodology and analysis of the data obtained.

[199] Brian T Fitzpatrick and Robert V Gilbert, "An Empirical Look at Compensation in Consumer Class Actions," *Journal of Law & Business*, New York University, 2015, Vol. 11 (4), p. 778.
[200] Branch and McMullen, *supra, note* 140.
[201] Kalajdzic, *supra,* note 111.
[202] Piché and Lespérance, *supra,* note 28, p. 87.

6.2 Process of obtaining data

We wanted to empirically determine the factors influencing claim rates by collecting information on the distribution protocols of a sample of class actions that have paid out compensation in recent years. As will be seen below, we faced a number of constraints, which had the effect of limiting the size of our sample and, consequently, the analysis we were able to perform on the data.

We started by identifying all the class actions in which an individual compensation process has been implemented over the last five years in Canada. This involved a major data collection effort particularly in provinces outside Québec, since there is no database containing an exhaustive list of class actions in Canada. Indeed, as stated previously, registration of class-action related information in the Canadian Bar Association's database is not mandatory. The exercise led to the identification of 243 class actions in which a claims process was established between 2011 and 2016.

The next step was to set up a random sample of about twenty class actions from the directory. We did this by selecting every tenth class action listed[203]. We excluded certain class actions, for several reasons: distribution was carried out indirectly, it was a coupon settlement, the number of members was unknown, the person who originally had the data could not be found, the distribution was either not completed or was completed but the take-up rates had not yet been calculated.

For each class action in this sample, we then attempted to compile data relevant to the analysis of the factors determining the take-up rate, such as the number of members and defendants involved, the type of case, the length of the proceedings and the means undertaken to publicize the notice. Since most of the information is not publicly available, we had to contact the attorneys of record individually and ask them to provide the necessary data. Nearly one hundred attorneys were contacted by email and phone, often several times each.

Despite repeated contacts, acquiring information from counsel proved particularly difficult for various reasons. In most cases, our emails and calls remained unanswered. In other cases, the attorneys no longer worked for the same firm and the data was not archived. Some of the attorneys we did manage to contact refused to send us the information we requested. They justified their refusal by citing lack of time or their desire to maintain professional secrecy[204]. It also happened a few times that we encountered some blunt refusals before the communication was abruptly terminated.

[203] I.e. we selected class actions numbers 10, 20, 30, etc.
[204] Note that there is no justification for invoking professional secrecy to refuse the transmission of data, since the judicial process is public.

As stated previously, the difficulty that researchers experience in obtaining information on class action take-up rates is well documented in the literature. Pace and Rubenstein (2008),[205] in an empirical study of class-action-related data in the United States, report that despite "the significant time and effort we put into the task, the final outcomes of four out of five class action cases were beyond our discovery. It is not that the data are non-existent – claims administrators or parties certainly have them – it is, rather, that they are secreted away. The outcomes of publicly approved settlements lie locked in private files," It is therefore scarcely surprising that we encountered the same difficulties with regard to class actions in Canadian jurisdictions.

Given these problems, we employed different strategies to expand our class action sample. We first contacted other attorneys in our repertoire, this time by selecting cases from among those already selected[206]. Some of the attorneys who responded positively to our requests for information provided us with data on other class actions they had participated in. In the end, our sample contained information on 16 class actions that distributed compensation between 2011 and 2016.[207]

Finally, we note that the information provided by attorneys, when they agreed to share their data, were sometimes fragmentary. We had to complete our research by browsing through judgments approving settlements or claims protocols when these were publicly available. These judgments include data on communications with the members and the procedures required for filing a claim.

6.3 Results

The take-up rate and other information from our sample of 16 class actions are presented in the table in Appendix 4.

The take-up rates, which we define as the number of members who received direct compensation divided by the total number of members covered by the class action, were usually provided individually by the attorneys we contacted. Sometimes it was possible to complement the information with the judgment approving the settlement agreement. When only a range was provided, we employed hypotheses to establish the number of members and defendants[208].

[205] Nicholas M. Pace, and William B, Rubenstein. "How Transparent are Class Action Outcomes - Empirical Research on the Availability of Class Action Claims Data", RAND Institute for Civil Justice, 2008, p. 45.
[206] Class actions numbers 5, 15, 25, etc. were the ones chosen.
[207] We foresaw an optimal number of at least 20 class actions for our sample. Despite our best efforts, we could only obtain 16. After analysis and consulting our methodologist, we can say that four more class actions would have in no way changed or enhanced the results of this study.
[208] For example, if the number of members in a class action in our sample was estimated at between 40,000 and 50 000, we had an average of 45,000 members.

We also present in the table in Appendix 4 the field of law corresponding to the class action, the financial compensation (the mean and the interval, when available), how long members were allowed to request each type of claim (individual, automatic and hybrid) and the means chosen to communicate with members. Most of this information was obtained from publicly available judgments relating to the 16 class actions. Finally, we also present the time between the authorization judgment and the distribution process ("length of proceedings"). It should be noted that this period usually underestimates the number of years elapsed between the start of legal proceedings and distribution of financial compensation to the members, since it can sometimes take years to authorize or certify a class action.

There is considerable variance in the take-up rates we arrived at, which is consistent with the results of the empirical studies cited previously, compared with which they fall in the upper range of reported claim rates. Our claim rates vary between 18 to 100%, with an average of about 60%. We believe that one factor that might explain the high rates we obtained is the way our sample was constructed. Indeed, it is possible that a bias was introduced due to the fact that the attorneys who agreed to provide us with data were generally satisfied with the take-up rate obtained. Instead, the numerous refusals or failures to get back to us could be symptomatic of class actions with low take-up rates. Again, we believe that greater transparency and greater accessibility to information would enable a more accurate analysis of factors affecting take-up rates.

The size of the sample does not permit an advanced statistical analysis of the determinants of the take-up rate. However, there are three observations we wish to make that also come up in the literature we studied.

First, the close-to 100% take-up rates are related, unsurprisingly, to claim processes in which members were compensated automatically. In these cases, the members received direct compensation, either through a deposit to their bank accounts or by a check in the mail. The success of automatic compensation in class actions has also been remarked by Fitzpatrick and Gilbert (2015), who state that "in light of the success of automatic distributions, courts and counsel interested in the compensatory side of class actions should make bolder efforts to find and preserve data on class members from the case's outset"[209]. Note also that several of the class actions in our sample were affected by the removal of members between the start and the end of the proceedings, which inevitably has an effect on the ability to contact members, and therefore the take-up rate. We shall return to the efforts needing to be undertaken to preserve the data in the next section.

A second observation is that the steps that members need to take in order to participate in the distribution process may also affect the take-up rate. For example, the lawyer responsible for a case with a take-up rate of 18% observed that the oaths required in making the request were

[209] Fitzpatrick and Gilbert, *supra, note* 199.

the main factor behind the low rate. This result was achieved despite counsel personally contacting members. Also, in other class actions that obtained average claim rates, members were generally asked to complete a form and provide supporting documents which they subsequently had to send by mail.

Finally, from the data obtained and our conversations with attorneys who provided information, we believe that targeted communications can improve the take-up rate. In fact, one class action in our sample displays a claim rate of 90%, which attests to the efficacy of publishing notices in local newspapers and on municipal websites. Other examples of targeted communication are publishing notices on specialized websites or even within the institutions involved in the class actions.

Although a more thoroughgoing analysis of the links between take-up rates and the various explanatory factors would be possible if the sample were larger, we believe that the factors influencing take-up rates in class actions are generally circumstantial. Our efforts have shown that the comments of the attorneys we contacted are useful, even essential, in arriving at a proper understanding of the progress of the claims process. Our study therefore points to the need to deepen understanding of the circumstances surrounding the entire class action procedure, most likely through interviews with the parties concerned. We shall return to this point later.

7. Discussion

The previous sections have helped shed light on the many factors that can result in downward or upward variance in the class action take-up rate. While it is unrealistic to expect a high take-up rate every time a claims process begins, given the circumstances of each class action, it nonetheless remains that there are several levers available to legislators and stakeholders to maximize the number of defendants.

It is on these levers that we shall focus in this section, through considering the lessons learned from the analysis of the doctrine, from interviews with experts, from focus groups as well as the sampling of class action distribution protocols discussed in the preceding section. As will be seen, improvements can be made at all stages of the claims process, from the publication of the notice to the accountability phase at the end of the claims process.

We are aware that the following suggestions have been made repeatedly by experts, both in studies and through the doctrine on class action. We believe, however, that they are still relevant because, as this study has led us to observe, most of these suggestions have not been put into practice or only partially so.

7.1 Communications with members

As the experts interviewed for this research repeatedly pointed out, a good communication strategy for contacting action members is an essential first step in obtaining a satisfactory take-up rate.

First of all, successfully making contact with members will often depend on information that is within the reach of those responsible for the claim process. The ability to contact members directly is a luxury that only a limited number of class actions enjoy. For example, cases of a medical nature or financial disputes are more likely to have a high take-up rate, since the members' contact information is usually available. Since this information generally leads to an automatic award, for example via a transfer on a consumer's credit card, it is not surprising to see a claim rate of 100% in such cases.

One reason for the members' contact information not always being available is simply that the defendant does not have it (sometimes the defendant has no register or the register is not up-to-date). Unsurprisingly, this situation can be exacerbated when legal proceedings drag on. It is therefore important for the judge to ensure that the information is available, particularly during class action authorization. As suggested by one of the experts interviewed for this research, it would be a good idea to consider including within the law the requirement that defendants keep members' contact information at the disposal of the parties for the entire duration of the process. This could be done by means of an order issued at the beginning of the proceedings (from the judge to the defendant) to submit to the court the list of members covered by the class action.

As previously reported, in most class actions, incomplete information prevents members' being identified directly. In these cases, different solutions are available to the parties to maximize the benefits of the communication plan and contact as many members as possible.

One avenue frequently employed in Canada is the use of professional claims managers who, over the years, have developed expertise in managing the class action claims process, including identifying members. For example, these managers can use demographic data related to the class action members to better target the communication campaigns. They can also take advantage of web technologies and the era of "Big Data." One expert interviewed gave the example of a claims manager who developed techniques to estimate the probability that class members would move in a given period, which allowed him to better gauge the chances of making contact by mail. The same manager was also able to verify whether members actually clicked on the hyperlinks in the emails they were sent. We believe that using the expertise developed by claims managers is one avenue to be considered in maximizing the take-up rate.

Communication with members should be allowed to take many forms within the same action. For example, in an action requiring members to fill out a form in order to claim the amount, one of the current ways of doing this is to send members a claim form by mail. However, communication with members should not stop there. In order to contact members who may

have moved, successive waves of communication, e.g. contacting by phone and e-mail, can be considered. By doing so, the chances of reaching a larger number of members are increased.

When communicating with members, the parties should always pay careful attention to the form and content of the message. For example, short messages written in clear language are always preferable. Avoid, as far as possible, the use of legal terms that are unfamiliar to the average consumer. Also, close attention should be paid to the title of the message. In the focus groups, some participants noted that, if the title of a document does not clearly state what it is about, or if it is not "catchy," the chances of it being read are low. In Canada, it is also important to ensure the quality of the translation when advertising campaigns are conducted in both official languages. Incidentally, the importance of notices in contacting class action members has pushed the Québec Bar to publish a guide suggesting best practices for the content of notices, their means of publication and the language to be used[210]. We believe that practitioners across Canada could learn from this guide.

Another lesson learned from the interviews with experts and focus groups is that the communication plans must make use of the latest technologies such as emails, social networks or specialized websites, or telephone messaging services (SMS). In fact, a majority of the participants surveyed in the focus groups claimed that best way to reach them was to use social networks or the specialized sites they regularly visit.

Special attention will be required in the presentation of the messages, however, because participants in the focus groups told us they were suspicious of information circulated electronically. They reported having seen ads on the Internet about class actions of which they were members and could make a claim, but had not done so because they believed them to be fraudulent. This demonstrates that when communications are transmitted electronically, care must be devoted to presentation in order to inspire confidence in the legitimacy of the action. This can be achieved for example by including the logo of a recognized organization related to the action, such as the court rendering the judgment, the government, the counsel's law firm or an even an association, if it is acting as defendant.

On the other hand, the experts agree that publication of notices in newspapers is to be avoided. Participants in the focus groups confirmed that they read this type of media very little, declaring that they generally keep informed online. In addition, notices in newspapers are usually located in the last section and are not easy to spot, even for an experienced reader. When publication in newspapers is used, the notices should appear inserted in many different newspapers, including those offered free of charge in public transport in major Canadian cities. These newspapers enjoy wider circulation and advertising is cheaper. When necessary, more targeted publications may also be placed in local newspapers. These two methods are preferable to publishing notices in major newspapers.

[210] Québec Bar, *supra, note* 150.

In general, it is important to tailor the communications to the class members. Elderly people, newcomers and natives might require using special communication channels. This has been done successfully in the past, especially in Québec, in the case *Picard v. Québec*, in which the use of local radio and translation of communications into the dialects of the various indigenous groups covered by the class action achieved a good take-up rate.

The communications used must also be adapted to the type of class action in question. For example, during a medical case, we may want doctors to inform their patients of the existence of a claims process. Other creative avenues have been used in the past, for example using sandwich-men in front of Montreal metro stations during a class action for users of public transport.

Finally, it is obvious that communication campaigns with the greatest financial resources will be able to expand their communication methods and target the largest number of members. Our recent experience has shown how successful this can be, especially in *Infineon Technologies AG* v*. Option consommateurs,* in which an extensive advertising campaign broadcast on television and radio as well the use of a website and social media resulted in a large number of claimants.

7.2 Claims

The steps to be undertaken by class action members are a crucial factor in obtaining good levels of participation by defendants. In fact, as one of the experts interviewed declared, the ideal is to have no claim process but rather to pass directly to automatic distribution. This is the compensation mode that had the highest take-up rate in the sample we analyzed in the previous section. However, as described above, offering direct compensation, for example by depositing an amount in a consumer's bank account, is not possible when we know only the identity of the members but not their contact information. This mode could be used in class actions aimed at compensating people who bought a consumer good.

We would like to emphasize certain principles that will help maximize the take-up rate, including keeping the claim process simple; the complexity of the steps must be proportional to the amounts members can receive, thereby ensuring that the benefits to claimants are higher than the cost of their participation.

The simplicity of the claims process can be promoted through various means. The first is to keep the number of steps required for members to make their claim to a minimum. Next, the forms provided must be simple and easy to complete. One of the experts interviewed gave the example of the use of automatic forms previously filled in by the claims manager based on available information. All members had to do to qualify as claimants was to put a check mark in the corresponding boxes. In general it is also preferable to indicate clearly on the form the amount that can be claimed rather than, for example, to indicate a range of amounts.

It is also important to avoid requesting evidence from claimants when unnecessary. Class action procedures generally extend over several years, which increases the likelihood that members

will no longer have the evidence requested; this is very often the case with proof of purchase. If necessary, two claims processes could be held in parallel: the first with a fixed amount requiring a simple statement from members, and a second with higher amounts that will be allocated on the basis of justifying evidence. In all cases, mandatory oaths are to be avoided, since they greatly limit the participation of claimants due to the investment in terms of time and effort that they are not always prepared to make.

The experts and participants surveyed in the focus groups agree that transmitting claim forms by Internet may encourage members to participate in the claims process. This method was used in the claims process for *Infineon Technologies AG* v*. Option consommateurs* and demonstrates the effectiveness of such an approach.

Experts generally agree that the length of the claim period should be three to six months. The experts we interviewed and the participants in the focus groups were unanimous on this point: too long a claims period would reduce the take-up rate, since claimants tend to procrastinate in filling out forms, and may end up forgetting to do so. However, the process should be adapted to the type of case. For example, the claim period should be extended when there is a considerable amount of evidence to be provided, such as a medical report, statements of account or a sworn statement.

Although participants in the focus groups indicated that they would not bother to claim if the amount of compensation was too low, most said they would participate in the process to obtain justice and discourage companies from continuing the same wrongful conduct, regardless of the amount they received in compensation. The literature review also showed that compensation through coupons is associated with very low claim levels, and is therefore a type of compensation to be avoided.

Finally, several of the participants surveyed in the focus groups said that it was useful to have access to external assistance from skilled resource persons, particularly in the context of complex claims processes. This assistance could be given via a phone line made available to claimants who need answers to their questions, or by help sessions to complete claim forms.

7.3 Public registries

Among the means used by the legal community to better communicate class-action-related information to Canadians are the establishment of two class action registries: the registry of the Superior Court of Québec[211] and Canadian Bar database[212]. It also emerged from the focus groups that the citizens believe that practical information relating to class actions be centralized. Those surveyed said, for example, that they would consult the registries prior to purchasing a

[211] Online : http://services.justice.gouv.qc.ca/dgsj/rrc/Accueil/Accueil.aspx
[212] Online : http://www.cba.org/Publications-Resources/Class-Action-Database

product to ensure the integrity of the business. However, several things should be done to maximize the benefits of these registries.

First, since most Canadian consumers are unaware of the existence of these two registries, efforts should be made to better publicize their existence. Also, a test consultation of these resources showed that it can be difficult to quickly find information on a given class action. The sites hosting the registries are primarily designed for lawyers, and ordinary citizens have difficulty navigating them. It emerged from the focus groups that if the information is not easily and quickly available, consumers will not take the time to consult the registries. Improving the ergonomics of the Québec registry and the Canadian database could facilitate and increase the frequency of visits by Canadians. We thus suggest providing effective search tools on each site that use simple keywords to locate class actions against a particular defendant. The site would also give information on each of the actions contained in the databases in a concise table format, for example.

The information contained within the records should also include claim forms used and the final data, the take-up rates obtained after the claims process was completed. Our own research has shown the difficulty entailed in searching for information related to the claim process. These improvements will allow for greater transparency in the results, which would then facilitate the identification of factors for increasing take-up rates in the context of class actions.

Another potential improvement concerns the Canadian Bar database. Unlike the Québec registry, the information available in the Canadian database is provided voluntarily. These improvements could be inspired by the Québec Superior Court registry. It should also be mandatory for information on class actions in Canada to be recorded in the Canadian Bar database.

Finally, it seems like a good idea for consumers to be able to access a single portal that combines information on the entirety of Canadian class actions, past or present, of which Canadians may be members. We consider that such a portal would facilitate accessibility to this information.

In our opinion, the creation of a single public registry containing all the information related to class actions in Canada would form the basis of a better understanding of the factors affecting take-up rates. Until such a registry is set up, it will be difficult to establish the factors that promote high take-up rates. It is important to reiterate that this duty of disclosure should apply both during the class action and afterwards, when distribution has taken place. The creation of a registry and the obligation to register information within it could be performed through legislation, in collaboration with the Canadian Bar Association and the bar associations of each province. This obligation could also be imposed by judges, who have discretionary powers allowing them to issue orders to promote the sound management of class actions. For instance, when a judgment is made with regard to a class action, judges could always order the number of members, the take-up rate and the rate of compensation to be recorded in a register.

7.4 Role of counsel

On several occasions, the experts quoted in this study questioned the role played by counsel after the end of judicial proceedings. In fact, how can we be sure that it is in their interest to maximize the take-up rate and actively participate in the claims process? In the opinion of several experts, because the remuneration of attorneys is not linked to the take-up rate, their motivation to maximize this rate is low.

Admittedly, the solution to this problem is not simple, since, as we have stressed several times in this report, the take-up rate depends on chance factors that are sometimes beyond the control of the parties. There is no direct link between the effort expended by counsel and the take-up rate. Experts are therefore cautious when it comes to proposing tying attorneys' remuneration to the take-up rate and proposals differ, particularly given the risk for firms that become involved in a very long process when they assent to participate in a class action.

Some experts recommend counsel being paid a premium or additional fees in the event of achieving a positive result. For example, if the judge in a given class action considers that the necessary efforts have been made to maximize the take-up rate, he could accord counsel a premium.

One expert interviewed suggested another approach. In his view, it would be enough, once the class is completed, to make the take-up rate public in order to encourage counsel to maximize it. Publication of the take-up rate on the website of law firms or in existing data registers, combined with the obligation to be accountable to the judge after completing the claims process, would encourage counsel to provide the effort required. The expert also commented that "People don't change if you don't measure it."

Overall, we believe it is important to ensure that attorneys have all the incentives they require to invest in maximizing the take-up rate. Publishing data on the claims process combined with the accountability process is a good starting point. As for linking attorneys' fees to the take-up rate, we believe that this is one possibility the judge should consider, but it should remain at his discretion, given the unique circumstances involved in each class action.

7.5 Role of judges

Through this research, we have observed that Canadian judges enjoy broad discretionary powers in matters of class action. We believe that the power granted to judges is one of the main tools that could help increase the class action take-up rate. This tool deserves special attention, because judges can modify class action practices in response to the needs of the moment without resorting to a thorough reform of the legislation. This discretionary power permits judges the freedom to adapt to different situations as they arise.

As we saw in the section on Canadian law, their discretion is exercised in many ways. The judge is able, for example, to control communications to members. He can ensure that their content

and form will permit them to reach as many members as possible. If necessary, he can also direct that there be more than one message sent to members. Judges also have the power to order automatic, direct compensation to members whenever possible, thus ensuring that more members are compensated.

Judges also have control over the process of distributing compensation to members. They can, for example, order a second distribution to take place if the first was not satisfactory. They can also exercise control over attorneys to ensure that they take make every effort to promote a high take-up rate. If they deem necessary, they may even order that the distribution be managed by a third party, a claims manager.

In our research, we were confronted with the problem of accessibility to data. In fact, as we mentioned earlier, there is currently no requirement in Canada to make public the final data on the claims process. Among the solutions proposed, we suggested creating a single database containing all information related to class actions in Canada. To ensure that the information is transmitted to the database, judges could systematically order, when rendering a judgment, that the class action data be recorded in it. Another way of ensuring the sustainability of information about class actions is for judges to include it within their final judgments. We found that this is unfortunately not the current practice. Judgments rendered at the end of class actions - known as closing judgments in Québec - often contain only partial information about the take-up rate. In most cases, they are completely silent on the subject. Adopting the practice of automatically disclosing take-up rates within class action closing judgments would be a simple way of increasing transparency with regard to access to information.

To summarize, we believe that judges have an important role to play. Like Branch and McMullen (2011), we not only believe that judges should play an active role in monitoring conduct and enforcement to ensure that compensation reaches consumers, but also that information concerning take-up rates be made public.

8. Conclusion and Recommendations

Through our research, we wanted to answer the question: How can we improve the take-up rate in the class action distribution process? We have seen that there is no simple answer to this question and that many factors combine to influence the take-up rate, both positively and negatively.

We have identified a set of measures that could be implemented to ensure that the number of members involved in the claims process is maximized. For example, publishing clear and concise notices, taking advantage of modern communication technologies, and tailoring messages to the specific circumstances of class actions, are measures likely result in contacting a larger number of participants. A claims process limiting the number of steps and supporting documents needed to qualify as a claimant would also be conducive to greater member participation. We also drew

attention to the broad powers that judges can profitably employ to ensure an accountability process that is sufficiently compelling, clear and informative.

The factors that may serve as inspiration to practitioners were articulated in the doctrine, by the experts we interviewed, and by participants in the focus groups. However, we believe that the ever-growing body of class actions in Canada has far from exhausted its possible lessons and that additional research would further clarify the criteria essential to ensuring high levels of claims in class actions. To ensure the success of this research, we believe that two changes should be considered.

First, the parties involved should have ready access to data on class actions that is complete, standardized and easily accessible. Our research has shown that there are still considerable barriers to accessing class action data in Canada today, despite repeated efforts. As long as all the information, including that related to take-up rates, is not systematically made public, it will not be easy to access, making it difficult to clearly establish the factors that may influence these rates. We believe that the information is useful not only for researchers but also for those who administer the claims process; it may inspire them to contact many members or ensure a good number of claimants. This improved accessibility to data will depend upon a complete and informative accountability procedure, and the exercise, by the judges, of all the discretionary powers entrusted to them by law.

We believe it is essential to rely on the contribution of attorneys and other parties responsible for the claims process in analyzing the factors underlying the class action take-up rate. In-depth case studies need to be conducted given the severe limitations of the purely empirical method. The researchers of the *Laboratoire sur les actions collectives*, Piché and Lespérance (2016), would seem to concur on this point.

Although some progress has been made in recent years, such as the establishment of an accountability process in Québec, we believe that much remains to be done in order to fully understand the determinants of class action take-up rates. Stakeholders in the community must make full use of the levers available to them and employ all the creativity possible within the framework of the law.

Option consommateurs recommends:

To the judiciary:

That judges play an active role in monitoring the progress and implementation of the claims process;

That, whenever relevant, judges will see that a third party is appointed as claims manager;

That judges issue an order requiring the defendants to retain, if known, the contact information of members covered by the class action for the entire duration of the legal proceedings and to disclose it to the defendant in a timely manner.

Judges and attorneys:

That they should work together, to ensure:

- that the disclosure of information pertaining to class action is improved;
- that various communication strategies are used, tailored to class action members;
- that communications to members (especially notices and forms) are written so as to be more easily understandable;
- that translations are of high quality;
- that new technologies are utilized to contact members;
- that communication experts in readability and comprehensibility are hired if needed;
- that simple and effective claims modes are adopted - complex claims modes should be used only when necessary and the amount to be obtained is high;
- that overly long claim periods are avoided (if possible);
- that the distribution is carried out automatically (if possible);
- that members can get help in making their claim, for example over the phone;
- that an appropriate accountability process takes place;
- the possibility of linking attorneys' fees to the take-up rate is studied.

Federal and provincial governments, the Canadian Bar Association and law societies:

That they agree to establish a committee to coordinate the implementation of a centralized Canadian class action registry or to improve the existing registry;

That after consultation with stakeholders, they will make sure:

- that this register contains all the relevant information on class actions (class description, type of claim, communication methods, claim rates, etc.), and before, during and after the action, perhaps by requiring counsel to record the information related to their class action;
- that it contains information on the claims process and links to appropriate resources;
- that it be designed in a format making it easy to consult;
- that it be made public, known to the public and updated regularly.

Appendix 1 - Profile of participants in the focus groups

Table 1 - Profile of participants in the focus groups by gender, age, occupation and education

		Montreal - 1	Montreal - 2	Toronto - 1	Toronto - 2	Total
Number of participants		10	10	10	10	**40**
Sex	Men	40%	40%	50%	50%	**45%**
	Women	60%	60%	50%	50%	**55%**
Age	18-24	20%	20%	10%	10%	**15%**
	25-34	0%	20%	20%	30 %	**18%**
	35-44	20%	20%	20%	10%	**18%**
	45-54	20%	10%	20%	20%	**18%**
	55-64	20%	20%	10%	20%	**18%**
	65+	20%	10%	20%	10%	**15%**
Occupation	Worker	50%	70%	80%	90%	**73%**
	Student	20%	20%	10%	0%	**13%**
	Retired or other	30 %	10%	10%	10%	**15%**
Education completed	Secondary studies	60%	60%	20%	30 %	**43%**
	PSE	30 %	10%	30 %	0%	**18%**
	University studies	10%	30 %	50%	70%	**40%**

Appendix 2 - French Discussion Guide

Aujourd'hui, nous parlerons d'un sujet juridique : les recours collectifs. Sans le savoir, vous êtes peut-être membres actuellement d'un ou de plusieurs recours collectifs. Nous voulons savoir ce qui pourrait vous inciter à faire une demande pour obtenir votre argent lorsqu'un recours collectif se termine.

1. **CONNAISSANCE DES CONSOMMATEURS**

   1.1. Dans vos mots, pouvez-vous me dire ce qu'est un recours collectif ?

   1.2. Pouvez-vous nommer des recours collectifs dont vous avez déjà entendu parler ?

   1.3. Comment en avez-vous entendu parler ?

   1.4. Est-ce qu'il y a des recours collectifs qui sont actuellement en cours et auxquels vous portez un intérêt ? Pourquoi ?

Un recours collectif est une procédure judiciaire qui permet à une personne de représenter un groupe qui a le même problème qu'elle. Par exemple, si une entreprise a imposé des frais illégaux de 30 $ à des milliers de consommateurs, un seul de ces consommateurs peut la poursuivre au nom de tous les autres. S'il y a un règlement à l'amicable ou un jugement favorable, des milliers de personnes pourront alors être indemnisées. Les consommateurs qui font partie d'un recours collectif s'appellent les « membres ». Ils n'ont pas à faire de démarche pour être membres du recours : ils en font automatiquement partie s'ils sont dans la même situation que la personne qui a intenté le recours. Puisqu'il y a beaucoup de recours collectifs intentés au Canada, il est possible que plusieurs d'entre vous soient actuellement membres d'un recours collectif sans même le savoir. On ne connaît pas nécessairement l'identité des membres parce qu'il n'est pas toujours possible de savoir qui a été touché par une pratique commerciale ou qui a acheté un bien d'un certain type. En pratique, il s'écoule souvent plusieurs années entre le moment où un recours collectif est intenté et le moment où un jugement est rendu (ou qu'un règlement à l'amicable est conclu).

   1.5. Savez-vous si vous avez déjà été membre d'un recours collectif ou si vous êtes actuellement membre d'un recours collectif ? Pensez-vous que vous l'avez été ou pas ?

      1.5.1. Qu'est-ce qui vous amène à croire cela ?
      1.5.2. Selon vous, comment peut-on savoir si on est ou non membre d'un recours collectif ?

Lorsqu'un recours collectif est « gagné », il arrive souvent que l'argent soit remis directement aux membres. Pour reprendre notre exemple ci-haut, on peut remettre 30 $ à chaque membre.

Souvent, ce remboursement n'est pas automatique. Pour avoir cet argent, il faut que les membres le demandent, le plus souvent en remplissant un formulaire, sur papier ou sur Internet. C'est ce qu'on appelle « faire une réclamation » dans un recours collectif.

1.6. Avez-vous déjà appris que vous pouviez réclamer de l'argent dans le cadre d'un recours collectif ? Si oui, pouvez-vous m'en parler ? (S'assurer qu'ils disent sur quoi portait le recours.)

1.7. Si oui, comment l'avez-vous appris ?
- Par un avis dans un journal ?
- Par une publicité à la télévision ou à la radio ?
- Sur les médias sociaux ?
- Par votre entourage ?
- Par une communication directe (envoi postal) ?
- Par un article dans le journal ou un reportage à la télévision ?
- Autres ?

1.8. (Pour l'ensemble du groupe) Est-ce que vous avez déjà vu des avis de recours collectifs ou des annonces au sujet de recours collectifs ?

(Pour ceux qui ont déjà appris qu'ils pouvaient réclamer de l'argent*)* :

1.9. Avez-vous présenté une réclamation ?

1.9.1. Quelles démarches avez-vous faites pour obtenir votre argent ?
1.9.2. Êtes-vous satisfait de la façon dont s'est déroulée la réclamation ?
1.9.3. Avez-vous eu des difficultés particulières ?
1.9.4. Avez-vous eu besoin d'aide ou d'information supplémentaire pour faire votre réclamation ? Si oui, où avez-vous obtenu cette aide ? (Par exemple : le représentant du recours, le cabinet d'avocats, le gestionnaire des réclamations, les proches…)
1.9.5. Êtes-vous satisfait du montant d'argent que vous avez reçu ?
1.9.6. Avec l'expérience que vous avez vécue, est-ce que vous présenteriez à nouveau une réclamation dans un recours collectif ? (S'ils répondent « ça dépend », les amener à préciser leur pensée.)

1.10. Avec ce que vous entendez, pensez-vous que vous seriez ouvert à l'idée de présenter ou de présenter à nouveau une réclamation dans le cadre d'un recours collectif ? Est-ce que vous trouvez que cela vaut la peine ?

1.11. Si vous pouviez faire une réclamation dans un recours collectif et que vous ne l'avez pas fait, pourquoi ne pas l'avoir fait ?

Des recours collectifs peuvent être intentés dans différents domaines et pour différentes raisons. Des consommateurs peuvent poursuivre une entreprise qui a fait de la fausse publicité ou qui leur a fait payer des frais qu'elle n'avait pas le droit d'exiger. Ils peuvent aussi poursuivre en groupe une entreprise qui les a fraudés ou une autre qui a fabriqué un médicament ayant des effets secondaires préjudiciables.

Au Canada, certains recours collectifs ont compté un très grand nombre de membres. Des exemples :

a. *Toutes les personnes qui avaient acheté des appareils électroniques contenant de la mémoire vive entre le 1er avril 1999 et le 30 juin 2002 pouvaient réclamer 20 $ en allant sur un site Internet (recours DRAM). Les fabricants de la mémoire vive avaient fait de la collusion pour en hausser le prix.*

b. *Toutes les personnes qui avaient acheté certains yogourts de marque Danone entre le 1er avril 2009 et le 6 novembre 2012 pouvaient réclamer 30 $ en allant sur un site Internet (recours contre Danone). L'entreprise affirmait faussement que son produit renforçait le système digestif des personnes qui le consommaient.*

c. *Toutes les personnes qui avaient subi des dommages physiques ou psychologiques après avoir mangé certains produits Maple Leaf produits entre le 1er janvier et le 31 août 2008 ont pu réclamer entre 750 $ et 125 000 $ en envoyant un formulaire de réclamation par la poste. Une enquête avait révélé que ces produits étaient contaminés à la listéria.*

1.12. Est-ce qu'il s'agit de recours collectifs auxquels vous avez participé ou auriez aimé participer ? (Faire le lien avec les 3 exemples ci-haut ou d'autres exemples pour enrichir la discussion.)

Dans d'autres cas, des membres de recours collectifs peuvent obtenir un remboursement sans avoir aucune démarche à faire. Par exemple, un commerçant peut envoyer directement des chèques par la poste à ses clients, sans qu'ils aient à remplir un formulaire de réclamation pour obtenir cet argent. Une banque pourrait aussi porter automatiquement un crédit au compte de ses clients.

1.13. Avez-vous déjà reçu un dédommagement pour un recours collectif sans avoir eu à en faire la demande ?
1.14. Si oui, étiez-vous au courant que vous étiez membre du recours collectif ?
1.15. La raison pour laquelle vous avez reçu cet argent était-elle claire ?
1.16. Si vous avez reçu un chèque : avez-vous déposé le chèque ?

Puisque les membres d'un recours collectif sont souvent inconnus, ils sont généralement informés de ce qui se passe dans le recours dont ils font partie par les médias. Le plus souvent, ce

sont des avis qui sont publiés dans les journaux. Quelques fois, des publicités peuvent aussi être diffusées à la télévision ou dans d'autres médias. Enfin, il existe des sites web qui répertorient les recours collectifs en cours au Canada.

1.17. Vous est-il déjà arrivé d'apprendre que vous auriez eu le droit de réclamer de l'argent dans un recours collectif alors que le délai pour ce faire était dépassé ? Racontez.

2. <u>INFORMATION</u>

2.1. Avez-vous déjà lu un avis concernant un recours collectif dans les journaux ? Est-ce que vous trouvez que c'est un bon outil pour vous informer sur les recours collectifs ? Pourquoi ? (On montre un ou deux avis – 4 feuilles par groupe. Le but est seulement d'illustrer ce qu'est un avis, pas de le commenter.)

2.2. Avez-vous déjà vu des annonces concernant des recours collectifs ? Est-ce que vous trouvez que c'est un bon outil pour vous informer sur les recours collectifs ? Pourquoi ? (Au besoin – s'ils ne parlent pas –, on décrit les différentes formes que peut prendre la publicité : publicité à la télévision, sur Internet, distribution de dépliants, etc.) (Si pertinent, montrer la publicité de DRAM pour illustrer.)

2.3. Avez-vous déjà consulté un registre de recours collectifs en ligne ? (il y en a deux : le registre de la Cour supérieure du Québec et le registre de l'Association du Barreau canadien.) (Si pertinent, montrer les illustrations de la page d'accueil de chaque registre.)

2.4. Est-ce vous connaissiez ces sites ? Est-ce que vous pensez qu'ils peuvent être utiles pour vous ?

2.5. Quelle serait la meilleure façon de vous informer du fait que vous pouvez obtenir de l'argent dans un recours collectif ?

3. <u>RÉCLAMATIONS</u>

Pour obtenir de l'argent dans le cadre d'un recours collectif, on peut :

- *Remplir un formulaire sur Internet.*
- *Remplir un formulaire papier, puis l'envoyer par la poste.*
- *Faire une déclaration solennelle (ou assermentée) (cela se fait verbalement et en personne).*
- *Recevoir de l'argent automatiquement, sans avoir à faire aucune démarche.*

La ou les manière(s) de procéder dépend(ent) du type de recours, des ententes qui ont été prises, du fait qu'on connaît ou non les membres du recours ou tout simplement du résultat des négociations entre les parties au litige.

On le constate, ces façons de faire demandent plus ou moins d'effort de la part des membres d'un recours.

3.1. Quel est le meilleur moyen ?

3.2. Qu'est-ce qui vous semble être un délai raisonnable pour faire une réclamation ?

3.3. Qu'est-ce qui pourrait vous inciter à entreprendre une réclamation dans le cadre d'un recours collectif? (Si nécessaire : la possibilité d'obtenir une somme d'argent élevée ? Des procédures simples ?)

3.4. Auriez-vous davantage tendance à faire une réclamation dans certains types de recours? (Si nécessaire, illustrer avec ce qui suit – les recours liés à de la collusion, par exemple, des entreprises se sont entendues pour maintenir élevé le prix d'un produit; les recours liés à de fausses déclarations, par exemple, pour vendre leurs produits, les entreprises leur ont attribué des qualités qu'ils n'ont pas; les recours liés à des problèmes de santé, par exemple, un produit vous a causé des dommages physiques ou psychologiques; la situation à l'origine du recours vous a fait perdre de l'argent, par exemple, la valeur de votre auto a baissé.)

3.5. Qu'est-ce qui pourrait vous amener à renoncer?

3.6. Quels renseignements est-il justifié d'exiger pour que vous obteniez de l'argent, selon vous ? (Ne pas lire les choix; au besoin, relancer avec ces différents éléments.)

- Mes coordonnées.
- Des renseignements sur l'achat (nom du commerçant, date approximative de l'achat, etc.).
- Une preuve d'achat d'un bien.
- Des renseignements qui démontrent que j'ai subi un dommage, comme des factures pour la réparation d'un bien.
- Des renseignements personnels (par exemple, sur mon état de santé, comme mon dossier médical).

3.7. Dans quel type de situation seriez-vous prêt à fournir ces renseignements ?

3.8. Est-ce que vos réponses pourraient changer selon le montant que vous pouvez obtenir dans le recours collectif ? (Par exemple, pour réclamer 5 $, 20 $, 200 $, 2 000 $ ou plus.)

3.9. Si oui, pourquoi ?

3.9.1. (Si cela n'a pas été abordé) Combien de temps êtes-vous prêt à consacrer pour faire une réclamation dans un recours collectif ? (S'ils disent que ça dépend du montant à obtenir, essayer de savoir quelle démarche ils sont prêts à faire pour quel montant.)

3.9.2. Y a-t-il un montant d'argent minimal en dessous duquel vous ne feriez aucune démarche, quelle que soit la circonstance ?

3.9.3. Est-ce que le montant qui vous porterait à faire une réclamation est fonction de la valeur du bien ou du service faisant l'objet du recours ?

3.10. (Si cela n'a pas été abordé) Est-ce que l'importance que vous accordez à une cause peut avoir un impact sur vos réponses ? (Par exemple, si c'est un dossier qui vous choque particulièrement ou, au contraire, si c'est un dossier qui ne vous intéresse pas.)

3.11. Est-ce que vos réponses pourraient changer si le processus de réclamation est ouvert plusieurs années après que le recours collectif a été intenté ?

3.12. Croyez-vous qu'il pourrait être utile d'avoir de l'aide pour faire une réclamation ?

3.12.1. Dans quelles situations ?

3.12.2. De quel type d'aide auriez-vous besoin ? (Par exemple : des réponses à vos questions par téléphone, de l'aide pour obtenir les documents exigés dans la réclamation, de l'aide pour remplir les formulaires.)

4. PERCEPTIONS

4.1. Si vous aviez à faire une réclamation dans le cadre d'un recours collectif, auriez-vous bon espoir de recevoir votre argent ?

4.2. Croyez-vous qu'il pourrait y avoir de la fraude dans le cadre d'un recours collectif ? Comment serait-il possible de la détecter ?

Dans un recours collectif, l'argent ne va pas toujours dans les poches des membres. Dans certains cas, par exemple lorsque le montant à remettre à chaque personne est trop petit, on peut plutôt choisir de remettre cet argent à des organismes de bienfaisance. On peut aussi faire de même avec le reste l'argent que les membres n'ont pas réclamé.

4.3. Est-ce que cela vous semble une solution acceptable ? Sous quelles conditions ? Selon vous, existe-t-il d'autres solutions acceptables ? Si oui, lesquelles ?

4.4. Croyez-vous que les recours collectifs sont une bonne façon d'obtenir justice ?

5. CONCLUSION

5.1. Avez-vous des commentaires ou des suggestions ? (Sur l'ensemble de la discussion)

Appendix 3 - English Discussion Guide

1.1. What do you think of when you hear the term "Class Action Lawsuit"?

Definition: a legal process that allows one individual to represent an entire group that has the same problem. For example, if a company is charged $30 in illegal fees to thousands of consumers, one consumer can sue on behalf of all the others. If there's an out-of-court settlement or there's a favourable judgement, then all of the consumers will be eligible to receive a portion of the settlement. Members of the class action are automatically involved in the class action if they have the same issues. The identity of members is not necessarily known as it's not always possible to know who's been affected by the problem or who has bought a defective product. It often takes several years between the time when a class action suit is issued and the time when a judgement is made (or an out-of-court settlement is reached). It could be that there's a problematic product or business practice on the market; it could take several years for the suit to be resolved. Only at that point, will people be able to be eligible for compensation.

1.2. Which ones have you heard about?

1.3. Where do you hear about the class actions?

1.4. Ongoing lawsuits ?

1.5. Personal experience ?

1.6. Thoughts on process/systems – is this a good way to provide justice?

1.7. Who participated in a class action lawsuit?

1.8. How would you go about finding out if you're a part of a class action lawsuit?

1.9. Is anyone aware of directories of class actions?

1.10. Often compensation, is not automatic, they need to request it by filling out some paperwork in order to be compensated (which is called filing a claim in the class action).

1.11. Has anyone learned that they are eligible to receive compensation for a class action?

1.12. How many have seen notices/announcements related to class actions?

1.13. What would be the best time/place to communicate with you about these class actions? For instance, companies might not know who bought the talcum powder or what TV shows you watch or what newspapers you read.

1.14. For you personally, based on your media consumption, what would be the best way to reach you?

1.15. Consumers would have to visit this website periodically to look for products/services that would implicate them. Does the group think that that would be an effective way to stay informed? Who would check it regularly?

1.16. Let me ask, who have gone through this process, what was your experience of the process itself?

1.16.1. How easy/difficult was it for you to fill out the form?
1.16.2. Was there anything about that process that was challenging/difficult/irritating?
1.16.3. Did you need any help filling out the claim form?
1.16.4. When you got the money, was it a small amount or a large amount?
1.16.5. How satisfied were you with the amount of money that you had received?
1.16.6. Based on your experience, would you be likely to file a claim in another class action lawsuit?

1.17. For everyone, how likely would you be to filing a claim in a class action?

1.18. When you think about it, what would be some of the reasons that you would file a claim?

1.19. Is there anyone who might've been in a position to file a claim, but didn't ?

Class action lawsuits can be brought out in a variety of domains and a number of reasons. Class action lawsuits can be from false advertising, or to make them pay charges they have no right to be accepted, or can institute a lawsuit against a company that defrauded them or that instituted a drug with adverse side effects. Examples include, Danon products, Maple Leaf foods that contained Listeria.

1.20. Talking about these class actions, is there anyone who thinks now, that they could've participated in these class actions?

1.21. Have you ever received a notice from a company that they are giving you a refund/credit/etc. without having to do anything?

Shows example of newspaper notices of class actions

1.22. When you see this newspaper notice, does it feel like this is an effective way to learn about class actions?

1.23. Is the kind of thing that would get your attention in the newspaper?

1.24. If folks could pick the section in a newspaper where you would be most likely to read, where would that be?

1.25. If I put this ad in a newspaper, for example, 3 times in a week, how likely would you be to see it?

1.26. Can social media be a place to hear about class actions?

1.27. What do you think of when you see the ads in graphic formats?

1.28. What could they have put in there to make it look legit?

1.29. Now that you know that there is a website (Canadian Bar Association) that lists all the class actions, does this interest you more? To what degree would this be useful for you?

1.30. What's the best way to tell you about ongoing class actions?

1.31. What would need to be said in the first 5 seconds of a YouTube ad to catch attention?

1.32. Which of these methods would be your number 1 choice of receiving the money from a class action? (1=fill out form on Internet, 2=fill out paper form, 3= sworn declaration (in person), 4= automatically)

1.33. Does mail really reduce your likelihood to file a claim?

1.34. How much time is too much time to complete a claims process?

1.35. If, for example, I worked at an ad agency, I could make an ad about how you were denied justice, treated unfairly, lost time – which would be the more compelling ad to get you to join the suit?

1.36. Does it feel like there are some class actions that you would be more likely to participate in?

1.37. The information part of the claims process: there may be different information requirements (i.e. name of merchant, approx. date of purchase, proof of purchase, invoices for health concerns, contact information, personal information on health – medical records, etc.). What degree do these requirements seem reasonable?

1.38. How many people would say that your willingness to provide information is relative to the payout that you might receive?

1.39. In this process, would you be more likely to provide the information if, for example, there was a number provided?

1.40. If you saw an ad with a phone number for a law firm that you had never heard of before, to what degree would you feel satisfied that you would think that that's a credible place to call?

1.41. Is there any amount of money that too low to make a claim?

1.42. When you think about the minimum amount that you would require going through the claims process, I wonder if the minimum is the minimum no matter what, or if it would change from other factors?

1.43. Would your minimum change if the subject matter of the class action changed?

1.44. How does timing affect your likelihood to make a claim?

1.45. How many of you would be more willing to participate in a class action lawsuit, if there was somebody there to help you file the claim?

1.46. If you were to file a claim as a part of a class action, to what degree would you be confident that you would receive compensation? Would you be very confident or skeptical?

1.47. Sometimes the compensation doesn't go into people's pockets; either the judge orders money goes to charity if payout is too little or if there's money set aside that is not all claimed. What do you think about it? Fair/reasonable?

1.48. Advice to the sponsoring law firm.

Appendix 4 - Sample data

Type of class action	Jurisdiction	Take-up rates (%)	Amount of claim ($), average and interval	Length of procedure	Claim period	Type of claim	Communication with members	Claim Procedure
Civil liability	Québec	34.9	754 [30, 2800]	3 years	90 days	Single	Notice sent to members and advertising in major newspapers, television and radio.	Claim Form to complete and return by mail.
Civil liability	Québec	18.2	320	5 years	1 year	Single	Notice sent to members and published in major newspapers. Personal contact by counsel. Publication of notice on the defendant's website.	Forms to complete and return by mail. Must be sworn.
Civil liability	Québec	98.0	525, [500, 1500]	2 years	90 days	Hybrid (mostly automatic)	Notices sent directly to members by mail.	Checks sent automatically to most members; others had to complete a form, attach supporting documents and send everything by mail.
Consumer law	Québec	50.7	[35, 70]	3 years	60 days	Hybrid	Personalized notices sent to members of the class and insert published in monthly circulars.	Checks sent automatically; others had to complete a form, attach supporting documents and send everything by mail or Internet.
Civil liability	Québec	58.4	101, [10, 110]	2 years	90 days	Single	Notices published in local newspaper and on the website and social network of Action Collective; posters displayed at entrance of the city of Saint-Remi.	Form to be sent by mail or to the community center with proof of residency.
Tax law	Québec	100.0	n/a	1 year	-	Automatic	Notice sent directly to members.	Automatic reifund.

Consumer law	Québec	65.2	540, [125, 1500]	7 years	1 year	Single	Notice published in local newspapers and broadcast by local radio stations.	For the majority, simple form. The rest had to complete a form and provide supporting evidence.
Civic liability	Québec	90.0	5540 [1200, 8400]	7 years	1 year	Single	Notices published in local newspapers and on the web site of municipalities.	Forms to complete and submit by mail with supporting documents. Solemn declaration signed by major defendants.
Insurance	Québec	41.0	51	> 10 years	60 days	Hybrid	Notices distributed to members and advertising in major newspapers and on television. Websites set up.	Some members were reimbursed automatically with mailed checks. The others had to complete a form and provide supporting documents.
Insurance	Québec	56.4	51	> 10 years	60 days	Hybrid	Notices distributed to members and advertising in major newspapers and on television. Websites set up.	Some members were reimbursed automatically. Checks mailed. The others had to complete a form and provide supporting documents.
Non-contractual liability	Ontario	25.7	7000	2 years	1 year	Single	Letter or phone call to Member	Information on damage suffered must be provided. Checks sent to members by mail.
Copyright	Ontario	88.1	n / d	4 years	90 days	Single	Notice published in newspapers, in magazines, and on specialist websites for writers.	Form to be sent by mail with supporting documents.
Extracontrac-tual liability	Ontario	48.2	1940 [1500, 27500]	9 years	90 days	Single	Notice sent to members.	Form to be transmitted by the member.

Civic liability	Ontario	78.8	2600	2 years	60 days	Single	Notices sent directly to the member by email (if possible). Published in major newspapers and on the classactionlaw.ca website.	n/a
Labour law	Ontario	47.6	5534	7 years	90 days	Single	Notices and forms mailed to members of trade unions. Notice published on websites and in newsletters of trade unions as well as on the website of the counsel of record's law firm	Form to complete and return by mail. Checks mailed to defendants.
Non-contractual liability	British Columbia	57.0	3920, [500, 10,000]	3 years	60 days	Single	Notices and forms mailed to members.	Form to complete and return by mail. Checks mailed to members.

Appendix 5 - Experts interviewed

In our interviews, we questioned people from various backgrounds with different roles in the class action process.

We interviewed six lawyers who work in class actions by request: Marie-Anaïs Sauvé and Normand Painchaud of the firm Sylvestre Painchaud and associates, David Bourgoin of the firm BGA, Yves Lauzon of the firm Trudel Johnston and Lespérance, Craig Jones of the firm Branch MacMaster and Jonathan Foreman of the firm Harrison Pensa.

We also had the opportunity of interviewing a class action defense lawyer in: Shaun Finn of the firm BCF.

We conducted an interview with Law Professor and Associate Dean Jasminka Kalajdzic of the University of Windsor, Ontario.

We recently conducted two interviews with people working for organizations that have been or are currently defendants in class actions: George Iny of the APA (Association for Automobile Protection) and Norman Caron of MÉDAC (Mouvement d'éducation et de défense des actionnaires).

We had also planned to conduct interviews with claims managers [213]. We contacted three of the largest firms that offer claim management in Canada, Groupe Bruneau, RicePoint and Collectiva. Unfortunately, our requests for an interview remained unanswered, despite follow-up, which explains why there are no claims managers among the experts interviewed.

[213] Claims managers are third-party companies hired during class actions to manage the claims process.