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CLASS ACTIONS
PROGRESS REPORT

Presented by

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About the Institut québécois de réforme du droit et de la justice (IQRDJ)

Founded in 2018, the Quebec Law and Justice Reform Institute is an independent, public-oriented institution devoted to the reform of law and justice. Its work is aimed at the ongoing adjustment of legal normativity to the contemporary needs of society and the rule of law. It is based on legal and interdisciplinary research, as well as on the ongoing consultation and participation of members of civil society. For the purposes of its research activities, the Institute relies on the advice of a Scientific Committee made up of jurists and researchers from disciplines other than law, affiliated with different universities.

CLASS ACTIONS – PROGRESS REPORT

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Introduction

[1] At its 2022 meeting, the ULCC's Civil Section considered and accepted this Class Actions Project. Overseen by the Institut québécois de réforme du droit et de la justice ("IQRDJ"), the project aims to prepare "a Uniform Act adapted to the current realities of class actions" in order to implement a solution that "promotes access to justice and provides a coherent judicial response".[1]

[2] At the invitation of the IQRDJ, the undersigned set up a working group to carry out this project. Formed in February 2024, this group is comprised of practitioners and

[1] Uniform Law Conference of Canada, "Minutes of the Civil Section, 2022", Edmonton, August 2022 at 24, online (pdf): <https://www.ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-2022/Civil-Section-Minutes-2022.pdf>.

academics from diverse backgrounds working in four provinces, as well as within the federal justice system:

- Prof. Jérémy Boulanger-Bonnelly, chair (McGill University – Quebec)
- Mtre Andréane Joannette-Laflamme (Justice Canada – Federal)
- Mtre Clara Poissant-Lespérance (Trudel Johnston & Lespérance – Quebec)
- Mtre Emmanuelle Rolland (Audren Rolland – Quebec)
- Prof. Gerard Kennedy (University of Alberta)
- Prof. Guillaume Laganière (Université du Québec à Montréal – Québec)
- Prof. Hassan Ahmad (University of British Columbia)
- Prof. Jasminka Kalajdzic (University of Windsor – Ontario)
- Mtre Opeyemi Bello and Mtre Mandy Kinzel, alternate (Government of Alberta)
- Mtre Rima Kayssi (Justice Québec)[2]

[3] The working group held a first meeting in February 2024 to discuss the main themes of the project and the issues that, in the experience of its members, currently arise in the practice of class actions.

[4] This first meeting was followed by discussions with other actors in the justice system, as well as preliminary research including:

- A comparison of certain provincial class action statutes to identify their similarities and discrepancies, if any;[3]

- A review of Canadian academic articles published over the past ten years and identifying either issues related to class actions or avenues for reform;[4] and

- Targeted research in recent Canadian case law to concretely illustrate the issues identified.

[5] The working group met a second time on May 9, 2024, to discuss the results of this research and this report.

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[2] The members of the working group participate in their personal capacity and nothing contained in this report should be attributed to their respective employers. The working group was supported by Mtre Christina Croteau of the ULCC, Mtre Alexandra Pasca of the IQRDJ, as well as Mr. William Gogas-Lirette as a research assistant working with the IQRDJ. We would like to thank them warmly for their invaluable support.

[3] Given the time and resources available, this first phase focused on the laws of Quebec, Ontario and British Columbia, provinces in which most Canadian class actions are instituted. The laws of other provinces will be analyzed and compared in the second phase of the project.

[4] Some of these doctrinal articles were published before legislative amendments addressed the issues they raised. Their conclusions must therefore be assessed in light of current legislation. Nevertheless, they are often useful in identifying issues that require attention from legislators.

[6] It should be noted at the outset that the purpose of this report is to propose how to delineate the scope of the project, subject to the ULCC's comments and instructions in this regard. **The report is thus limited to a preliminary identification of issues that, in the opinion of the working group, merit the ULCC's attention**. It does not propose any avenues for reform at this stage, although it does mention a few options, but only for information purposes.

[7] The report is divided into five parts:

- The first part sets out the context of the project, including the ULCC's work on class actions up to 2007, and the evolution of class actions in Canada since then.
- The second part identifies the theoretical framework that serves as a prism for the analysis, first and foremost the objectives and principles underlying class actions.
- The third part describes the contemporary issues raised by class actions on which the working group proposes to focus its attention.
- The fourth part suggests a work plan for the rest of the project.
- Finally, the fifth part proposes a draft resolution for adoption by the Civil Section of the ULCC at its 2024 annual meeting.

1. Context

[8] A class action is a procedural vehicle that allows a person to act as a plaintiff on behalf of a class of persons.[5] It differs from other mechanisms which allow for the aggregation of individual actions – the mandate to act on behalf of another and the consolidation of proceedings[6] – by the possibility it offers the representative to bring an action on behalf of a group without obtaining the consent of its members or sometimes even knowing their identity.[7]

[5] The term "class action" is used in many Canadian jurisdictions, while others use the term "class proceedings": compare, e.g., *Class Proceedings Act, 1992*, SO 1992, c 6 [*CPA (ON)*]; *Code of Civil Procedure*, CQLR, c C-25.01, s 571 et seq [*CCP*]. For the sake of simplicity, this report uses “class action”.
[6] See, in particular, art 91 and 210 *CCP*; *Rules of Civil Procedure*, RRO 1990, reg 194, ss 5.02(1), 5.04(3) and 6.01.
[7] Article 571 *CCP* clearly states that a class action " is a procedural means enabling a person who is a member of a class of persons to sue, without a mandate, on behalf of all the members of the class" (emphasis added).

[9] A rudimentary version of this type of action was available as early as the nineteenth century in several common law jurisdictions,[8] but it was in the twentieth century that the class action gained traction. With the emergence of a [TRANSLATION] "society of mass production, exchange and consumption", the activities of various persons, and especially large companies, started affecting larger groups of people and generating complex "mass conflicts".[9] Individual actions, the axiomatic form of judicial proceedings, proved incapable of responding to this new reality, generating new interest in class actions.

[10] In Canada, this movement took the form of provincial legislative initiatives which, beginning in the 1970s, regulated and strengthened class actions. In 1978, Quebec took the lead in adopting the country's first statute in this area.[10] The other provinces followed suit a few years later: Ontario in 1992,[11] British Columbia in 1995,[12] Saskatchewan in 2001,[13] Newfoundland and Labrador in 2001,[14] Manitoba in 2002,[15] Alberta in 2003,[16] New Brunswick in 2006,[17] Nova Scotia in 2007,[18] and Prince Edward Island in 2021.[19] In 2002, amendments to the Federal Court's rules of procedure allowed for class actions to be brought before the Federal Court.[20]

[11] From 1977 to 2007, the ULCC showed some interest in the phenomenon. In a way, its work reflects the evolution of class actions during that period (1.1). Since 2007,

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[8] In Ontario, for example, the *Rules of Practice* had provided since the nineteenth century that "Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of, all." A restrictive interpretation of this rule limited its usefulness, which was criticized by the Supreme Court of Canada in *GM (Canada) v Naken*, [1983] 1 SCR 72, 105, citing the "need for comprehensive legislation governing the conduct and conduct of class actions." For a detailed common law history, see Michael A Eizenga and Emrys Davis, "A History of Class Actions: Modern Lessons from Deep Roots" (2011) 7:1 Can Class Action Rev 3.

[9] Mauro Cappelletti, "La protection d'intérêts collectifs et de groupe dans le procès civil (Métamorphoses de la procédure civile)" (1975) 27:3 RIDC 571, 572; see also Uniform Law Conference of Canada, *Proceedings of the 62nd Annual Meeting held at Charlottetown, Prince Edward Island*, 1980 at 110, para 2.2, online (pdf): <https://ulcc-chlc.ca/ULCC/media/Proceedings-2006-1994/1980-Charlottetown-Compte-rendu.pdf> [ULCC, *1980 Report*].

[10] *Act respecting the class action*, SQ 1978, c 8.

[11] *CPA (ON)*, *supra* note 5.

[12] *Class Proceedings Act*, SBC 1995, c 21, now RSBC 1996, c 50 [*CPA (BC)*].

[13] *The Class Actions Act*, SS 2001, c C-12.01.

[14] *Class Actions Act*, SNL 2001, c C-18.1.

[15] *Class Proceedings Act*, SM 2002, c 14, now CCSM, c C130.

[16] *Class Proceedings Act*, SA 2003, c C-16.5.

[17] *Class Proceedings Act*, SNB 2006, c C-5.15, now RSNB 2011, c 125.

[18] *Class Proceedings Act*, SNS 2007, c 28.

[19] *Class Proceedings Act*, SPEI 2021, c 30, now RSPEI 1988, c C-9.01. The three Canadian territories do not have class action legislation, but their courts can still hear class actions by virtue of their inherent powers, see *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 34 [*Dutton*].

[20] *Rules Amending the Federal Court Rules, 1998*, SOR/2002-417; see now *Federal Courts Rules*, SOR/98-106, part 5.1.

these actions have also continued to evolve and face new challenges (1.2). These two periods provide the context for this project.

1.1. The work of the ULCC (1977-2007)

[12] 1977 marks the ULCC's[21] first exploration of class actions. A report presented by the British Columbia representatives noted that the federal government and several provinces were considering their implementation and listed the issues to be considered.[22] The ULCC decided to establish a committee to monitor these developments.[23]

[13] In 1978, the committee reported on the adoption of the *Act respecting the class action* in Quebec and on discussions underway in Ontario and British Columbia.[24] In 1979, the committee began identifying issues of legislative policy and procedure to be addressed in a potential uniform act.[25]

[14] This work continued in 1980. The committee noted the importance of achieving some degree of uniformity in the regulation of class actions across the country in order to avoid a multiplicity of actions involving the same facts.[26] Over the next fifteen years, the ULCC continued to monitor provincial developments while gradually refining the contours of a potential uniform act.[27]

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[21] The name of the ULCC remained identical over time in English, but not in French, as it evolved from the "Conférence sur l'uniformisation des lois au Canada" to the "Conférence pour l'harmonisation des lois au Canada".

[22] Uniform Law Conference of Canada, *Proceedings of the 59th Annual Meeting held at St. Andrews New Brunswick*, 1977 at 208, online (pdf): <https://ulcc-chlc.ca/ULCC/media/Proceedings-2006-1994/1977-St-Andrews-Compte-rendu.pdf> [ULCC, *1977 Report*].

[23] *Ibid* at 29.

[24] Uniform Law Conference of Canada, *Proceedings of the 60th Annual Meeting held at St. John's Newfoundland*, 1978 at 111, online (pdf): <https://ulcc-chlc.ca/ULCC/media/Proceedings-2006-1994/1978-St-John-s-Compte-rendu.pdf>.

[25] Uniform Law Conference of Canada, *Proceedings of the 61st Annual Meeting held at Saskatoon, Saskatchewan*, 1979 at 84, online (pdf): <https://ulcc-chlc.ca/ULCC/media/Proceedings-2006-1994/1979-Saskatoon-Compte-rendu.pdf>.

[26] ULCC, *1980 Report*, *supra* note 9 at 112.

[27] Uniform Law Conference of Canada, *Proceedings of the 63rd Annual Meeting held at Whitehorse, Yukon*, 1981 at 30 and 78, online (pdf): <https://ulcc-chlc.ca/ULCC/media/Proceedings-2006-1994/1981-Whitehorse-Compte-rendu.pdf> (describing the experience of Quebec and developments in other provinces); Uniform Law Conference of Canada, *Proceedings of the Sixty-Fourth Annual Meeting held at Montebello, Quebec,* 1982 at 31 and 96, online (pdf): <https://ulcc-chlc.ca/ULCC/media/Proceedings-2006-1994/1982-Montebello-Compte-rendu.pdf> (skimming over an Ontario report and amendments to the Quebec law); Uniform Law Conference of Canada, *Proceedings of the 65th Annual Meeting held at Quebec, Quebec,* 1983 at 27, online (pdf): <https://ulcc-chlc.ca/ULCC/media/Proceedings-2006-1994/1983-Quebec-Compte-rendu.pdf>; Uniform Law Conference of Canada, *Proceedings of the 66th Annual Meeting held at Calgary, Alberta*, 1984 at 32, online (pdf): <https://ulcc-chlc.ca/ULCC/media/Proceedings-2006-1994/1984-Calgary-Compte-rendu.pdf>; Uniform Law Conference of Canada, *Proceedings of the 67th Annual Meeting held at Halifax, Nova Scotia*, 1985 at 31, online (pdf): <https://ulcc-

[15] It is finally in 1996 that the ULCC adopted its first *Uniform Class Proceedings Act*.[28] The act has six parts:

- Part I defines certain terms, in particular to provide that "common issues" need not be identical.

- Part II sets out a certification procedure, including time limits, applicable criteria, definition of sub-groups and certification order.

- Part III governs the conduct of the proceedings. It sets out its various stages, gives discretion to the court in its management, provides for various incidental questions, regulates the class members' right to opt out, details certain procedural and evidentiary issues, and requires the publication of notices throughout the proceeding.

- Part IV sets out the content and effect of orders made by the court, whether with respect to common issues or individual issues, as the case may be. It also establishes the parameters of recovery, including by aggregate award, and distribution. Finally, it governs settlements, discontinuances, and appeals.

- Part V governs costs, fees and disbursements, including for the purpose of determining each party's liability in this regard.

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chlc.ca/ULCC/media/Proceedings-2006-1994/1985-Halifax-Compte-rendu_1.pdf>; Uniform Law Conference of Canada, *Proceedings of the 68th Annual Meeting held at Winnipeg, Manitoba*, 1986 at 33, online (pdf): <https://ulcc-chlc.ca/ULCC/media/Proceedings-2006-1994/1986-Winnipeg-Compte-rendu.pdf>; Uniform Law Conference of Canada, *Proceedings of the 69th Annual Meeting held at Victoria, British Columbia*, 1987 at 27, online (pdf): <https://ulcc-chlc.ca/ULCC/media/Proceedings-2006-1994/1987-Victoria-Compte-rendu_1.pdf>; Uniform Law Conference of Canada, *Proceedings of the 70th Annual Meeting held at Toronto, Ontario*, 1988 at 28, 49 and 97, online (pdf): <https://ulcc-chlc.ca/ULCC/media/Proceedings-2006-1994/1988-Toronto-Compte-rendu.pdf> (key reports summarizing issues and avenues for reform, and summarizing selected reports of law reform commissions) [ULCC, *1988 Report*]; Uniform Law Conference of Canada, *Proceedings of the 71st Annual Meeting held at Yellowknife, Northwest Territories*, 1989 at 77, online (pdf): <https://ulcc-chlc.ca/ULCC/media/Proceedings-2006-1994/1989-Yellowknife-Compte-rendu_1.pdf>; Uniform Law Conference of Canada, *Proceedings of the 72nd Annual Meeting held at Saint John, New Brunswick*, 1990 at 36, online (pdf): <https://ulcc-chlc.ca/ULCC/media/Proceedings-2006-1994/1990-Saint-Johns-Compte-rendu.pdf>; Uniform Law Conference of Canada, *Proceedings of the 73rd Annual Meeting held at Regina, Saskatchewan*, 1991 at 32, online (pdf): <https://ulcc-chlc.ca/ULCC/media/Proceedings-2006-1994/1991-Regina-Compte-rendu.pdf>; Uniform Law Conference of Canada, *Proceedings of the 77th Annual Meeting held at Quebec, Quebec,* 1995 at 41, online (pdf): <https://ulcc-chlc.ca/ULCC/media/Proceedings-2006-1994/1995-Quebec-Compte-rendu.pdf>; Ruth Rogers, *Class Actions Statute 1995 – Civil Section Documents – A Uniform Class Actions Statute*, 1995, online (pdf): <https://ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-1995/Class-Actions-Statute-1995.pdf>.

[28] Uniform Law Conference of Canada, *Uniform Class Proceedings Act*, 1996, online (pdf): <https://ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Class-Proceedings-Act.pdf>.

- Finally, Part VI addresses general issues such as the suspension of limitation periods and the scope of the legislation.

[16] After an eight-year hiatus, the ULCC launched a new National Class Actions Project. As its name suggests, this project focused on multi-jurisdictional class actions, which the ULCC had mentioned as early as 1977[29] but were becoming increasingly important.

[17] In 2005, the committee in charge of the National Class Actions Project recommended the creation of a Canadian Class Action Database and various amendments to the *Uniform Class Proceedings Act* to encourage provincial legislatures to: allow for the certification of a class action covering members in another jurisdiction; require that in such a case, the plaintiff notify the plaintiffs leading other similar actions in Canada; and give the courts the power to deal with similar actions, for instance by modifying the group or refusing to certify an action as necessary.[30]

[18] Finally, in 2007, the ULCC passed the *Uniform Class Proceedings Act (Amendment) 2007*, which implemented the committee's recommendations.[31] This amended version of the *Uniform Class Proceedings Act* remains the version that the ULCC is recommending for adoption.[32]

1.2. The Evolution of Class Actions in Canada Since 2007

[19] Since 2007, class actions have evolved rapidly. Without describing these changes in an exhaustive manner here, it is worth recalling some of the salient points presented, among other sources, in two reports and two books published in Ontario and Quebec respectively in 2018 and 2019.[33]

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[29] ULCC, *1977 Report*, *supra* note 22 at 210, para 2.
[30] Uniform Law Conference of Canada, *Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis, and Recommendations*, 2005 at para 3, online (pdf): <https://ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-2005/Interjurisdictional-Class-Actions.pdf> [ULCC, *2005 Report*]. A supplementary report followed a year later, see Uniform Law Conference of Canada, *Supplementary Report on Multi-Jurisdictional Class Proceedings in Canada*, 2006, online (pdf): <https://www.ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-2006/Multi-Jurisdictional-Class-Proceedings-in-Canada.pdf>.
[31] Uniform Law Conference of Canada, *Uniform Class Proceedings Act (Amendment) 2007*, online: <https://www.ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Class-Proceedings-Act-(Amendment)-2007.pdf>.
[32] Uniform Law Conference of Canada, *Uniform Acts recommended by the ULCC/CHLC for enactment*, 15 June 2022, online (pdf): <https://www.ulcc-chlc.ca/ULCC/media/Civil-Section-documents/Lois-uniformes-recommandees-par-la-CHLC-pour-etre-mises-en-vigueur-en-date-du-15-juin%C2%A02022.pdf>.
[33] Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms – Final Report*, Toronto, 2019, online (pdf): <https://www.lco-cdo.org/wp-content/uploads/2019/07/LCO-Class-Actions-Report-FINAL-July-17-2019.pdf> [*LCO Report*]; Catherine Piché, *Perspectives de réforme de l'action*

[20] First, "class actions have grown significantly in volume, complexity and impact" over time.[34] This trend is partly a reflection of the maturity of class actions, a few years or decades after their implementation. But other phenomena also contribute to their growth, for example the emergence of so-called "industry" class actions, in which the representative sues multiple defendants from the same industry.[35] The increase in the number and complexity of class actions raises various issues, particularly in terms of the management of proceedings and the use of judicial resources.

[21] Second, and in the same vein, class actions often cause **considerable delays**, which are well documented in Ontario[36] and Quebec.[37] It is not uncommon for these actions to take several years to come to an end, even when a settlement occurs. However, during the consultations leading up to this report, several observers suggested that these delays are not unique to class actions but are also applicable in other matters.[38] In fact, several observers have noted that class actions generally proceed fairly well because they are more closely managed.

[22] Third, **multi-jurisdictional class actions** are on the rise. The activities of large companies often affect people from several provinces. When this happens, it may seem preferable for access to justice and judicial resources to have a single action for all those affected. These actions, however, come with "extraordinary challenges",[39] which are set out in more detail below.[40] First and foremost, the rights of affected members, regardless of the jurisdiction in which they are located, must be adequately protected. It is also necessary to consider the impact of these actions on access to justice and judicial resources in each jurisdiction.

[23] Fourth, a large number of class actions result in a **settlement**. This trend is potentially beneficial in terms of time, costs and access to justice, as well as providing

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collective au Québec, 2019, online (pdf): <https://www.justice.gouv.qc.ca/fileadmin/user_upload/contenu/documents/Fr__francais_/centredoc/rapports/ministere/RA_Piche_Ref_Action_coll_Qc.pdf> (this report focuses on costs and timelines) [*Piché Report*]. See also two reference books that discuss these same trends: Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (Vancouver: UBC Press, 2018); Catherine Piché, *L'action collective : ses succès et ses défis*, Montréal, Thémis, 2019.

[34] *LCO Report*, *supra* note 33 at 1; *Piché Report*, *ibid* at 4.

[35] These actions took off after *Bank of Montreal v Marcotte*, 2014 SCC 55 at para 43, in which the Supreme Court of Canada held that a representative could sue defendants with whom he or she had no personal legal relationship, under certain conditions.

[36] *LCO Report*, *supra* note 33 at 5.

[37] *Piché Report*, *supra* note 33 at 23.

[38] See generally Trevor CW Farrow & Lesley A Jacobs, "Introduction: Taking Meaningful Access to Justice in Canada Seriously" in Trevor CW Farrow & Lesley A Jacobs, eds, *The justice crisis: the cost and value of accessing law*, Vancouver, UBC Press, 2020, 3 at 4.

[39] *LCO Report*, *supra* note 33 at 6.

[40] See section 3.3 of this report.

parties with greater certainty and, in many cases, simplifying the process of distributing agreed-upon amounts. However, the increasing number of settlements raises other issues, including the degree of involvement of the court in assessing the proposed settlement and monitoring its implementation.[41]

[24] Fifth, class actions have come under heavy criticism in recent years for their failure, in some cases, to compensate members. These criticisms denounce the **minimal compensation sometimes awarded to members**, especially in the context of settlements,[42] as well as the sometimes very low take-up rate considering the alleged number of members. To take just one example, in some class actions, financial institutions have had to pay amounts as low as $4 to each class member.[43] Even when the total amount is significant, some people question the true value of such class actions. On the other hand, some members of the working group noted that the award of lower sums may be explained by many reasons: for example, some actions may be primarily aimed at the restitution of illegal profits or the granting of remedial measures aimed at changing behaviour. This type of action is particularly frequent in consumer law. Despite the above-mentioned criticisms, this issue must therefore be addressed in a nuanced manner.

[25] These new realities facing class actions – and many others – continue to fuel interest in potential reforms. In addition to Prince Edward Island's adoption of its class action regime in 2021, Quebec[44] and Saskatchewan[45] have recently launched consultations in that area.

[26] This reform movement is further fueled by repeated calls for a change in judicial culture and better access to justice. In 2014, Quebec adopted a new *Code of Civil Procedure*, at the centre of which it placed the principles of accessibility, quality and promptness of civil justice, as well as the idea of a "fair, simple, proportionate and

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[41] *LCO Report*, *supra* note 33 at 7-8. For several years now, courts have already become more closely involved in the review and approval of settlements.
[42] *Ibid* at 8; see also Daniel Jutras, "L'action collective et l'intérêt public" in Catherine Piché, ed, *Class Action Effects / Les effets de l'action collective*, Montréal, Yvon Blais, 2018, 59 at 71.
[43] See, in particular*, Option Consommateurs c Banque de Montréal (BMO)*, 2020 QCCS 1985 at paras 16-17.
[44] Ministère de la Justice du Québec, *onsultation publique : Perspectives de réforme de l'action collective au Québec*, Québec, April 2021, online (pdf): <https://www.justice.gouv.qc.ca/fileadmin/user_upload/contenu/documents/Fr__francais_/centredoc/rapports/ministere/RA_Persp_Ref_Action_coll_Qc_MJQ.pdf>.
[45] Law Reform Commission of Saskatchewan, *Reform of the Class Actions Act: Consultation Report*, 2021, online (pdf): <https://lawreformcommission.sk.ca/Class-Actions-Act-Consultation-Report.pdf>; Law Reform Commission of Saskatchewan, *Class Actions Act: Final Report*, June 2023, online (pdf): <https://lawreformcommission.sk.ca/Class-Actions-Act-Final-Report-1.pdf>.

economical application of procedural rules".[46] Common law jurisdictions are also concerned with this, as the Supreme Court of Canada noted:

> Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.[47]

These access to justice considerations are fundamental, and they must be at the center of any potential reform of class actions, regardless of the jurisdiction concerned.

[27] Despite this evolution of the class action and its context, both the Law Commission of Ontario and Professor Piché, in their respective 2019 reports, were of the opinion that most of the provisions in force in both provinces remained appropriate.[48] While class actions deserve constant attention, notably through this project, it is quite possible that required reforms will in some cases be modest rather than draconian.

2. Framework: The Objectives and Policies Underlying Class Actions

[28] Without delving into the theoretical foundations of class actions in too much detail, it is nevertheless useful to recall their main objectives, since these objectives form the basis on which any potential reforms of class actions should be based. Moreover, these objectives transcend provincial and territorial boundaries, and are therefore useful as an analytical lens to identify issues which deserve our attention.

[29] It is well recognized that class actions have three main objectives: compensating members; conserving judicial resources; and deterring illegal or reprehensible conduct.[49] These three objectives were first identified by authors and endorsed by the Supreme Court of Canada in 2001.[50] In order to better understand the ins and outs of these objectives, it is appropriate to repeat the Court's words in *Dutton*.

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[46] *CCP*, Preliminary Provision, para 2.
[47] *Hryniak v Mauldin*, 2014 SCC 7 at para 2 (emphasis added).
[48] *LCO Report*, *supra* note 33 at 1; *Piché Report*, *supra* note 33 at 5.
[49] Law Reform Commission of Ontario, *Report on Class Actions*, vol 1, 1982 at 117-46, online: <https://digitalcommons.osgoode.yorku.ca/library_olrc/112/> [*Report of the LRCO (1982)*].
[50] *Dutton*, *supra* note 19; *Hollick v Toronto (City)*, 2001 SCC 68 at para 27; *Rumley v British Columbia*, 2001 SCC 69. See more recently *L'Oratoire Saint-Joseph du Mont-Royal v JJ*, 2019 SCC 35 at para 6 [*Oratoire*]. See also ULCC, *1988 Report*, *supra* note 27 at 52.

[30] First, the Court notes the importance of judicial economy:

> First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times)[51]

[31] Next, the Court traced the link between class action and access to justice:

> Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied.[52]

[32] Finally, the Court mentioned the objective of deterring class actions:

> Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation.[53]

[33] These principles justify the existence of class actions and guide their development, but their implementation must also account for other principles. The collective nature of the action requires that certain interests be better protected than in an individual action. On the one hand, absent members, i.e., class members other than the representative, who are often inactive and even unknown, and whose interests sometimes diverge from those of the parties to the litigation, must be protected. On the other hand, the scope of the class action and its frequent media coverage generate some risks for the defendants, who sometimes face large-scale monetary claims and whose reputation may

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[51] Dutton, *ibid* at para 27 (citations omitted).
[52] *Ibid* at para 28 (citations omitted). It should be noted, however, that access to justice is a contested concept and that a richer vision could lead reforms in other directions: see, for example, Michael Molavi, "Beyond the Courtroom: Access to Justice, Privatization, and the Future of Class Action Research" (2015) 10:1-2 Can Class Action Rev 7, 28-30 [Molavi, "Beyond"]; see also, Kalajdzic, *Class Actions in Canada*, *supra* note 33 at 70.
[53] *Dutton*, *supra* note 19 at para 29 (citations omitted).

be threatened even before the action is certified.[54] Finally, the scale of class actions also has an impact on judicial resources, which must be protected from misuse.

[34] These considerations specific to the class action explain why it follows distinct rules, whether it is the more active role of the court at all stages of the proceeding, the process of certification or authorization of the action, or the multiple means by which the members of the action are kept informed of its progress. In short, in the analysis of the issues, it is necessary to keep in mind not only the objectives of the class action, but also the interests involved and the degree of protection they must receive.

[35] Finally, in addition to the above, other interests may attempt to influence any proposed reforms. As the Law Commission of Ontario noted, "[c]lass action discussions are often polarized and appear to be influenced by stakeholder interests and perspectives".[55] Legislatures usually try to find a balance between the positions of these different groups, but this is not an easy exercise.

[36] This analytical framework leads us to a preliminary analysis of the issues that we believe should be the focus of the next steps of this project.

3. Issues to be explored in this project

[37] Our discussions and preliminary research suggest that the following five issues warrant further consideration to explore potential amendments to the *Uniform Class Proceedings Act*: the certification (or authorization) process (3.1); overlapping class actions within the same jurisdiction (3.2); multi-jurisdictional class actions (3.3); the mechanism for monitoring the enforcement of final judgments and settlements (3.4); and the approval of class counsel's fees (3.5). Other issues mentioned in the literature do not seem to warrant the attention of the working group and the ULCC at this stage (3.6).

[38] Before examining these issues in turn, a few remarks are in order. Class actions are governed not only by legislative and regulatory instruments, but also by a vast body of case law and some directives or practice directions adopted by courts. While the legislation sets out the principles by which class actions must proceed and the general parameters for their implementation, it cannot foresee everything and may leave some concrete issues in the hands of courts. Issues of judicial resource allocation, for example, do not necessarily need to be legislated.[56] In the same vein, the "need for active and

[54] See in particular *Report of the OLRC (1982)*, *supra* note 49 at 291.
[55] *LCO Report*, *supra* note 33 at 1.
[56] To take just one example, let us mention the creation, a few years ago, of a small team of ten or eleven judges in Montreal to handle all applications for authorization of class actions and their management up to the hearing on the merits, a notable initiative that did not require any legislative change. See also Valérie Beaudin, "Quand on se compare, on se console : le Québec aurait-il trouvé le juste milieu ?" (2023) 544

assertive case management"[57] in order to reduce delays is primarily a matter of judicial practice. In this project, therefore, it is necessary to distinguish between what should be harmonized legislatively and what should be determined by the courts in their own context.

[39] Finally, it should be remembered that the following analysis remains preliminary and is presented only for the purpose of defining the scope of the project. At this stage, the multiple nuances of each issue have not been explored in detail.

3.1. Authorization or certification procedure

[40] The first step in a class action, in all Canadian jurisdictions, is to ask the court to authorize or certify it, as the case may be. To obtain this certification, the applicant must meet a series of criteria that vary from one province to the other. Prior to this certification being granted, the action does not exist in its collective form; it is only after the authorization or certification order has been made that it can formally proceed[58].

[41] The purpose of this certification process is to mitigate some of the risks associated with class actions: the rights of class members, who are represented without a mandate, can be affected by a poorly crafted claim; defendants can suffer the financial and reputational repercussions of large and often high-profile claims; and the justice system as a whole risks spending its limited resources on complex actions that are not worth it.[59] Authorization or certification limits these risks. It may also define the scope of the action by narrowing the class involved, the issues and the conclusions sought,[60] although these aspects of the action can generally be adjusted later in the proceedings if necessary.

[42] Statistics suggest that certification plays its role to some extent, although the vast majority of applications are granted. The Law Commission of Ontario estimated that as of 2019, "approximately 73% of contested certification motions [we]re eventually

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Colloque national sur l'action collective : développements récents au Québec, au Canada et aux États-Unis 7, 70.

[57] *LCO Report*, *supra* note 33 at 5.

[58] In Quebec, the action is formally commenced by filing an originating application only after authorization has been obtained: art 574 and 583 *CCP*. Conversely, in common law jurisdictions, the action is commenced at the outset but its certification allows it to proceed collectively: see e.g. *CPA (ON)*, *supra* note 5, s 2(1) and 2(2).

[59] In general, see *Piché Report*, *supra* note 33 at 11-13; see also Veronica Aimar, "L'autorisation de l'action collective : raisons d'être, application et changements à venir" (2018) 13:1 Can Class Action Rev 71, 75-80.

[60] *Piché Report*, *supra* note 33 at 13.

granted, in whole or in part".[61] This percentage is similar in Quebec, where Professor Piché put it at about 70% in 2019.[62]

[43] This procedural step has been the subject of vigorous debate for a long time, but three questions seem to arise more acutely today and could be explored within this project. First, what criteria should be used to certify class actions? Second, should these criteria be assessed in a separate procedural step (as is the case now), or as part of the proceedings on the merits (by removing the separate step of the certification motion)? Third, what evidence should be admitted at this stage, on both sides?

3.1.1. Certification Criteria

[44] The criteria for certifying class actions vary from province to province. Four criteria are generally applied in all jurisdictions, although their wording differs:

- First, the proposed action must raise common issues of law or fact, the exact nature of which is defined in different jurisdictions.[63]

- Second, the claim must establish a colour of right or disclose a cause of action, the exact wording of which test varies by province.[64]

- Third, there must be an appropriate class, defined in different ways depending on the jurisdiction.[65]

- Fourth, there must be a representative who can adequately represent members and who is not in a conflict of interest with them.[66] In Ontario and British Columbia, this representative must also produce a plan with a workable method of advancing the proceeding on behalf of the class and of notifying class members.[67]

[45] From this quick overview, it can be seen that while many of the criteria are similar from one province to another, their wording sometimes varies, introducing nuances that

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[61] *LCO Report*, *supra* note 33 at 5.
[62] *Piché Report*, *supra* note 33 at 21-22; see also Aimar, *supra* note 59 at 81, who arrives at similar data; see, however, Beaudin, *supra* note 56 at 23 (suggesting that in Quebec, in 2020 and 2021, the authorization rate was around 55%).
[63] For example, Quebec defines them as "identical, similar or related issues of law or fact" (art 575(1) *CCP*) whereas Ontario defines them as "common but not necessarily identical issues of fact, or common but not necessarily identical issues of law that arise from common but not necessarily identical facts": *CPA (ON)*, *supra* note 5, ss 1(1) and 5(1)(c)); See also *CPA (BC)*, *supra* note 12, s 1, which adopts a definition identical to that of Ontario.
[64] Art 575(2) *CCP*; *CPA (ON)*, *supra* note 5, s 5(1)(a); *CPA (BC)*, *supra* note 12, s 4(1)(a).
[65] Art 575(3) *CCP*; *CPA (ON)*, *supra* note 5, s 5(1)(b); *CPA (BC)*, *supra* note 12, s 4(1)(b).
[66] Art 575(4) *CCP*; *CPA (ON)*, *supra* note 5, s 5(1)(e); *CPA (BC)*, *supra* note 12, s 4(1)(e).
[67] *CPA (ON)*, *supra* note 5, s 5(1)(e); *CPA (BC)*, *supra* note 12, s 4(1)(e).

deserve to be explored and compared further. The statistics tend to confirm that these criteria are applied differently from one province to another, since while most refusals of authorizations in Quebec are based on the colour of right test, rejections in Ontario are mainly based on the common issues test.[68]

[46] In addition to these four criteria, in some jurisdictions there is a requirement that a class action be the preferable procedure or the best means for the resolution of common issues. In Ontario, this test requires the plaintiff to establish that the class action is superior to all other reasonably available means of advancing the claim *and* that the common issues predominate over any individual issues.[69] In British Columbia, a broader list of factors must be considered.[70]

[47] In Quebec, this criterion simply does not exist, although its addition to the *Code of Civil Procedure* has been proposed by some observers.[71] While the actors in defence are generally in favour of this idea,[72] the actors in demand are opposed to it,[73] and these different perspectives were expressed within the working group. This debate and the differences between provinces with respect to this criterion deserve reflection and should be explored within this project, the second phase of which will determine if a reform is needed and, if so, the direction it should take.

[48] In addition to these legislative differences, the interpretation of the various criteria by the courts has also given rise to some debate. In Quebec, for example, the courts have

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[68] *Piché Report*, *supra* note 33 at 23; see also Aimar, *supra* note 59 at 83.
[69] *CPA (ON)*, *supra* note 5, ss 5(1)(d) and 5(1.1); prior to the recent reform of this test, the Supreme Court of Canada had ruled on the issue, including in *AIC Limited v Fischer*, 2013 SCC 69.
[70] *CPA (BC)*, *supra* note 12, ss 4(1)(d) and 4(2).
[71] *Piché Report*, *supra* note 33 at 63-66 (or a similar proportionality test).
[72] See, for example, Bureau d'assurance du Canada, *Mémoire sur la consultation publique – Perspectives de réforme de l'action collective au Québec*, September 2021 at 5, online (pdf): <https://bac-quebec.qc.ca/media/6003/20210929_memoire_consultation-perpectives-reforme-action-collective.pdf>; Médicaments Novateurs Canada & Medtech Canada, *Mémoire dans le cadre de la consultation publique du ministère de la Justice du Québec « Perspectives de réforme de l'action collective au Québec »*, 30 September 2021 at 11 and 16, online (pdf): <http://innovativemedicines.ca/wp-content/uploads/2021/10/Reforme-de-laction-collective-au-Quebec-Memoire-de-Medicaments-novateurs-Canada-et-MedTech-Canada.pdf>; Association internationale des avocats en défense, *Mémoire en réponse à la consultation publique portant sur les perspectives de réforme de l'action collective au Québec*, September 2021 at 31-32, online (pdf): <https://www.iadclaw.org/assets/1/6/Class_Action_Reform_Submission_-_Quebec_2021_-_french.PDF>.
[73] See, in particular, Centre québécois du droit de l'environnement, *Consultation publique, Perspectives de réforme de l'action collective au Québec – Mémoire*, September 2021 at 4, online (pdf): <https://www.cqde.org/wp-content/uploads/2021/10/memoire_cqde_action-collective.pdf>; Environnement Jeunesse, *L'action collective comme outil de justice sociale et environnementale*, 1 September 2021 at 4, online (pdf): <https://enjeu.qc.ca/wp-content/uploads/2021/09/Memoire_ENJEU_MJQ.pdf>.

over time relaxed the threshold that plaintiffs must meet in order for their action to be authorized. The Supreme Court of Canada recently summarized it as follows:

> [7] At the authorization stage, the court plays a "screening" role. It must simply ensure that the applicant meets the conditions of art. 575 *C.C.P.* If the conditions are met, the class action must be authorized. The Superior Court will consider the merits of the case later. This means that, in determining whether the conditions of art. 575 *C.C.P.* are met at the authorization stage, the judge is ruling on a purely procedural question. The judge must not deal with the merits of the case, as they are to be considered only after the application for authorization has been granted.
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> [8] The Court has given "a broad interpretation and application to the requirements for authorization [of the institution of a class action], and 'the tenor of the jurisprudence clearly favours easier access to the class action as a vehicle for achieving the twin goals of deterrence and victim compensation'". In other words, the class action is *not* an [translation] "exceptional remedy" that must be interpreted narrowly. On the contrary, it is [TRANSLATION] "an ordinary remedy whose purpose is to foster social justice": [...][74]

[49] This minimum threshold has attracted some criticism.[75] In a now well-known excerpt, Bich J.A. of the Quebec Court of Appeal expressed herself as follows, noting that this threshold, combined with the way in which the authorization process operates, can lead to cumbersome debates that do not always allow for effective scrutiny of proposed actions [TRANSLATION]:

> [72] In practice, moreover, the process of prior authorization of class actions, in its current framework, consumes significant judicial resources, the scarcity of which does not sit well with what appears to be a deployment of efforts out of proportion to the result achieved, which is obtained at the cost of a backlog that is difficult to bear. It is also a costly process for the parties, slow (sometimes even interminable), giving rise to debates that in most cases will in any case be taken up on the merits if the action is authorized and will still generate various interlocutory disputes. And that's not to mention the right of appeal that tops it all off, multiplying the opportunities to prolong the preliminaries, a right of appeal that the legislature, for elusive reasons, has recently chosen to expand.
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> [73] Class actions are intended as a means of facilitating access to justice, while all too often, paradoxically, the prior authorization process, in its current form, hinders access. And when it is not an obstacle, it is a formality whose

[74] *Oratoire*, *supra* note 50 at paras 7-8 (citations omitted).
[75] *Piché Report*, *supra* note 33 at 4 (noting that some members of the legal community are of the view that many of the applications are [TRANSLATION] "frivolous or *de minimis* and that the standard of proof, at least in Quebec, "remains very undemanding").

> exorbitant costs undermine its *raison d'être*, or a kind of procedural worldliness that does not allow for effective filtering. In any case, it engenders widespread dissatisfaction, not to say – and I dare say – frustration, which resonates throughout the judicial system. Some may be taking advantage of the situation (there are countless denunciations of the "industry" of class actions, the new avatar of "*ambulance chasing*"), but this does not justify the status quo.
>
> [74] It will be argued that the reason things have turned out this way is because the legislation, which is based on a theoretically sound foundation, is misunderstood or misapplied. This is possible, I concede, but the statement solves nothing. For my part, I would be inclined to say that if practice, after 38 years, does not succeed in bringing the theory to life, it is because the theory is defective or outdated, or because the model that claims to embody it needs to be not simply patched up or retouched, but outright renovated. [...][76]

[50] In common law jurisdictions, too, some observers have felt that the criteria for certification are interpreted too broadly. In particular, criticism has been levelled at the concept of "workable method" as analyzed within the criterion of adequate representation, which appears to be applied in different ways depending on the jurisdiction.[77] Conversely, other actors could argue that the criteria in common law jurisdictions are appropriate or should be more flexible.

[51] In short, the legislative and judicial differences justify a more in-depth study of the certification criteria in the context of this project, but without prejudging the outcome of this reflection. If a reform was deemed appropriate, its potential directions would be many, ranging from simply "[e]ncouraging courts to interpret elements of the s. 5 certification test more rigorously"[78] to modifying some of these tests, for example by replacing the "cause of action" test with the "reasonable prospect of success"[79] test. However, the consequences of such changes are significant and need to be carefully considered, which could be done as part of the second phase of this project.

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[76] *Charles c Boiron Canada inc*, 2016 QCCA 1716 at paras 72-74.
[77] *CPA (ON)*, *supra* note 5, s 5(1)(e)(ii); see Kate Boyle & Nicholas Hooper, "The Unworkability of the Workable Methodology Standard" (2021) 16:2 Can Class Action Rev 93.
[78] *LCO Report*, *supra* note 33 at 7.
[79] See *Securities Act*, CQLR, c V-1.1, s 225.4; Bureau d'assurance du Canada, *supra* note 72 at 6; Médicaments Novateurs Canada & Medtech Canada, *supra* note 72 at 11; André Ryan & Shaun E Finn, "Une proposition plus modeste : soumissions au ministre de la Justice du Québec dans le cadre de réformes possibles au régime d'action collective", *Repères*, October 2021, EYB2021REP3365 (La Référence); Maxime Nasr et al, "La crise de la quarantaine de la procédure d'autorisation" (2020) 480 Colloque national sur l'action collective : développements récents au Québec, au Canada et aux États-Unis 153, 182-83.

3.1.2. Appropriateness of Certification as a Separate Procedural Step

[52] To the extent that the certification criteria remain undemanding, several observers have questioned the appropriateness of dealing with certification as a separate procedural step.[80] Indeed, in all Canadian jurisdictions, the debate on certification is the first step that plaintiffs must pass before the action can proceed in its collective form[81].

[53] The main purpose of certification is to protect absent members, defendants, and the justice system as a whole from frivolous or ill-founded claims.[82] The question is whether certification, as a separate procedural step (and one that precedes the main proceeding in Quebec), is the best way to achieve this goal. Indeed, in many actions, but not all, the authorization stage leads to significant debates and challenges that, in some cases, may go further than what a "screening" stage – to use the courts' own words – warrants.

[54] Several authors, courts and commentators have put forward various solutions, ranging from the outright abolition of the authorization stage to its reinforcement, to its integration into the merit stage.[83] In Quebec, these various options for reform have made their way into some decisions of the Court of Appeal which mentioned them.[84]

[55] It is not necessary for the purposes of this report to explore in more detail the various proposed avenues for reform. Suffice it to say that this point is currently being debated, which makes it an interesting subject of study for the next phase of the project.

3.1.3. Evidence Admitted at Certification

[56] Finally, if certification continues to be a separate procedural step, some people question the type of evidence that should be admitted at that stage, both from the representative plaintiff and from the defendant(s).

[57] On this point, there are significant differences between the provinces. In Quebec, the applicant must present "some evidence" in support of the allegations contained in the

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[80] See paragraph [54], below.
[81] In Quebec, this step precedes the proceeding, see art 574 and 583 *CCP*. In other provinces, this step is the first one in the proceeding, see *CPA (ON)*, *supra* note 5, s 2(1) and 2(2).
[82] *Supra* note 59.
[83] *Piché Report*, *supra* note 33 at 25-27; Aimar, *supra* note 59 at 92-99; Nasr et al, *supra* note 79; Patrick Visintini, "If it Ain't Broke, Don't Fix it; if You're Not Sure, Measure Again: Strengthening the Imperfect Mechanics of Class Authorization" (2020) 15:2 Can Class Action Rev 115; see also Beaudin, *supra* note 56 at 71.
[84] *Charles c Boiron Canada inc*, 2016 QCCA 1716 at paras 70 and 74; *Whirlpool Canada c Gaudette*, 2018 QCCA 1206 at para 29; see also *Desjardins Financial Services Firm Inc v Asselin*, 2020 SCC 30 at paras 207-209 (Côté J, dissenting).

application for authorization when they are vague, general or imprecise, but the threshold is low.[85] On the other hand, since 2002, the defendant has had to seek leave from the court to present "relevant evidence".[86] Courts frequently caution parties against their tendency to turn the authorization stage into a "mini-trial," while recognizing that some evidence is sometimes useful in assessing the criteria for authorization.[87] The Ontario and British Columbia statutes, on the other hand, do not provide for anything similar. One author notes, however, that evidence admitted by several provincial and federal courts, and even required of the plaintiff in some cases, is more significant.[88]

[58] These discrepancies suggest that it may be appropriate, within the broader analysis of the certification stage, to explore a possible harmonization of the criteria for the evidence admitted at this stage of the action.

[59] In closing, any potential reform of these aspects of certification, whether with respect to the criteria, the procedure used, or the evidence admitted, must be analyzed in light of the three objectives of class actions, first and foremost access to justice. These considerations should be central to the second phase of this project.

3.2. Overlapping Claims Within the Same Jurisdiction

[60] A second issue identified by the working group is the overlap of several class actions within the same jurisdiction.[89] Occasionally, after an application for authorization or certification of a class action is filed, another similar or identical action is commenced. The courts must then determine which of these actions should proceed, with the others generally being stayed.

[61] Again, there are different provincial approaches. In Ontario, this issue is addressed through carriage motions, which have recently been the subject of new regulation under section 13.1 of the *Class Proceedings Act, 1992*. That section sets out certain factors that the court must consider, including the amount of work performed to date, the likelihood of success, the expertise and experience of the solicitors, and the funding of each proceeding.[90]

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[85] *Oratoire*, *supra* note 50 at para 59; see also *Desjardins*, *ibid* at para 74.
[86] Art 574 *in fine CCP*; see also *An Act to reform the Code of Civil Procedure*, SQ 2002, c 7, art 150.
[87] See *Oratoire*, *supra* note 50 at para 57; see also, more recently, *Ward c Procureur général du Canada*, 2021 QCCS 109 at paras 17-20; *Lemay c VR Champlain inc., Roulottes A.S. Lévesque*, 2024 QCCS 505 at paras 7-8.
[88] Mohsen Seddigh, « Class Action Certification: 'Meaningful Screening Device' and the 'Compensable Loss' Theory » (2021) 17:1 Can Class Action Rev 193.
[89] The overlap of actions between jurisdictions will be discussed in the next section, 3.3.
[90] *CPA (ON)*, *supra* note 5, s 13.1(4).

[62] British Columbia also has carriage motions, but the criteria are set out in case law, not legislation.[91] One author notes that the lack of legislative intervention in this area means that the criteria are unpredictable across jurisdictions.[92] Despite this criticism, it may be appropriate to maintain some measure of judicial discretion to account for the particularities of each case. This debate suggests that some effort towards harmonization might be useful, either through the Ontario model or another approach.

[63] Finally, Quebec adopts another approach, the "first to file" rule, which provides that the first action proceeds and that any other action that overlaps with it is stayed.[93] An exception exists, however, where the first action [TRANSLATION] "suffers from serious deficiencies, the lawyers responsible for it are not in a rush to advance it, they have filed similar proceedings elsewhere in Canada [...], that is, indications that the lawyers behind the first procedure are only trying to occupy the field and are not driven by the best interests of the putative members in Quebec".[94] These criteria, which are similar in some respects to the factors to be assessed in the context of a carriage motion, do not, however, modify the basic rule.

[64] In several provinces, this issue has been the subject of criticism and proposals for reform. The Quebec rule has been criticized by some authors who believe that it encourages lawyers to file their action as quickly as possible, even if it means botching it and subsequently amending it.[95] Essentially, these authors suggest the adoption of mechanisms similar to carriage motions. Conversely, some authors are of the opinion that common law carriage motions are too complex and should be modified or simply replaced by the Quebec approach.[96]

[65] In short, the positions are far apart from each other, but they have in common that they suggest a harmonization of the law applicable to overlapping actions. In addition, other options could be explored, such as orders that would join multiple actions into one and require lawyers to work together and share the fees. These discussions and options make overlapping claims an interesting issue to explore as part of this project.

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[91] *Moiseiwitsch v Canadian National Railway Company and Canadian Pacific Railway Company*, 2022 BCSC 331.
[92] Gerald Antman, “Carriage Motions in Ontario: Inconsistent Application of an Indeterminate Test” (2018) 13:1 Can Class Action Rev 103.
[93] *Hotte c Servier Canada inc*, 1999 CanLII 13363 (QC CA).
[94] *Schmidt c Johnson & Johnson inc*, 2012 QCCA 2132 at paras 50-53.
[95] *Ibid* at paras 35-36; Médicaments Novateurs Canada & Medtech Canada, *supra* note 72 at 13; Ryan & Finn, *supra* note 79.
[96] See Timothy Law, “Determining a Fair Price for Carriage?: Applying a “Fee-Driven” Factor and Reverse Auctions to Adjudicating Carriage Motions in Ontario” (2021) 16:2 Can Class Action Rev 187; Cole Pizzo, “Class Actions and Beauty Pageants: The Need for Carriage Motion Reform in Ontario” (2019) 15:1 Can Class Action Rev 111.

[66] Finally, another aspect of this issue that may be useful to consider is the overlap not between two class actions, but between a class action and another type of action. Some authors are of the opinion that litigants who make a claim before an administrative tribunal should be able to bring a class action in this context, whether in relation to human rights or tenancy law, for example.[97] While some provinces sometimes allow it, the approach is not universal.

3.3. Multi-jurisdictional class actions

[67] The third issue of interest to the working group concerns multi-jurisdictional or multi-territorial class actions, i.e. those in which some members are located outside the jurisdiction seized. These actions may be national, if the class includes members in the jurisdiction and another Canadian province or territory. They can also be global, if the class includes members from outside Canada. In addition, several such actions may be commenced and proceed in parallel in different jurisdictions.

[68] This type of action, which seems to be becoming more frequent,[98] raises two main challenges. First, it raises a management issue similar to the issue of overlap identified above: at the certification stage, when two actions are brought in different jurisdictions but target the same class in whole or in part, should the second action be stayed, not certified, or circumscribed? The second issue arises on the merits, where the court hearing an action that includes foreign members may be called upon to apply laws that are foreign to it and to issue a decision that will be binding on members located in another jurisdiction.

[69] The first issue, the **management of these actions and their overlap**, has already been the subject of many discussions and reforms. The *Uniform Class Proceedings Act (Amendment) 2007* addressed precisely this issue, including notices to foreign members, the management of the action and the possibility of limiting it.[99] A few years later, this uniform act was complemented by a judicial protocol developed by the Canadian Bar Association and now applied in several provinces.[100] These measures appear to have

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[97] Jean-Simon Schoenholz, "Opening the Doors of Justice: Group Litigation and Claims of Systemic Discrimination" (2017) 48 Ottawa L Rev 687, 718; Jérémy Boulanger-Bonnelly, "Actions collectives et tribunaux administratifs : un vide juridictionnel à combler" (2022) 67 McGill LJ 454. These reforms, however, would require work that would exceed the scope of class actions, as they would touch on the jurisdiction of these courts and tribunals.

[98] Ryan & Finn, *supra* note 79.

[99] *Supra* note 31. Some recent changes to Ontario's act also address this issue: *CPA (ON)*, *supra* note 5, ss 5(6)-(8), 5.1.

[100] Canadian Bar Association, *Class Action Judicial Protocols (2018),* Resolution 18-03-A, online (pdf): <https://www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2018/Class-Action-Judicial-Protocols-(1)/18-03-A-ct.pdf>; *Regulation of the Superior Court of Québec in civil matters*, CQLR, c C-25.01, r 0.2.1, s 62; *Consolidated Civil Provincial Practice Direction*, Ontario, s 76, online:

played their part, as the stakeholders consulted so far are of the view that, in most cases, lawyers pursuing similar actions in different jurisdictions are able to agree on their respective progress. It would be helpful, however, to confirm these impressions in the context of this project.

[70] A recent case provides an illustration of this type of cooperation. Class actions had been commenced in various provinces against the same defendant on the basis of the same facts, namely alleged defects in the engines of certain vehicles. The lawyers involved in each of these actions worked together to reach a settlement that settled them all. Judges from Ontario and Quebec also worked together to hold a concurrent hearing that allowed them to approve the transaction in their respective jurisdictions.[101]

[71] Even so, some authors observe a distinct trend in Quebec, where the courts, under the effect of *CPC* articles, seem to place particular emphasis on the protection of Quebec members and consequently limit the scope of multi-jurisdictional actions or refuse to stay a Quebec action.[102] In addition, in order to authorize a national class action, Quebec courts require that their jurisdiction be established over each member of the class.[103] The analogous analysis in Ontario and British Columbia takes into account the interests of *all* members of the proposed action as well as other factors.[104] The criteria by which a class action may be stayed when another similar action proceeds in another jurisdiction would warrant exploration in the context of this project.

[72] In addition, pan-Canadian reforms could be explored. Recent suggestions have been made for the creation of a panel that would include representatives from all provinces to address, among other things, issues relating to overlapping remedies in different jurisdictions.[105] Consideration could also be given to giving a greater role to the

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<https://www.ontariocourts.ca/scj/practice/consolidated-civil-pd/>; see Joseph Marcus, "National Class Actions in Canada: Yet Another Call for Clarity and Coordination" (2012) 8:1 Can Class Action Rev 41.

[101] *McBain v Hyundai Auto Canada Corp*, 2021 ONSC 1734; *Pelletant c Hyundai Auto Canada Corp*, 2021 QCCS 793.

[102] This posture is founded, among others, on art 577 *CCP*; Maxime Nasr & Thomas Kingsley, "La suspension d'une action collective en droit international privé – ou la mystérieuse affaire du justiciable québécois égaré à Regina" (2023) 544 Colloque national sur l'action collective : développements récents au Québec, au Canada et aux États-Unis 253, 267-68; see also Faiz Munir Lalani, "Vers une approche harmonisée : la coordination et la gestion des actions collectives multiterritoriales au Canada" (2021) 498 Colloque national sur l'action collective : développements récents au Québec, au Canada et aux États-Unis 3; *Ranger c Aphria inc*, 2021 QCCS 534 at paras 74-75. A good example of this trend is *Charbonneau c Apple Canada Inc*, 2016 QCCS 5770 at para 86 (application for leave to appeal dismissed 2018 QCCA 2089); see also *Micron Technology Inc c Hazan*, 2020 QCCA 1104.

[103] See *Holcman c Restaurants Brands International Inc*, 2022 QCCS 2168 at para 20; citing *Zoungrana v Air Algérie*, 2016 QCCS 2311 at para 70.

[104] *CPA (ON)*, *supra* note 5, s 5(6)-(7); *CPA (BC)*, *supra* note 12, s 4(3)-(4).

[105] Justice William Hourigan & Preston Jordan Lim, "The Case for a Canadian Panel on Multi-Jurisdictional Class Proceedings" (2024) 102 Can Bar Rev 240.

Federal Court, while remaining within constitutional limits, for example where the defendants are federal undertakings. These various options are worth exploring[106].

[73] However, it is the second issue, the **treatment of a multi-jurisdictional class action on the merits**, that deserves particular attention. At this stage of the proceedings, questions arise relating to the applicable law and the enforcement of judgments, beyond the usual rules of private international law which remain applicable.

[74] These issues have not yet received much attention, perhaps because several multi-jurisdictional actions have settled or have not progressed beyond the certification stage. At that stage of the action, courts are flexible and tend to relegate to the merits, as much as possible, any issues arising from discrepancies between the various laws applicable to class members according to their jurisdiction [TRANSLATION]:

> [125] Indeed, without being an expert in comparative law or Ontario law, it seems reasonable to me to assume, for the time being at least and until proven otherwise, that consumer law does not vary so much from one Canadian province to another, at least in substance. Repeating the appellant's criticisms of the respondent, it seems reasonable to me to believe that Canadian legislation from coast to coast, regardless of province, prohibits a merchant, under the threat of civil or penal sanctions, or both, from providing a service that does not materially correspond to the contractual description of the service, offering and selling a product under false or misleading representations or by failing to disclose to the purchaser material facts relevant to the intended purchase, and finally, invading the privacy of its customers.
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> [126] In short, I conclude, and this is said with respect to the contrary view, that, at least for the time being, there is nothing to prevent Ontario subscribers from being part of the class action in the same way as Quebec subscribers and the appellant and Ms. Raphaël from being its representatives.[107]

[106] Some members of the working group also noted that class actions that proceed in one province but involve the governments of multiple jurisdictions as defendants could raise other issues regarding the jurisdiction of courts in one province to determine the rights of the government of another province. For an example of such an action, see *Wassermann v Saskatchewan (Highways and Infrastructure)*, File No. QBG 789 of 2020 (Regina).

[107] *Union des consommateurs c Bell Canada*, 2012 QCCA 1287 at paras 125-26; cited more recently in *Amram c Rogers Communication inc*, 2024 QCCS 534 at para 70; see also *Vivendi Canada inc v Dell'Aniello*, 2014 SCC 1 at para 62 ("Only substantial differences between the applicable legal schemes would cause a class action to lose its collective nature").

[75] On the merits, however, the question of the applicable law cannot be avoided and raises complex issues. If the class includes members from different provinces who are subject to different laws, the court will necessarily have to deal with this overlap.[108]

[76] For example, in consumer law, Quebec is distinguished, among other things, by the possibility it offers consumers, under certain conditions, to claim punitive damages.[109] But what happens if a lawsuit is brought in Ontario on behalf of a class that includes Quebec members? Will counsel be aware of the possibility of claiming such damages? Will the Ontario judge be able to apply these provisions in practice, even if he is theoretically empowered to do so? Or will he tend to reduce the action to its lowest common denominator, which cannot be to the advantage of the Quebec members who are part of the class?[110] What happens if the parties waive, pursuant to applicable provisions of private international law, the application of foreign law, for instance Quebec law?

[77] Faced with these difficulties, some observers have questioned whether it would not be better to abandon multi-jurisdictional classes and allow several class actions to proceed in each province concerned. This option was already considered by the ULCC in 2005.[111] It was recently echoed in a judgment that expressly stated that it [TRANSLATION] "challenged the established notion of pan-Canadian national classes across Canada" by refusing to stay a Quebec class action to allow a similar action to proceed in British Columbia.[112] However, this solution may appear to be contrary to the objective of access to justice that underlies class actions. On the other hand, other solutions could be considered, such as the possibility of resolving certain common issues in a multi-jurisdictional class action while leaving certain issues specific to one of the jurisdictions concerned to be decided by the courts of that jurisdiction.

[78] These many questions, which are likely to arise with great urgency in the near future, deserve further study and a harmonized approach. Obviously, a class action statute

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[108] This concern has already been expressed in passing by some judges, see, for example, *Canada Post Corp v Lépine*, 2009 SCC 16 at paras 56-57; see more recently *Benamor c Air Canada*, 2020 QCCA 1597 at para 102; *Air Canada c PA,* 2021 QCCA 873 at paras 173-98.

[109] *Consumer Protection Act*, CQLR, c P-40.1, s 272 *in fine*.

[110] In the same vein, some authors wonder whether there would be a change in substantive law if a foreign court decided a Quebec case without having jurisdiction over the individual action: Nasr & Kingsley, *supra* note 77 at 254.

[111] ULCC, *2005 Report*, *supra* note 30 at para 16.

[112] *Option Consommateurs c Nippon Yusen Kabushiki Kaisha (NYK)*, 2022 QCCS 1338 at para 173. On appeal, the Court expressed some doubts on that part of the judgment : *Nippon Yusen Kabushiki Kaisha c Option Consommateurs*, 2023 QCCA 513 at para 9. The constitutional validity of multi-jurisdictional class actions was also the subject of debate : Peter Hogg & S Gordon McKee, “Are National Class Actions Constitutional?” (2010) 26 Nat’l J Const L 279; Janet Walker, “Are National Class Actions Constitutional?: A Reply to Hogg and McKee” (2010) 48:1 Osgoode Hall LJ 95; Peter Hogg & Gordon McKee, “Are National Class Actions Constitutional? A Reply to Walker” (2010) 31 Nat’l J Const L 183; Joshua Krusell, “Are National Class Actions Constitutional? A Reply to Walker, Hogg and McKee” (2012) UT Fac L Rev 9.

cannot alter the applicable substantive law, but it can provide a procedure for better coordinating the action of the courts, notably when the parties must take position on the law applicable to the merits.

[79] Finally, a related issue is the enforcement in one province of foreign decisions that purport to cover members located in the province. Consider the example of an Ontario action that includes Quebec members. Imagine that the final judgment in this case fails to consider Quebec law or, at the very least, the possibility of awarding punitive damages. Can this decision be binding on Quebec members? If a similar class action were brought before a Quebec court, the defendant would plead *res judicata* in an attempt to have the Ontario judgment recognized, but could it defeat the action? These types of questions are important both for class members, who need to know whether an action in another jurisdiction is binding on them, and for defendants who want to know whether the decision is binding on all the members that it purports to cover.

[80] Some courts have had the opportunity to explore these issues. In 2005, the Ontario Court of Appeal decided a case in which McDonald's was sued in Illinois for alleged fraud committed by its employees in various contests.[113] The class action was brought on behalf of an international class that included McDonald's Canada customers and notice was given through a Canadian magazine. After a settlement was reached in the U.S., Ontario customers commenced their own class action and McDonald's sought to have the action stayed or dismissed, arguing, among other things, that the U.S. judgment was binding on the Ontario members. The question of the enforcement of the foreign judgment in Canada thus arose directly. The Court of Appeal concluded that such a judgment could be enforced in Canada, but only if the foreign court was justified in assuming jurisdiction over the multi-jurisdictional class action and if the members' rights had been properly protected.[114] In that case, the notice given to the Canadian members was found to be inadequate.[115]

[81] This analysis was taken up and supplemented in *IMAX*, which involved alleged false or misleading statements on the part of IMAX that had an impact on its share price.[116] Again, a U.S. class action whose members included Canadian individuals had been settled, and the issue was whether the class in an Ontario class action should be

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[113] *Currie v McDonald's Restaurant of Canada Ltd*, 2005 CanLII 3360 (ON CA); see para 13 for a description of the issue ("the application of the real and substantial connection test and the principles of order and fairness to unnamed, non-resident plaintiffs in international class actions").
[114] *Ibid* at paras 17 and 30.
[115] *Ibid* at paras 31 and 39-40.
[116] *Silver v IMAX,* 2013 ONSC 1667; for a discussion of this case and other related issues, see John P. Hooper et al., "Cross-Border Class Action Litigation: Navigating Overlapping and Competing Multi-Jurisdictional Class Actions" (2014) Colloque national sur les recours collectifs: développements récents au Québec, au Canada et aux États-Unis 379.

limited to exclude these individuals. The Court applied the *Currie*[117] test, but added that the protection of the interests of Canadian members could include a duty on the part of counsel in the foreign action to consider the law applicable to their situation, for example in Ontario.[118]

[82] In Quebec, article 594 *CCP* provides in such a situation that the court must verify "that the rules of the Civil Code that apply to the recognition and enforcement of foreign decisions have been complied with and that the notices given in Québec in connection with the class action were sufficient", and "the requirements that governed the exercise of the rights of Québec residents are equivalent to those imposed in class actions brought before a Québec court, that Québec residents may exercise their rights in Québec in accordance with the rules applicable in Québec and that, in the case of collective recovery of claims, the remittance of any remaining balance to a third person will be decided by it insofar as the Québec residents' share is concerned". This article has not been the subject of in-depth judicial analysis.

[83] In sum, multi-jurisdictional class actions, whether domestic or international,[119] raise complex issues of management, recognition and enforcement. These issues of increasing importance merit further consideration in the context of this project.

3.4. Implementation of Final Judgments and Settlements

[84] The fourth key issue identified by the working group is what happens *after* a class action has come to an end. At this stage of the action, the enforcement of the judgment or settlement generally results in the disbursement of amounts to class members and, sometimes, an individual claims process. While the court is generally responsible for overseeing this phase of enforcement, not all provincial legislation provides for specific accountability measures to ensure that enforcement actually achieves its objectives.

[85] In response, the Law Commission of Ontario suggested in 2019 that accountability should be improved after the end of the proceeding, including by

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[117] *Silver*, *ibid* at para 97.
[118] *Ibid* at para 127; similar issues also arise when a Canadian court determines whether it can take up a global class action: see, for example, *Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP*, 2016 ONCA 916; *Airia Brands Inc v Air Canada*, 2017 ONCA 792, especially at para 107.
[119] A few authors have written on the specific issue of global class actions, noting the divergence between provinces and proposing various reforms to improve their management, see Madeleine Brown, "Our Aging *CPA*: It's Time for Ontario to 'Opt-In' to a Modern Global Class-Actions Framework" (2018) 13:2 Can Class Action Rev 155; Émilien Morin-Lévesque, "L'autorisation d'actions collectives mondiales au Canada : deux solitudes aux antipodes" (2023) 18:2 Can Class Action Rev 233; Paul-Erik Veel & Graham Henry, "Absent Foreign Claimants in Canadian Class Actions: Where to After *Airia Brands*?" (2018) 13:1 Can Class Action Rev 27.

"requiring detailed final outcome reports".[120] It also recommended that the report include information not only on the actual compensation offered to members, but also on any measures implemented by the parties to prevent similar conduct in the future, when such measures are part of the settlement.[121]

[86] The requirement to submit such a report was incorporated into Ontario law in 2020, which now requires it to be filed within 60 days of the distribution of the amounts awarded by judgment or as part of a settlement agreement, and specifies the content of the report.[122] In Quebec, although the *Code of Civil Procedure* does not impose such a requirement, court regulations and directives require that a report on administration be filed after a collective recovery with individual payment, or after a settlement.[123] No such requirement appears to exist at this time in British Columbia.[124]

[87] In view of the differences between the provinces on this issue, it would be useful to consider in the context of this project the desirability of requiring such a report and the elements that it should contain.

3.5. Lawyers' Fees

[88] The fifth and final issue that the working group proposes to explore concerns the criteria used to approve class counsel's fees.

[89] Class counsel, regardless of jurisdiction, enter into a fee agreement with the class representative. Two main models are used: the percentage agreement or the premium hourly rate.[125] The first model provides that counsel will receive a percentage of any amount paid to the class, which may vary depending on the stage at which the action ends. The second model provides that counsel will receive a payment equal to the number of hours worked multiplied by their hourly rate plus a certain factor.

[90] However, these fee agreements are subject to court approval, regardless of whether the class action ends in a final judgment or a settlement. In Quebec, for example, the court, "[i]n the interests of the class members, … assesses whether the fee charged by the representative plaintiff's lawyer is reasonable; if the fee is not reasonable, the court

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[120] *LCO Report*, *supra* note 33 at 8.
[121] *Ibid* at 12.
[122] *CPA (ON)*, *supra* note 5, ss 26(12) and 27.1(16).
[123] *Regulation of the Superior Court of Québec in civil matters*, CQLR, c C-25.01, r 0.2.1, s 59; *Directives de la Cour supérieure du Québec, Division de Montréal*, 1 January 2024, s 130(4).
[124] See *CPA (BC)*, *supra* note 12, s 33 (although this section gives judges the power to supervise enforcement and take any appropriate action, which could include the requirement of an administrative report) and 35 (although this section requires the filing of a plan for distribution).
[125] See in general *Piché Report*, *supra* note 33 at 47.

may determine it".[126] In Ontario, a fee agreement "is not enforceable unless approved by the court" which must verify that the fees "are fair and reasonable" in light of certain factors.[127] The B.C. legislation has the same effect, but does not list specific factors.[128]

[91] This is where a possible harmonization effort could be undertaken. While the Ontario *CPA* provides a list of factors to be considered to assess the reasonableness of fees since the 2020 reform, neither Quebec nor British Columbia provide such a list. The case law has filled this gap by developing its own criteria, based in particular on the lawyers' professional rules of conduct,[129] but this has resulted in variable criteria.[130]

[92] Some of the stakeholders consulted for this report noted that the inclusion of such a list of factors in the legislation could increase the predictability and transparency of fees. In fact, prior to the Ontario reforms, the Law Commission of Ontario suggested developing such a list of factors,[131] as did Professor Piché in Quebec.[132]

[93] It is then a question of identifying the appropriate criteria, an issue that will need to be examined in greater depth. For now, the Ontario legislation provides a good starting point, as do some published opinions by authors.[133] Generally speaking, it is a question of establishing a point of equilibrium that provides fair compensation, without exaggerating. As some have noted, lawyers' fees have often made headlines, sometimes seeming disproportionate to the compensation received by class members.[134] On the other hand, class actions require counsel to invest significant resources with no guarantee of success. Given this risk, low remuneration would encourage lawyers to decline certain mandates, leaving members of the affected classes without compensation and limiting the deterrent

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[126] Art 593 *CCP*.
[127] *CPA (ON)*, *supra* note 5, ss 32(2)-(2.3).
[128] *CPA (BC)*, *supra* note 12, s 38.
[129] See, for example, *Option Consommateurs c Banque Amex du Canada*, 2018 QCCA 305 at paras 59 et seq; see more recently *Association québécoise de lutte contre la pollution atmosphérique c Volkswagen Group of Canada Inc*., 2022 QCCS 2186 at para 87.
[130] Compare with *Sherry v CIBC Mortgage Inc*, 2022 BCSC 676 at para 41.
[131] *LCO Report*, *supra* note 33 at 9.
[132] *Piché Report*, *supra* note 33 at 49.
[133] See, e.g., Ryan & Finn, *supra* note 79; Lisa Chamandy, Jean Lortie & Shaun Finn, "Putting a Price on Legal Services: Determining Reasonable Class Counsel Fees in the Settlement Context" (2014) 9:2 Can Class Action Rev 420; Jean-Philippe Groleau & Guillaume Charlebois, "Les honoraires en demande en matière d'actions collectives : comment éviter de jouer à l'apprenti-sorcier en vue de moduler le comportement des avocats" (2019) Colloque national sur l'action collective : développements récents au Québec, au Canada et aux États-Unis 169; Peter W Kryworuk & Jacob Damstra, "Revisiting Class Counsel Fee Approvals: Towards Presumptive Validity of Contingency Fee Agreements" (2021) 17:1 Can Class Action Rev 109; Jasminka Kalajdzic, "How Much Is Too Much? Contingency Fees in Class Actions" (2014) 9:4 Class Action 615; Garth Myers & David Rosenfeld, "Twenty Years Later: What Are the Risks Faced by Plaintiff's Counsel, and How Have These Risks Changed?" (2015) 10:1-2 Can Class Action Rev 101.
[134] *LCO Report*, *supra* note 33 at 8; *Piché Report*, *supra* note 33 at 4.

effect of class actions.[135] In other words, [TRANSLATION]: "We need to find a balance between the incentives experienced by the actors".[136]

3.6. Other issues

[94] In closing, other issues have given rise to some debate in doctrine or jurisprudence. At this time, however, the working group is not proposing to include them in this project:

- The stage at which preliminary motions can be heard by the court is subject to distinct approaches. In Quebec, the possibility of filing preliminary motions prior to the class action being authorized is limited.[137] Conversely, preliminary motions are more broadly allowed in Ontario and British Columbia, under certain conditions.[138]

- The possibility of suing several defendants simultaneously, some of whom the representative has no legal relationship with, was the subject of a debate that was resolved in Quebec with the *Marcotte* decision.[139] In Ontario, however, it appears that a legal relationship with each defendant is still required under the *Ragoonanan* principle.[140]

- The Law Commission of Ontario suggested changes to the rules surrounding appeals,[141] some of which were reformed in 2020. However, the provinces are taking different approaches here as well. Quebec requires leave to appeal from the

[135] See, e.g., Theodore Eisenberg, Goeffrey Miller & Roy Germano, "Attorney's Fees in Class Actions : 2009-2013" (2017) 92 NYU L Rev 937 at 937-38; Molavi, "Beyond", *supra* note 52 at 18; André Durocher, "Une grosse carotte, un gros bâton : l'accès à la justice et les aspects financiers de la pratique en matière de recours collectifs" (2013) Colloque national sur l'action collective : développements récents au Québec, au Canada et aux États-Unis 337; see also *Piché Report*, *supra* note 33 at 53.
[136] *Piché Report*, *supra* note 33 at 42.
[137] Art 584 *CCP*; *Electronic Arts inc c Bourgeois*, 2024 QCCA 284 at para 13.
[138] See *CPA (ON)*, *supra* note 5, s 4.1; Alexander Mulligan, "Pre-certification Motions that Dispose of or Limit the Issues at Trial: Six Factors for Judges to Consider" (2022) 17:2 Can Class Action Rev 97; Fiona Sarazin, "Early Disposition or Prejudicial Attrition? An Analysis of Bill 161 and Pre-Certification Dispositive Motions in Class Actions" (2022) 17:2 Can Class Action Rev 53; *British Columbia v The Jean Coutu Group (PJC) inc*, 2021 BCCA 219 at para 37.
[139] *Bank of Montreal v Marcotte*, 2014 SCC 55 at paras 43-45.
[140] *Ragoonanan Estate v Imperial Tobacco Canada Ltd*, 2000 CanLII 22719 (ON SC) at para 54; applied recently in *Pugliese v Chartwell*, 2024 ONSC 1135 at paras 84-90. See Sidney Brejak, "The Precarious State of the *Ragoonanan* Principle in Ontrario" (2023) 18:2 Can Class Action Rev 171.
[141] *LCO Report*, *supra* note 33 at 10. With respect to appeals, for example, the presence of a divisional court in Ontario creates issues that do not exist elsewhere.

authorization of a class action, but not from the refusal to authorize it,[142] whereas no such asymmetry exists in Ontario and British Columbia.[143]

- Some authors have suggested reforms to the fees paid to representatives.[144]

- Some stakeholders suggested greater transparency with respect to third-party funding agreements.[145] The recent Ontario reform includes a section on this point.[146]

[95] It should be noted that if these issues are not within the scope of this project in the view of the working group, it is possible that the second phase will reveal the need for more careful consideration, or the need to include other issues.

4. Next Steps

[96] The project proposal presented to the ULCC in 2022 provided that the presentation of this progress report would be followed, one year later, by a draft report with policy issues and proposing possible solutions for a potential uniform act. The working group expects to be in a position to present such a report at the 2025 annual meeting.

[97] To this end, the working group envisages the following:

- Continued research in doctrine and case law to identify possible solutions to be considered in response to the issues described in this report;

- A consultation with practitioners and academics to gather their comments and reactions on issues raised, potential solutions and other issues that have not been explored to date;

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[142] Art 578 *CCP*. Leave is granted pursuant to strict conditions since *Centrale des syndicats du Québec c Allen*, 2016 QCCA 1878 at paras 57-60.
[143] *CPA (ON)*, *supra* note 5, s 30; *CPA (BC)*, *supra* note 12, s 36.
[144] Suzanne E Chiodo, "Tawdry or Honourable? Additional Payments to Representative Plaintiffs in Ontario and Beyond" (2023) Osgoode Hall Law School of York University All Papers; Vince Morabito, "Additional Compensation to Representative Plaintiffs in Ontario: Conceptual, Empirical and Comparative Perspectives" (2014) 40:1 Queen's LJ 341; Marie Ong, "Fair Compensation or Unjustified Temptation to Compromise?: An Empirical Review of Requests for Honorarium Awards in Canadian Class Actions" (2022) 17:2 Can Class Action Rev 3.
[145] See also, e.g. and more broadly, Rachel Howie & Geoff Moysa, "Financing Disputes: Third-Party Funding in Litigation and Arbitration" (2019) 57:2 Alta L Rev 465; Rachel Meland, "How Class Actions Have Shaped Litigation Financing Law in Canada" (2019) 14:2 Can Class Action Rev 467; Michael Molavi, "Law's Financialization : Litigation Finance and Multilayer Access to Justice in Canada" (2018) 33:3 Can J L & Soc'y 425.
[146] *CPA (ON)*, *supra* note 5, s 33.1. There is nothing similar in the British Columbia statute.

- Consultation within the working group in order to convert these research and consultation efforts into concrete recommendations.

[98] Subject to the adoption of the progress report in 2025 and any guidance that may be provided by the ULCC, the working group would devote the year 2025-2026 to the drafting of a uniform act and related commentaries.

5. Proposed Resolution

[99] Based on the above, the working group proposes the following resolution for adoption by the Civil Section:

> **BE IT RESOLVED**
>
> **THAT** the Progress Report of the Class Actions working group be accepted;
>
> **THAT** the working group continue its activities to identify possible solutions to address the issues raised in this report;
>
> **THAT** the working group present a policy report to the ULCC at its 2025 annual meeting.