1. The U.S. Chamber Institute for Legal Reform ("**ILR**") is pleased to make this submission in response to the call for public comment in relation to the ministère de la Justice's ("**MJQ**") review of the Québec class action regime. ILR welcomes the MJQ's study of the Québec class action authorization process and the need for reform in the area of class actions, with the benefit of over 40 years of experience under the current legal regime.

2. ILR is a not-for-profit public advocacy organisation affiliated with the U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses of all sizes and sectors, as well as local chambers, and industry associations. ILR's mission is to ensure a simple, efficient and fair legal system. Since ILR's founding in 1998, it has worked diligently to limit the incidence of litigation abuse in the U.S. courts and has been actively involved in legal reform efforts in the U.S. and abroad. Its members have a direct interest in how litigation is conducted in Canada, as many carry on business in Canada or trade with Canadians.

3. Given this level of trade and investment, U.S. businesses have a direct interest in the Canadian and Québec legal systems. They and their subsidiary companies also have direct exposure to litigation in Canada and Québec, and, in particular, to class actions. Many of these businesses, in fact, have been defendants in class actions in Canada over the past 40 years.

4. The MJQ's Consultation Paper, published in April 2021, sets out a series of proposed avenues of reform. For ease of reference, we have organized the submissions below, following our introductory comments, using those avenues of reform as headings. ILR does not have a specific position on some of the issues raised in the consultation paper, as noted below. Some of ILR's specific recommendations for reform set out below are also described in a paper released in October 2017, entitled *Recipe for Reform: A proposal for Improving Canadian Class Action Procedures*.[1]

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[1] In March 2015, ILR also published a research paper entitled "*Painting an Unsettling Landscape: Canadian Class Actions 2011-2014',* in which ILR reviewed notable developments in Canadian class action law and highlighted key defence strategies for businesses facing class action litigation in

I. INTRODUCTION AND CONTEXT FOR REFORM RECOMMENDATIONS

5. Class actions were originally designed to benefit legitimately aggrieved individuals by allowing them to more easily join together and seek efficient legal relief. Nowadays, many class actions come with significant costs, particularly when class actions are commenced that have little or no merit but place substantial pressures on companies to settle the cases.[2] Aside from the obvious economic and reputational risks for businesses that find themselves defending class proceedings, the economic costs of class action litigation may ultimately be passed on to shareholders (in the form of reduced stock value),[3] consumers (in the form of increased prices and lessened or delayed innovation),[4] and employees (in the form of diverted time addressing litigation, and potentially salary or job cuts in extreme cases).[5] These consequences raise serious concerns that many aspects of and developments in the class action regimes in Canada impose

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Canada ("*Painting an Unsettling Landscape*"); available at: http://www.instituteforlegalreform.com/uploads/sites/1/2017_canada_vFINALWEB.pdf.

[2] At least some Canadian judges have recognized that most class actions never proceed to a trial on the merits because the stakes are too high for the parties to gamble on a desirable outcome, and the process creates significant risk that an innocent defendant will be obliged to join the settlement to avoid the risk of tremendous damages that a case on the merits entails: see *Sun-Rype Products Ltd. v Archer Daniels Midland Co.,* 2010 BCSC 992 at para 18.

[3] See "*Economic Consequences: The Real Costs of U.S. Securities Class Action Litigation",* (U.S. Chamber Institute for Legal Reform 2014).

[4] See Giovanna ROCCAMO, *"Medical Implants and Other Health Care Products: Theories of Liability and Modern Trends"* (1994) 16 Advoc. Q. 421; Steven Garber, *"Product Liability, Punitive Damages, Business Decision and Economic Outcomes"* (1998) Wis. L Rev. 237; Steven Garber, "*Product Liability and the Economics of Pharmaceuticals and Medical Devices"* (Santa Monica: Rand Institute for Civil Justice, 1993); Richard MANNING, *"Changing Rules in Tort Law and the Market for Childhood Vaccines"* (1994) 37 J.L. & Econ. 247; Richard MANNING *"Is the Insurance Aspect of Producer Liability Valued by Consumers? Liability Changes and Childhood Vaccine Consumption"* (1996) 13 J. Risk Uncertainty 37.

[5] See *Warner v Smith & Nephew Inc.,* 2016 ABCA 223 at para 72 (minority decision): "Notwithstanding the accepted advantages of class proceedings, they do impose a cost on the economy. Inappropriate class proceedings can increase the cost of goods, discourage innovation, and distract manufacturers from more productive activities"; *Player v Janssen-Ortho Inc.,* et. al., 2014 BCSC 1122 at para 184: "Upon certification public notices stating that the drug is the subject of a class action and alleging the drug is unsafe and can cause death in ordinary use is likely to alarm anyone who is using or perhaps even prescribing fentanyl....if the evidence is insufficient to support the action then the consequences associated with involvement in an extensive and expensive class action are very serious".

unwarranted burdens on defendants and the courts, at the expense ultimately of shareholders, taxpayers and consumers, and support reform of the class action regimes in Canada to strike a fairer balance of the interests of all stakeholders.

6. A consistently stated goal of class actions is access to justice. The Supreme Court of Canada has expressly stated that "access to justice" requires access to just results, not simply access to the legal process for its own sake.[6] While many writers in this area focus their remarks on the importance of substantive justice for claimants (class members), some have emphasized the obvious—that defendants, as well as plaintiffs, are entitled to access to justice; in other words, access to just outcomes,[7] whether the outcomes come in the form of a final judgment or a settlement. However, many aspects of the class actions regime, including the low authorization threshold and the stringent limits to defendants' ability to adduce evidence at the authorization stage, raise questions about whether class actions fairly achieve substantive access to justice objectives, properly understood.

7. While we do not seek to impede true access to justice, we do seek to improve the existing class action regime to make it fair to both sides, and to put in place reforms that recognize the serious pressures on companies to settle even weak or meritless class actions at potentially significant social costs to all. As this submission will describe in more detail, specific reforms are needed to achieve the overarching goals of: a) discouraging the commencement of frivolous, meritless, or overly broad class actions, and b) encouraging the timely and fair resolution or adjudication of class actions. Accordingly, this submission proposes procedural reforms that address the authorization conditions, delays at the authorization stage, overlapping cases in multiple jurisdictions, and other related topics.

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6 *AIC Limited v Fischer,* 2013 SCC 69 at para 56. See also *Trial Lawyers Association of British Columbia v. Attorney General of British Columbia*, 2014 SCC 59 at para 47, where it is noted that burdens that prevent litigants from bringing frivolous claims will not be perceived as unduly interfering with access to justice, and may in fact increase efficiency and overall access.

7 *2038742 Ontario Limited v Quiznos Canada Restaurant Corp.,* 2010 ONSC 5390 at paras 17-18. *See also* The Honorable Frank IACOBUCCI, *"What is access to justice in the context of class actions?"* in Jasminka KALAJDZIC, ed. Accessing Justice: Appraising Class Actions Ten Years After *Dutton, Hollick & Rumley,* 28 (LexisNexis Canada, 2011).

A. Proposed Avenues of Reform #1 and 2: Proactive Case Management and Related Measures to Manage and Limit Delays at the Authorization Stage

Recommendations:

- *Preserve the existing internal guideline regarding the scheduling of the authorization hearing within a year of the filing of the application for authorization, but refrain from enacting a formal rule in this regard;*
- *Enact a rule requiring that a case management conference be convened within 90 days of the filing of the application for authorization, where the parties and the court would agree upon a procedural timeline for all steps leading up to the authorization hearing;*
- *Require plaintiff to obtain leave of the court with respect to any amendment to the application for authorization or to file additional evidence after this initial case management conference;*
- *Formally adopt the Canadian Bar Association's Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions as a way to achieve more seamless management of overlapping multijurisdictional class actions;*
- *Encourage a balanced used of judicial discretionary powers in a way that protects parties' fundamental procedural rights, including audi alteram partem;*
- *Define clear criteria for the admission of evidence from the defendants at the authorization stage that are consistent with the goals of that procedural stage.*

8. The ILR submits that the rules, judicial guidelines and related measures currently in place seem to provide adequate means to bring a class action to authorization, and eventually to a common issues trial on the merits, within a reasonable period of time where the parties and court collectively wish to do so.

9. What might be perceived by some to be (and sometimes are) unreasonable delays most often occur where class counsel does not wish to move the case forward quickly (whether due to other competing time commitments, a desire to let the litigation mature in other venues or for other strategic reasons), where the parties have chosen to move towards resolution that requires complex negotiations, sometimes in multiple jurisdictions, or where the proposed class action is overbroad or overly ambitious in terms of scope and parties involved.

10. While undue delays should be avoided, it is worth noting that class actions are generally some of the most complicated civil cases and require a reasonable amount of time and process to be fairly adjudicated. The mere fact that class

actions take a long time to reach a trial does not necessarily mean there has been "unreasonable" delay.

11. In this regard, we note that the *Report prepared to the attention of the ministère de la Justice du Québec* dated September 2019 by the Class Actions Lab under the supervision of Pr. Catherine Piché (the "**Report**") and the Consultation Paper state that a "class action takes on average two years and 185 days to reach the final authorization judgment", and thus conclude that "delays caused by the authorization process are significant" (our translation).[8] This conclusion appears to be based on data that is at best a decade old, and which should not be considered as indicative of the current situation in Québec.

12. Several measures have been implemented over the past three years to ensure that class actions progress to the authorization hearing faster. One such measure is the creation, in 2018, of a group of specialized judges of the Québec Superior Court in charge of the case management of all class actions filed in the Judicial District of Montreal[9] at the authorization stage, with a number of judicial days per year specifically allotted per judge to perform this task. Those judges have developed a particular expertise regarding the management of class actions at the authorization stage, and later at the merits stage, and can thus ensure that cases proceed diligently and efficiently to the authorization hearing and to trial.

13. Along with our general observations on delays at the authorization stage, we have included below our comments on certain specific avenues of reform proposed by the MJQ as well as ILR's proposed alternative measures which aim to address factors that underlie delays at the authorization stage in a way that is both effective and balanced.

14. The ILR is not in favour of adopting a set deadline of one year following the date of filing for the hearing on the authorization of the proposed class action. The current system, where case management judges apply an internal guideline to the same effect, is efficient and well adapted to the practical reality of class actions, while offering the necessary flexibility to adapt to the requirements of particularly complex cases or those involving an unusually large number of

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8 Consultation Paper, p. 4.

9 The vast majority of proposed class actions are filed in the Judicial District in Montreal, and recent years have shown an increase in this trend. In 2020, approximately 90% of the applications for authorization of a class were filed in the Judicial District of Montreal, and the rest was spread across the province.

defendants, or to the delays resulting from late amendments by plaintiff or the coordination of multijurisdictional overlapping proceedings.

15. The ILR also submits that early case management to determine the procedural timeline leading up to the authorization hearing and limits to late amendment of pleadings or filing of additional evidence by plaintiff are additional measures that can be implemented to better control delays at the authorization stage. Accordingly, we propose the adoption of a rule providing that a case management conference be convened within 90 days of the filing of the application for authorization, during which the parties and the court would agree upon a procedural timeline for the authorization stage, and after which the plaintiff could only amend the application for authorization or file additional evidence with leave of the court.[10]

16. The ILR is favourable to the exercise of case management judges' discretionary powers in an active and proactive manner, but emphasizes that such powers should be used with careful consideration of the fundamental and guiding principles of justice codified in the *Code of civil procedure*, including the principle of *audi alteram partem*[11] and should be balanced against the parties' fundamental procedural rights.

17. The ILR further cautions against certain proposed avenues of reform aimed at managing delays at the authorization stage that would result in undue limitations to the defendants' procedural rights, thereby detracting from fundamental goals of the authorization process, namely the protection of defendants' rights and the weeding out of frivolous actions. We respectfully submit that enacting such measures would ultimately affect the legitimacy of the authorization stage.

18. One such measure is the proposed restrictive approach as regards the evidence adduced at the authorization stage. Allowing defendants to adduce adequate, proportionate evidence that is tailored to the analysis of the authorization conditions is necessary in order to protect class members, defendants and the interests of the justice system by filtering out frivolous or ill-founded actions.

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[10] A similar measure was adopted in Australia and requires the holding of an initial case management conference within six weeks from the date on which the application was filed: see *Practice Note CM 17—Representative Proceedings Commenced under PartIVA of the Federal Court of Australia Act 1976*, para. 1.2(b).

[11] Art. 17 CCP.

19. The ILR agrees that evidence adduced at the authorization stage ought to be limited to the analysis to be performed at that stage, and thus should not veer into voluminous, complex and controversial evidence pertaining to grounds of defence on the merits. However, we submit that adopting a generic restrictive approach to evidence at this stage would ultimately adversely affect the fairness and legitimacy of the authorization process and deter from its goals. Rather, the ILR proposes to codify guiding principles to assist the courts in assessing what constitutes the "relevant evidence" admissible at this stage of the proceedings. In this regard, two core principles emerge from a long line of jurisprudence on the issue: (i) the evidence that the defendant seeks to adduce should relate directly to the analysis of one of the authorization conditions; and (ii) the proposed evidence should be proportionate in light of the proposed class action and the analysis required at the authorization stage.[12]

20. Finally, in order to control delays in a context of multijurisdictional class actions brought in various provinces, we also suggest that the Canadian Bar Association's *Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions* be formally incorporated to the CCP, as this would allow for better and more seamless coordination by the case management judges in the various provinces involved.[13]

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[12] See e.g. : *Option Consommateurs c. Banque Amex du Canada,* 2006 QCCS 6290; *Allstate du Canada, compagnie d'assurances c. Agostino*, 2012 QCCA 678*; Option Consommateurs c. Brick Warehouse, l.p.*, 2011 QCCS 569; *Kramar c. Johnson & Johnson*, 2016 QCCS 5296; *J.B. c. Soeurs Grises de Montréal*, 2021 QCCS 3630.

[13] As regards the management of overlapping multijurisdictional class actions, and while this issue is not specifically addressed in the avenues of reform, future avenues of reform could consider amending the criteria governing the analysis of applications to stay Québec class actions in the presence of parallel overlapping class actions to achieve better alignment between the tests used in the various Canadian provinces in this respect, as noted by the Québec Court of Appeal in the recent decision *Micron Technology Inc. v. Hazan*, 2020 QCCA 1104.[13]

B. Proposed Avenue of Reform #3: Addition of a Proportionality Test or Principle at the Authorization Stage

Recommendation:

- *Add a proportionality test as a fifth authorization condition;*
- *Continue to use proportionality as a guiding principle of procedure in the interpretation of the other authorization conditions and throughout the class action procedure (including at the merits stage);*
- *Consider the addition of a predominance test at the authorization stage.*

21. The ILR is in favour of this avenue of reform. Proportionality has long been part of courts' analysis at the authorization stage, although it was at times controversial as to whether it should be considered a separate condition for authorization, or rather be used as a guiding principle when analyzing the other authorization conditions.

22. The ILR is in favour of the adoption of proportionality as a standalone authorization condition, as a tool to prevent the long, complex and costly mechanism of a class action from being triggered when it proves to be disproportionate or inappropriate in the circumstances.

23. Contrary to what is suggested in the Report, proportionality is not a factor that inherently favours the authorization of a class action.[14] Rather, it should be treated as neutral and should be considered in light of the circumstances of each case.

24. For instance, a putative class action may fail to meet the proportionality condition in situations where a company has already put in place a compensation process that the court believes is adequate, for example, through simplified claims refunds, product recalls or free repairs, depending on the circumstances.[15]

25. Proportionality may also offer a safeguard against two growing trends which have both tarnished the image of class actions as a vehicle of access to justice and adversely impacted its legitimacy.

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[14] Report, p. 28 et seq.

[15] See e.g.: *Paquette c. Samsung Electronics Canada Inc.*, 2020 QCCS 1160.

26. The first trend was described by Professor Jutras as the proliferation of class actions raising issues of an astounding triviality, in blatant contravention of the doctrine of *de minimis non curat lex*. Those actions, which seek compensation for what would normally be described as everyday inconveniences, clutter the court dockets and impede access to justice.[16]

27. The second trend is the monetization of public interest claims, whereby class counsel devise trivial monetary claims in order to convert what would otherwise constitute public interest litigation into damage claims asserted by way of a class action. Analyzed under the lens of proportionality, those claims would more likely appear as they truly are, and courts would be better position to redirect plaintiffs to a more suitable and efficient procedural vehicle such as a motion for declaratory judgment or injunctive proceedings.[17] The proportionality test would offer a framework to analyze whether a class action is the appropriate procedural vehicle in those scenarios, akin to the preferability test used in other provinces.[18]

28. A similar standard already exists in other Canadian provinces and it is advisable that the legal environment in which businesses operate across the country be as predictable and consistent as possible. We thus propose that this new proportionality criterion be aligned with the superiority requirement as defined in the recent amendments to the *Ontario Class Proceedings Act*, which requires that the class action procedural vehicle be preferable to all reasonably available means of resolving the class members' claim, including as applicable, a quasi-judicial or administrative proceeding, the case management of claims in a civil proceeding, or any remedial scheme or program outside of legal proceedings.

29. In addition to the addition of proportionality as a formal authorization condition, this cardinal principle of procedure should continue to inform the analysis of the

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16 Daniel JUTRAS, « L'action collective et l'intérêt public », in C. PICHÉ, *Class Action Effects/Les effets de l'action collective*, id., p. 71.

17 Daniel JUTRAS, « L'action collective et l'intérêt public », in C. PICHÉ, *Class Action Effects/Les effets de l'action collective*, id., p. 72-73. A classic example of this principle is found in the landmark decision of *Marcotte c. Longueuil (Ville)*, 2009 CSC 43, where the Supreme Court of Canada held that a class action was not the proper procedural vehicle to challenge a municipal taxation regulation, as a single litigant could bring an individual motion for declaratory judgment and obtain a judgment that would effectively benefit all other residents of the municipality, all the while avoiding the procedural complexities and hurdles of a class action.

18 *Id.*

other authorization conditions and should continue to be applied at the merits stage of the class action.

30. Whether as a result of the combination of the proportionality condition and the existing "common issues" condition or as a result of the adoption of a separate "predominance" condition, the revised authorization test should ensure that class actions are only authorized in cases where common issues of fact and law predominate over any questions affecting only individual class members (i.e. questions which do not lend themselves to adjudication in the context of a common issues trial). Such a result would be consistent with the true *raison d'être* of class actions and its goals of judicial economy. It also has the advantage of being better aligned with the test used in common law provinces.

C. Proposed Avenue of Reform #4: Eliminating the Prior Authorization Stage of a Class Action and Integrating it into the Main Proceedings

Recommendation: Maintain the prior authorization stage and improve certain authorization conditions (as discussed in the sections above and below).

31. As noted in the Report, the authorization process seeks to achieve three fundamental goals: (i) the protection of absent class members, (ii) the protection of defendants, and (iii) the protection of efficient use of judicial resources.

32. ILR is particularly concerned with the second goal. The introduction of a class action has serious consequences for the defendants, who often face significant reputation and commercial consequences, and are facing a large financial exposure as a result of the aggregation of multiple individual claims.[19] By filtering out frivolous or malicious actions, the authorization process "ensure[s] that parties are not being subjected unnecessarily to litigation in which they must defend against untenable claims".[20]

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[19] André DUROCHER & Claude MARSEILLE, « Autorisation d'exercer une action collective », Jurisclasseur Québec, coll. « Droit civil », *Procédure civile II*, fasc. 21, Montréal, Lexis Nexis, p. 21/6; Brian T. FITZPATRICK, « Do Class Actions Deter Wrongdoing? », in C. PICHÉ, *Class Action Effects/Les effets de l'action collective*, Montréal, Éditions Yvon Blais, 2018, p. 188 et seq.; Claude Marseille, « Le danger d'abaisser le seul d'autorisation » in C. PICHÉ, *Class Action Effects/Les effets de l'action collective*, id., p. 255-256.

[20] *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, at para. 61. See also : Pierre-Claude LAFOND, *Le recours collectif comme voie d'accès à la justice pour les consommateurs*, Montréal, Thémis, 1996,

33. Despite the important goals of the authorization process, the Report and the Consultation Paper nonetheless propose as an avenue of reform to eliminate the prior authorization stage and integrate it into the main proceedings on the merits.

34. ILR strongly opposes this proposed avenue of reform, which would fundamentally change the current regime and compromise the effectiveness of the authorization process as filtering mechanism. It is to be expected that, as a result, meritless actions would survive longer before any preliminary challenge could be raised, resulting in a less efficient use of judicial resources and slowing down the progress of those class actions that are well founded, due to an unduly encumbered court docket, a phenomenon that is already becoming apparent in practice.

35. Authoritative legal commentators have voiced their discomfort with the current authorization regime over the past few years, noting the contrast between the significant resources dedicated to this procedural stage and the low threshold resulting from years of caselaw continuously lowering the bar for authorization. This led some to question whether, in light of this context, the authorization stage should be eliminated altogether and integrated to the merits stage, or on the contrary, whether it should be given "the bite it deserves".[21] This latter proposal gathered support by senior members of the judiciary with expertise in the field of class actions, and is certainly the one that ILR finds preferable and more advisable.

36. One supporter of a strengthened authorization test is the Honourable Justice Savard, now Chief Justice of the Court of Appeal, who wrote:

> [29] […] Certains prônent la suppression de cette autorisation, d'autres, dont je suis, suggèrent plutôt de la renforcer. Mais dans l'attente de la révision de cette question, que ce soit par le législateur ou la Cour suprême, il faut s'assurer que l'action collective puisse jouer son véritable rôle et ne soit pas utilisée à des fins

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p. 349; *Vivendi Canada Inc. c. Dell'Aniello,* 2014 SCC 1, at para. 37; *Lambert c. Whirlpool Canada, l.p.*, 2015 QCCA 433, para. 11-12 (leave to appeal denied).

[21] See e.g. the comments of the Honourable Justice Bich in *Charles c. Boiron Canada*, 2016 QCCA 1716, at para. 69-74; see also *Asselin c. Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673.

> autres que celles pour lesquelles une telle voie procédurale existe.[22] [our emphasis]

37. As aptly summarized in the recent comments of the Honourable Justices Côté, Moldaver and Rowe of the Supreme Court of Canada, the objectives underlying objectives of "facilitating access to justice, modifying harmful behaviour and conserving judicial resources" that define the class action procedure "can be only be attained if a rigorous procedure is followed for the authorization of such an action", and "the class action will not be able to attain its objectives unless the courts give meaning and substance to the legislature's provisions in a manner consistent with their institutional role".[23]

38. From a comparative law perspective, it is also worth noting that amongst the various jurisdictions that have enacted class action regimes around the world, the vast majority[24] have elected to incorporate an authorization or certification mechanism akin to the one currently in force in Québec, based on the rationale that trial judges should "consider at the earliest possible time whether the class action device represents an appropriate vehicle for dealing with the claims of the class members".[25]

39. Finally, from a practical standpoint, we find that the Report does not establish how the proposed revised procedure resulting in the elimination of the prior authorization process would help to achieve more expedient and fair results and reduce delays related to the authorization of a class action.

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22 *Whirlpool Canada c. Gaudette*, 2018 QCCA 1206, at para. 29.

23 *Desjardins Financial Services Firm Inc. v. Asselin*, 2020 SCC 30, at para. 202.

24 Australia, which opted instead for a "decertification" regime, is one notable exception to the rule.

25 N. M. PACE, *Class Actions in the United States of America: An Overview of the Process and the Empirical Literature*, Santa Monica (California), RAND Institute for Civil Justice, 2007, at p. 593.

D. Proposed Avenue of Reform #5: Eliminating the Second Authorization Condition (the "Colour of Right" test) and Replacing it with a Preliminary Dismissal Procedure at the Merits Stage

Recommendations:

- *Maintain the merits test at the authorization condition set out under Art. 575(2) CCP;*
- *Reform and strengthen the existing test by adopting the existing "reasonable chances of success" leave test used with respect to secondary market securities misrepresentations class action.*

40. ILR strongly opposes the elimination of the existing "colour of right" or "arguable case" criterion codified under Art. 575(2) CCP.

41. A putative class action plaintiff should be required to make a modest showing that the proposed class action has some merit at the authorization stage. For the reasons noted in our introductory remarks, low authorization standards and evidentiary thresholds are areas of significant concern and thus call for the proposed avenues of reform outlined below.

42. Not only do we encourage the Québec legislature to keep the "colour of right" condition but we respectfully submit that this aspect of the authorization test should be strengthened to improve alignment with the goals of the authorization process, ensure a more efficient use of judicial resources and ultimately achieve better access to justice.

43. The lower the authorization threshold and the lighter the evidentiary burden, the higher the risk of meritless and extortionate class actions being brought with the goal of extracting an unjust settlement, because of the pressures to settle that a class action brings to bear on companies regardless of the merit of the claim.[26] While class actions are proceeding to common issues trials in Canada with more frequency,[27] it remains the case that most class actions never reach a trial on the

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[26] *Sun-Rype Products Ltd. v Archer Daniels Midland Co.*, [2010] BCSC 992 at para. 18, appeals allowed on other grounds, 2011 BCCA 187 and 2013 SCC 58; see also Warner at paras 71-72.

[27] *Painting an Unsettling Landscape*, supra at pages 23 - 25. While over 100 common issues trials have taken place across the country, the vast majority have been in Quebec. The Quebec class action trial against several tobacco companies, referred to in that paper, resulted in a $15-billion judgment; *Letourneau v. JTI MacDonald Corp et a*l, May 27, 2015, aff'd on appeal, *Imperial Tobacco*

merits. Defendants come under considerable pressure to settle class actions for reasons extraneous to their merit, or on terms that are disproportionate to the merits of the actions. Factors contributing to settlement pressure include the size of potential damages exposure, the enormous economic costs of defending a class proceeding, and the reputational pressure from publicity, which is inherent in many class actions, regardless of their merits.[28]

44. While recognizing that the authorization stage is a procedural step, some analysis of the merits of a proposed class action should be mandated at the authorization stage to weed out weak claims early. A proposed class action may be meritless either because it has no likely prospect of success on its facts, or because it is not suitable for class treatment, even though there may be some small group of individuals with viable claims against the defendant. A higher authorization threshold is necessary to ensure that substantive justice is not sacrificed to the access to justice objectives of class action legislation.

45. Indeed, recent Québec experience has shown an increase of "sectorial" class actions in a variety of industry. There is thus a real trend whereby class actions, meant to be a pure procedural vehicle aimed at achieving commutative justice in a more efficient manner, are being used in lieu of commissions of enquiry. Moreover, taking advantage of the low authorization threshold and the various presumptions recognized over time by pretorial law, certain plaintiffs use this procedural vehicle to impose a reverse evidentiary burden on defendants, forcing them to establish that they have not engaged in the impugned conduct or that the product that they manufactured was not defective – often with view to pressure defendants into early settlement.[29]

Canada ltée c. Conseil québécois sur le tabac et la santé, 2019 QCCA 358. In another trial since that paper was written, the Quebec court dismissed an action against Abbott alleging failure to warn of risk in the use of a medicine: *Brousseau c Laboratoires Abbott ltée,* 2016 QCCS 5083, aff'd on appeal, 2019 QCCA 801.

28 Canadian judges have recognized that most class actions never proceed to a trial on the merits. See *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2010 BCSC 992, at para. 18.

29 Class action proceedings instituted in Québec over the recent years contain a plethora of examples of this phenomenon, including, *inter alia*, the class actions brought against auto insurers and home insurers alleging a variety of deceptive or otherwise illegal practices relating to the use of preferred provider networks (*Jacques Généreux & Robert Beaudry c. Desjardins Groupe d'assurances générales inc., et al.*, 705-06-000009-218 and *Alain Tessier c. Desjardins Groupe d'assurances générales inc., et al.*, 410-06-000008-209).

46. This is precisely the scenario which caused the Chief Justice of the Supreme Court of Canada to warn against adopting the blanket assumption that a lower authorization threshold always equate greater access to justice: a class action authorized further to a generous interpretation of the authorization conditions which would result in a settlement providing for the payment of insignificant sums to the members of the class does not meet the goals of access to justice.[30] In the same vein, another author commented that a stricter authorization test may send a powerful signal in cases where the class action is authorized and encourage the negotiation of a settlement, whereas a lax authorization test may send the opposite message and lead defendants to choose defend the class action on the merits.[31]

47. Under the current rules, the plaintiff ought only to establish "a mere possibility of success [of the proposed class action]" which neither has to be realistic nor reasonable.[32] It is widely recognized that this test sets a low threshold for authorization.

48. Legislated authorization conditions should be amended to adopt a preliminary merits assessment similar to the one conducted to obtain leave to pursue a secondary market misrepresentation claim under the securities legislation in Quebec. Under that legislation, in order to obtain leave to pursue such an action, the court must be satisfied that there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.[33]

49. The decisions of the Supreme Court of Canada in *Theratechnologies Inc. v 121851 Canada Inc.*[34] and *Canadian Imperial Bank of Commerce v Green*[35] considering this leave requirement are instructive on why and how it could be applied generally to class actions. After noting the "depth of public concern" about entrepreneurial litigation and the necessity for measures to prevent "strike suits" in the securities class action context—that is, "meritless actions launched in order to coerce targeted defendants

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30 The Honourable Richard WAGNER, "Comment l'action collective est devenue ce qu'elle est" in C. PICHÉ, *Class Action Effects/Les effets de l'action collective*, Montréal, Éditions Yvon Blais, 2018, p.286

31 Claude Marseille, « Le danger d'abaisser le seul d'autorisation » in C. PICHÉ, *Class Action Effects/Les effets de l'action collective*, id., p. 256-257.

32 *Charles c. Boiron Canada inc.*, 2016 QCCA 1716.

33 *Securities Act*, CQLR c V-1.1, s. 225.4.

34 2015 SCC 18 [*Theratechnologies*].

35 2015 SCC 60 [*Green*].

into unjust settlements"[36]—the Supreme Court held that the "[leave] threshold should be more than a 'speed bump'.... In other words, to promote the legislative objective of a robust deterrent screening mechanism so that cases without merit are prevented from proceeding, the threshold requires that there be a reasonable or realistic chance that the action will succeed".[37]

50. Experience with securities class actions in Canada to date indicates that the requirement for a modest merits assessment has not discouraged unduly the pursuit of claims with merit, or prevented class proceedings from being pursued by class counsel who believe that they have some merit. A 2017 NERA Economic Consulting study found that the number of securities class action lawsuits filed in Canada more than doubled in 2016 compared to the year before.[38] é

51. There would be considerable benefit to requiring a putative class action plaintiff to make a modest showing that the proposed class action has some merit at the authorization stage. Such a requirement would provide a mechanism to weed out proposed class actions that are doomed to fail if they proceed to trial and would help deter the commencement of such claims in the first place. It would also give the authorization judge a more meaningful opportunity to narrow a putative class action by refining the proposed class definition and common issues to properly reflect what is really in issue, in those cases that have enough merit to warrant authorization.

52. With an early merits assessment as part of authorization, defendants would not need to bring expensive and lengthy summary judgment motions to dismiss unmeritorious claims, and potentially provide extensive pre-motion discovery.

53. Experience has shown that a class action is just as important and potentially problematic whether it relates to a secondary market securities transaction or any other area of law. The rationale in *Theratechnologies* for the leave test applies equally to other types of class actions. Disposing of all types of class actions with little or no merit early in the case, before significant expense and inconvenience is

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36 *Green* at paras 67-69.

37 *Theratechnologies* at para 38. See also Anthony Duggan, Jacob Ziegal, Jassmine Girgis, and David Feldman, *"The Statutory Claim for Secondary Market Misrepresentations after Theratechnologies and Green"* (Canadian Business Law Journal, 2017).

38 "Trends in Canadian Securities Class Actions: 2016 Update", NERA Economic Consulting, (February 22, 2017), available at http://www.nera.com/publications/archive/2017/trends-in-canadian-securities-class-actions-2016-update.html.

incurred by all parties and the courts will promote and better balance the judicial economy, deterrence and access to justice objectives of class action legislation.

54. Finally, while summary judgment is becoming an increasingly useful tool in facilitating the efficient adjudication of some class actions on their merits, it is not a proper substitute for a meaningful screening of proposed class actions at the authorization stage.

E. Proposed Avenues of Reform #6-8: Improving the Assessment and Approval of Class Counsel's Legal Fees

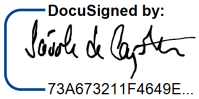
Recommendation: ILR does not wish to comment on the issue other than to better frame the circumstances in which the appointment of an amicus curiae may be appropriate and the related costs implications.

55. ILR is generally favourable to the proposed avenues of reform as regards the assessment and approval of class counsel's fees. However, the appointment of an *amicus curiae* to advise the court on issues related to the approval of class counsel's fees is a solution to be reserved to exceptional cases raising complex or novel issues. Detailed criteria have been developed by the case law over time to assess and approve class counsel fees, such that not all cases require the appointment of a neutral advisor to assist the court in this regard. Automatically appointing an *amicus curiae* in all cases would unduly increase the cost of class actions for the parties and result in additional delays. Moreover, any fees associated with the appointment of an *amicus curiae* should be paid out of any amount payable to the class members, following similar rules as those governing the payment of class counsel's fees.

II. CONCLUSION

56. We are grateful for this opportunity to present these submissions and proposals for reform of the Québec class action regime.

57. The reforms suggested in this paper are designed to achieve just balance in class action procedures. In particular, maintaining the authorization process and adopting stronger authorization standards which place more of a burden on plaintiffs to justify class treatment will go a long way to corralling abusive class proceedings at the earliest practicable opportunity, and will result in better allocating judicial resources to meritorious claims and ensure that they can be heard faster, thereby achieving better access to justice.



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