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"The doors to justice are open, but how do I get in?": Experiencing access to justice as a class action member

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Abstract

The purpose of this article is to discuss how class action members experience access to justice in class actions, and how one may innovate in order to obtain a more complete and holistic access to justice in the context of class actions. For this purpose, six individuals were interviewed by the Class Actions Lab, at Université de Montréal[2]; two of these individuals were class action members and four were class action representatives. They were asked generally about their level of involvement in the proceedings' decision-making processes and their perception of justice and satisfaction with the overall outcome of the proceedings. The data collected illustrates the correlation between adequate representation and enhanced access to justice for class members. The article concludes by presenting ideas gathered from the interviewed class representatives and members on how to improve access to justice in class actions.

[1] I wish to thank my extraordinary student Andrea Roulet for having worked with me on this special project at the Class Actions Lab.

[2] Class Actions Lab at the University of Montreal's Faculty of Law. Online: http://www.classactionslab.ca/. The Lab enables discussions between practitioners, thinkers, researchers and judges interested in class action law and its practice not just in Quebec, but across Canada and around the world. The Lab is a research centre and a meeting place, used to discuss class action law reform, both locally and internationally. Lab activities include building a database indexing class action judgments and consolidating empirical data relative to class actions; articles of doctrine addressing class action law issues; blogging and facilitating the sharing of data and communication between specialists around the world; establishing a research and discussion group; and providing varied opportunities for exchange and debate.

Introduction

Access to justice in the Canadian civil justice system is a fundamental preoccupation for legislators, judges and legal society alike. Canada has seen its position as one of the leaders of access to civil justice fall from 16th amongst all high-income countries in the world to 20th in 2018, as evidenced in the most recent World Justice Index (Agrast, Botero, & Ponce, 2018; Agrast, Botero & Ponce, 2011). Class actions are widely available in Canada, and seek to overcome barriers to justice (*AIC Limited v. Fischer*, para. 28ff.). They are considered to provide a formidable access to compensation to class members, particularly in Quebec (Piché, 2018, Class Actions in Quebec, at 19). Leaving this broader institutional perspective aside, how do class members and class representatives experience class actions? To what kind of justice are they provided access?

To provide "access" is to "enable those in need to pursue their legal interests," and to provide "justice" is a "result-oriented [exercise] which should be reached through equal or effective access" (Wrbka, Van Uytsel & Siems, 2012, p. 1). Therefore, the phrase "access to justice" points simultaneously to removing barriers to the system as well as obtaining an outcome that is considered fair (*AIC Limited v. Fischer*, para. 24). In *Western Canadian Shopping Centres Inc. v. Dutton*, the Supreme Court of Canada recognizes that

> [b]y 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. (para. 28) [our emphasis]

In the class action context, does access to justice merely involve the aggregation of claims to make litigation and court procedures more affordable? Is simply opening the "doors of justice" to arrive in the

courtroom enough to ensure that the members of a class action "access justice"?

An examination of the quality and role of the class representative can shed light on how class action proceedings provide more than mere economic convenience. This article thus describes six interviews conducted by the Class Actions Lab with class action representatives and class members, for which they shared their experience of the class action procedure. They discussed issues related to their level of involvement in the proceedings' decision-making processes and their perception of justice and satisfaction with the overall outcome of the proceedings. They explained how they came about to be involved in the class proceeding, and whether the actions were self-initiated or not. They addressed communications between members and counsel, and indicated whether the representative truly acted *on behalf of* the absent class members, and how they determined what was to be the best interests of the members. A discussion was held about the class action client, and who was required to consent to representation and decisions being made by counsel.

While it is a preliminary study, this article demonstrates the influence of the quality of the representation on access to justice in class actions, notably, the level of access and the fairness of outcomes in class proceedings. In it, we first discuss what it means to provide access to justice in class actions. Second, we address the legal requirements for "adequate" representation, as provided in the caselaw and doctrine. Third, we discuss our interviewees' perception of their level of "access" to decision-making. Fourth, we reflect upon the interviewees' overall experience and perceived level of "justice" obtained from the class action procedure. Finally, the relation between quality of representation and access to justice is discussed. This article concludes by addressing possible recommendations on how to innovate in class action procedures to enhance access to justice in Canadian class actions.

Access to Justice in Class Actions

A class action is a form of civil action in which one or a few plaintiffs can sue one or more defendant(s) on behalf of a larger group of people who claim the same type of loss from the same defendant(s). Instead of initiating separate lawsuits or having each plaintiff named in the case, the representative plaintiff can pursue the claim on behalf of the class. If and when a plaintiff recovers a form of indemnity or remedy in the case, all class members share in that recovery. Accordingly, class actions are considered as a tool to increase access to justice, given that the costs of litigation are shared among a larger group. Class actions are beneficial also because the case outcome binds all class members, preventing those class members from pursuing subsequent, separate cases. Nonetheless, the often tremendous financial costs associated with a class action may lead defendants to settling cases without merit early, and possibly at a discount.

Each province in Canada, with the exception of Prince Edward Island, has adopted class action legislation. These provincial legislations set out a promise to improve access to justice by providing a procedural mechanism which may bring balance "between the isolated citizen and companies," between consumers and large corporations, and groups of harmed individuals who share the same legal claim against their alleged wrongdoers (Lalonde, 1978). However, access to justice in the context of class actions is more than simply providing an economic convenience by enabling access to courtrooms and the litigation process.

Indeed, the class action is "[m]ore than a tool of convenience. It is entrusted with an explicitly social mission: to protect consumer rights, ensure access to justice, and sanction illicit behaviour" (Finn, 2014, p. 373). While the economic barrier to the justice system can be in many cases quite great, the class action also provides an option to overcome certain social and psychological barriers preventing an individual with a claim to seek redress for harm caused (Ontario Law Reform Commission, 1982). Having equal access through affordable

litigation is important, but access to justice equally concerns the ability for a procedure to lead to results that are individually and socially just (Cappelletti & Garth, 1978, p. 2). As the Ontario Law Reform Commission (1982) rightly puts it, "access to justice is a precondition to the exercise of all other legal rights."

Professor Jasminka Kalajdzic (2018) has published an interesting definition of access to justice that maintains more holistic views of both access and justice that encompasses the availability of the law as well as considerations for fair outcomes. She describes access to justice to be comprised of four fundamental and connected attributes in the context of class proceedings:

1. Access to justice necessarily infers an opportunity to pursue a claim that otherwise would not see the inside of a courtroom for economic, social or psychological barriers.

2. In addition to gaining physical access to litigation and considering the limited participation of class members in court procedures, the procedure must be as fair and transparent as possible.

3. In the limited circumstances where participation by class members is possible, this participation must be meaningful. In other words, a class member's right to object or to opt out should not be prevented.

4. The access to justice acquired by a class action procedure experienced by members of a class action is defined by the outcome being substantially fair. (Kalajdzic, 2018, p. 70)

On this last point, Kalajdzic notes that settlements in terms of quantum and distribution must be designed in a way that benefits class members to the fullest extent.

Considering these four factors, as applied to class member experience — and whether these members have enhanced responsibilities as

representatives or are instead regular class members — our interviews suggest that adequate representation serves to enhance members' access to justice in class actions and provides a more holistic and complete sense of justice. As such, with reference to the four-point definition of access to justice provided by Kalajdzic, when the representation is of a certain quality, and is considered "adequate," class members' access to justice becomes much more than merely about achieving a form of compensation.

Accordingly, an adequate representative will serve to improve the experience of access to justice in class actions particularly for the definition's second and third points. When representation is adequate, the representative serves as the class members' voice to serve their best interest, particularly for those members who are considered "absent." Increased communication between counsel and the members, as well as between the representative and the members, improves the transparency of the procedure. In addition, when a representative is adequate, they – at least in theory – serve to provide meaningful participation for the other members of the class. This latter point is apparent by the information gathered in the interviews where class representatives brought the opinions and objections of class members with them to settlement negotiations.

Therefore, when considering access to justice in the context of class actions, it is largely arguable that the procedure itself improves such access. However, the access to justice experienced by class members may be further enhanced when representation is in effect adequate. Before setting out the results from our study that relay the experience of class members, it is important to describe the scope of "adequate" representation in class actions.

Nature and Conditions to Representation in Class Actions

Class proceedings have a representative nature. Prior to the hearing on the merits, an individual who is a member of the class must seek leave from the court to represent a defined category of individuals, the class members. Referring to the Quebec *Code of Civil Procedure* (hereafter the C.C.P.), we note that article 575 (4) provides that it is the court who appoints the class member it designates as representative plaintiff. In Ontario, the Class Proceedings Act similarly provides that an order certifying a proceeding as a class proceeding states the names of the representative parties (s. 8(1)(b) Ont. C.P.A.). The class member chosen to represent the class is referred to as a "class representative" or "named plaintiff." These two categories of individuals, class members in general as well as class members with enhanced responsibilities as representative plaintiff, will concern us in this article.

The named plaintiff's representation of the class members influences the access to justice experienced by the class. Indeed, two characteristics of representation come into play: appointment of a representative, and adequacy of this representative. First, without representation there can be no litigation: 1) a named plaintiff representing the class must be appointed by the court (art. 575(4) and 576 C.C.P.; s. 5(2) and 8(1)b) Ont. C.P.A.), and 2) a lawyer or class counsel must be assigned (art. 84(2) C.C.P.; *Fenn v. Ontario*, paras. 10-11 and 19). Second, even if these two conditions are recognized, caselaw like *Keatley Surveying Ltd. v. Teranet, Inc.* shows that the access to justice obtained by class members depends on the representation being of a certain quality. The representation must be "adequate."

On the doctrinal level, the representative plaintiff has been considered to be "a pivotal figure in the class lawsuit, with the fate of the entire action rising or falling with [his or her] status [as] representative" (Burns, 1990, p. 165). Claimants overcome psychological and social barriers through a representative plaintiff

who provides guidance and takes charge of the action on their behalf (*AIC Limited v. Fischer*, para. 29). In practice, however, class representatives are often found to be mere "figureheads" who play very little or no part in the initiation and prosecution of the class claim, having often been recruited by lawyers in a so-called "entrepreneurial" stance (Burns, 1990, *Sibiga c. Fido*, para. 102).

In addition, final judgments on the merits of the class proceedings — as well as settlement approval decisions — will bind not only the named plaintiff, but also every member who falls within the definition of the class, including so-called "absent" members (Walker & Watson, 2014). Given every person's right to due process and right to fair representation, the representative plaintiff is therefore responsible for protecting the interests of those "absent" class members (Burns, 1990). The adequacy of this protection is the "*sine qua non* of representative capacity" and is precisely what ensures those absent members' access to justice (Strickler, 1984, p. 102). Representation is interpreted broadly, as was held by the Supreme Court of Canada in *Bank of Montreal v. Marcotte*, in which representative plaintiffs who did not have a direct cause of action against each defendant were considered to nonetheless have standing at authorization (para. 41).

The class action procedure first came to Canada in 1979 in the province of Quebec, greatly inspired by American class actions, and in particular by Rule 23 of the U.S. Federal Rules of Civil Procedure (Piché, 2011; Beaumier, 1987). Since then, Canadian class actions have developed by following some of the doctrinal developments of American class actions, notably on the topic of representation (Strickler, 1984). Accordingly, it is useful to highlight that U.S. courts have established the following four factors as serving to ensure adequate class representation: i) absence of any conflicts of interest between members of the class and the representative; ii) the representative's individual claim; iii) the motivation and ability of the representative to carry forward the class claim; iv) the competence of the representative's attorney (Strickler, 1984).

The standards for adequate representation in Canada are provided by the legislation of each province. In the province of Quebec, article 575(4) of the C.C.P. provides that the court "appoints the class member it designates as representative plaintiff if it is of the opinion that […] the class member appointed as representative plaintiff is in a position to *properly* represent the class members." This article has been interpreted by the [Quebec] courts in *Sibiga v. Fido Solutions Inc., Lévesque v. Vidéotron, s.e.n.c.,* and *Jasmin v. Société des alcools du Québec,* to mean that the representative must represent the class "adequately."

In *Infineon Technologies v. Option Consommateurs,* a Supreme Court of Canada case which originated in Quebec, the court held that the representative is adequate when he or she has an interest in the suit, competence, and absence of conflict with other class members. In addition, the court held that in determining whether these criteria have been met in the certification hearing, the court should interpret the factors liberally. Some decisions rendered in Quebec, such as *Sibiga v. Fido Solutions Inc.*, have followed this liberal interpretation and recognized that a representative does not have to be the most competent of all candidates, and a minimal understanding of the procedures does not prevent a representative from acting as such. Incidentally, in addition to the previously cited factors, the Supreme Court of Canada held in *Western Canadian Shopping Centres Inc. v. Dutton* that the proposed representative plaintiff "does not need to be typical of the class, nor the best possible representative, but he or she must be able to "vigorously and capably prosecute the interests of the class."

Similarly, in the other Canadian common law provinces, the legislation of each province provides the requirements for the representative plaintiff. For example, s. 5(1)(e)(i) of the Ontario *Class Proceedings Act* sets out that the representative plaintiff must fairly and adequately represent the interests of the class, must have produced a litigation plan, and must not have a conflict of interest with the other class members.

Canadian courts have on occasion found the representative to be inadequate. The Ontario Superior Court of Justice has held that a representative with minimal motivation (i.e., failing to account for the content of their own affidavit and failure to review key documents) is inadequate, citing their "disturbing level of unreliability, disinterest and even indifference" (*Sondhi v. Deloitte Management Services LP*). Other times, representatives have been held inadequate due to their antipathy towards other members and conflicts of interest (*Nixon v. Canada; Carom v. Bre-X Minerals Ltd*). It is the representative's duty to uphold the class' access to justice by providing a "check and balance" for the class counsel's entrepreneurial interests (*Sondhi v. Deloitte Management Services LP*). For Justice Perrell in *Fantl v. Transamerica Life Canada*,

> the presence of a genuine claimant reduces frivolous claims, acts as a check and balance to the excesses of entrepreneurial law firms, provides a voice to protect the interests of the absent class members, and *goes some distance to ensuring that the access to justice* and behaviour modification provided by the Act *make a meaningful contribution to both private and social good*. (para. 63) [our emphasis]

Interestingly, the role of the case management judge in administering justice is to protect the interests of the class members, notably when approving class action settlements (Piché, 2011). One may wonder whether this special judicial role in any way diminishes the representative's duties or role, and whether it provides the members with a safety net, resting assured that the decisions made by the representative will necessarily be in their best interests. Our opinion is that the court's proactive role of case manager in no way diminishes the importance of the representative's adequate character, a cornerstone condition to legitimately founded class proceedings, and that it instead complements it.

In the class action context, the representative's role is fundamental. They hold the burden and responsibility of ensuring that the class members are provided with access to justice. The representative is, in fact, a fiduciary of the members, with obligations to act with loyalty and honesty, consistently with the best interests of the beneficiary(ies). Accordingly, given the representative nature of class proceedings, the representative will be said to speak and act as the "voice" of the class members (Mulheron, 2004; Piché, 2011). Their principal responsibility is to make decisions that are in the best interests of all class members as beneficiaries. Thus, the class representative has a duty to be loyal to the class by putting the interests of the class above their personal interests if these interests differ (Piché, 2011).

In *Richard v. British Columbia,* the Supreme Court of British Columbia discussed the solicitor-client relationship in class action proceedings. The court clarified the representative's role as regards the other class members, holding that the class representative must "act in the class' best interest by directing litigation, instructing class counsel and authorizing settlement" (para. 42(2)). In *Richard v. British Columbia*, the class representative and class counsel disagreed on whether the proposed settlement was in the best interest of the class, the representative plaintiff arguing that it was not (para. 14). Class counsel refused to follow the representative's instructions, failed to consult with the class representative on a number of occasions for important litigative decisions, and failed to inform the defendants that the settlement had been rejected (paras. 17 and 43). These actions contributed to the court's ruling that class counsel had breached their duty of loyalty to the class representative as well as the class. Importantly, in this case the class representative had been acting as a fiduciary as they stood up for and acted in the best interest of the class despite the inactions of their class counsel.

While some may believe the representative plaintiff is to operate entirely altruistically, putting the interests of the class before their own, others contend that in practice, the class representative may not

be "adequate" in many situations. Accordingly, as mentioned above, representative plaintiffs are said to allegedly operate as "figureheads" or "placeholders" for class counsel, thereby serving their entrepreneurial interests (Klement, 2002; Burns, 1990). As a mere "figurehead," the named plaintiff is said to ignore their enhanced responsibilities as representative and thereby deprive the other class members of their access to justice.

Three elements shape the view that class action representatives may not truly be "adequate" in the vast majority of cases. Those elements relate to how class actions are initiated, to the tension posed by those actions' potential financial return, and to the generally relatively small claim of the representative plaintiff.

Addressing the practice of class actions in Ontario, and the steps taken by lawyers to institute a class action, former Ontario Chief Justice Warren Winkler has confirmed that it is the lawyers that generally seek out representatives and present them with the idea of a class action. He explains that "generally, a client will not approach a lawyer suggesting a class action (...). It is the lawyers who will likely recognize the case as a potential class action (...) the class action finds the lawyer first, who then seeks to find a representative plaintiff." (Winkler & Matthews, 2008). This proposal arguably discredits the named plaintiff's adequacy as a representative as it allegedly infers a lack of interest by this representative (McKenzie, 2016).

As for the exclusive financial incentives of lawyers in class actions, it must be recognized that they are much more important in class actions than in non-class litigation. Class counsel regularly finance class actions by way of contingency fees, thereby taking on a significant financial risk (Walker & Watson, 2014). In addition, they generally financially benefit more than the representative plaintiff or class members from a successful class action (Walker & Watson, 2014). Thus, there is a potential of great financial return for class counsel, which may in turn generate conflicts of interest.

Finally, while class actions permit the combination of small claims that would not otherwise be heard in front of the courts, the representative may also possess a relatively small claim. This small claim may discourage lawyers from giving meaningful instructions to their client, tempting class counsel to self-instruct (Winkler, 2008). In such cases, the freedom exercised by class counsel in important litigative decisions in class action proceedings extends far beyond what would be tolerated in non-representative proceedings. Accordingly, control of the litigation is said to be held by class counsel rather than the class action representatives (Walker & Watson, 2014, p. 133; *Haney Ironworks Ltd v. Manufacturers Life Insurance,* para. 30).

These three arguments have led many to consider class actions as "entrepreneurial in nature" (*Fantl v. Transamerica Life Canada*, para. 66). When in excess, these elements can lead to legal and ethical dilemmas such as the "dilemma of the absent client" (Piché, 2011, p. 100). Indeed, in representative litigation the lawyers do not know who their clients are (other than the class representative), and hence do not generally speak or communicate with them. Indeed, this lack of contact fosters a litigative environment that encourages the clients, including the class representatives, to be passive, therefore permitting — and encouraging — class counsel to make most or all of the important decisions of the case.

Furthermore, these arguments illustrate the palpable tension, particularly during settlement negotiations, between the entrepreneurial interests of counsel — financial, reputational and otherwise — and the best interests of class action representatives and members (Piché, 2011). Considering the financial risk entailed by a class action and the decision to pursue class action litigation, class counsel arguably have a heightened financial self-interest in both the timing and content of any settlement proposal.

Financial compensation may encourage the named plaintiff to exercise their fiduciary duties. As Justice Winkler (2008) duly

remarks: "the representative is the driving force in identifying the claim, choosing counsel, advancing the claim and in bringing the proceeding into fruition. This can involve a great deal of effort and commitment on the part of that person." Interestingly, Quebec's *Code of Civil Procedure* provides, in article 593, that "the court may award the representative plaintiff an indemnity for disbursements and an amount to cover legal costs and the lawyer's professional fee." As we have written elsewhere, compensation is not only ideal, but necessary, in our view, to ensure that the representative plaintiff adequately participates, where there is otherwise little incentive to do so (Piché, 2011). As such, in an Ontario Superior Court of Justice case*,* compensation for the named plaintiffs was held to be a "necessary" function that results in the monetary success of the class overall (*Sutherland v. Boots Pharmaceutical,* paras. 18–21). Providing a financial compensation to the class representative in exchange for their completion of fiduciary duties encourages class representatives to act as adequate representatives in the best interests of the class.

Given these considerations, and the widespread criticism of class action representatives' adequacy, one may ask what shapes members' perspectives of representation and of their representative's role, duties and obligations during class action litigation. Asking whether a higher standard of representation is necessary, given the evolution of the caselaw in this regard, may be relevant. On the other hand, one may wonder whether access to justice in class actions truly depends upon the representative's involvement in the litigation, or whether this access is instead furthered through other mechanisms such as hearings, class noticing, or class distributions. In the next section, these questions are considered through the perspectives of six interviewees about access to justice in class actions.

Class Members' and Representatives' Perspectives on Class Actions

Method and Sampling

To better understand the experience felt by members and representatives in class actions, we chose to conduct a sampling exercise. The method of sampling in qualitative research must be both appropriate and adequate (Morse, 1994). The method is *appropriate* if the choice of informants and the method of selection "fit" the study's purpose as determined by the research question, and it is *adequate* if the data is sufficient and possesses the required quality. Adequacy will depend upon the relevance, completeness and amount of information obtained. In our case, we felt that even if our sample was very small, there was some saturation as to the elements of information obtained from our interviewees. Access to a primary type of sampling was facilitated by the context of a parallel research project involving discussions with representatives, and a contact facilitated by colleagues with several of the class members.

Qualitative analyses generally require a smaller sample size than quantitative analyses. The sample size should be large enough to obtain enough data to sufficiently describe the phenomenon of interest and address the research questions. Qualitative researchers should seek the attainment of saturation, which occurs when adding more participants to the study does not result in additional perspectives or information (Glaser & Strauss, 1967). While saturation is the best indicator of the ideal sample, Morse (1994) has recommended that to understand the essence of an experience — for phenomenological studies such as our study on class members — a minimum of six participants be consulted, and author Creswell (1998) has recommended between 5–25 participants.

For this study, we conducted six interviews with class action members and representatives during the summer of 2018 through various research projects conducted at the Class Actions Lab of Université de Montréal. Held in person and by telephone, in and

around Montreal, and in the United States, for an average duration of 1 to 2 hours, the interviews dealt with member participation in class actions filed in the province of Quebec over the past 25 years. Our interviewees were individuals whose contacts were provided by collaborators in the Class Actions Lab's ongoing research projects. An ethics approval was obtained from the university for this purpose, and each of the interviewees expressly consented to participate and signed ethics consent forms.

There are inherent limitations to the present sample. The number of interviews is small, and one may wonder whether it was sufficient to reach conclusions and provide data saturation on this topic. Larger sample sizes may be necessary in some instances, and of course we must recognize that the experience of each person may be differentially affected by the process and applicable rules of procedure, as well as the nature of the action they were involved in. Nonetheless, we feel confident that our sample size — although small — was sufficient and relevant to provide a true picture of the class action experience. Indeed, we noticed, after several interviews, that no new insights, themes or issues were raised by the interviewees (Glaser & Strauss, 1990; Morse, 1994). This position is reinforced by the fact that while four of the interviewees had special responsibilities as class representatives, all six were class members (since representatives are also members of the class). We will discuss our findings below.

Due to the sensitive nature of some of the interviews conducted, and pursuant to the ethics consent forms, interviewees shall remain anonymous. It is helpful to mention, however, that the interviewees participated in class actions associated with one of the following four areas of the law: employment law, commercial fraud, sexual abuse, and insurance and social benefits law. In our interviews, the members' experience in a class action was either as a class member or as a class representative. Accordingly, and to preserve the anonymity of our interviewees, we used pseudonyms to refer to them as follows:

- *Daniel*, a class representative in an employment law case;
- *David*, a class representative in an insurance and benefits case;
- *Donna,* a class member in a commercial fraud case;
- *Diana*, a class representative in that same commercial fraud case;
- *Don*, a class member in a sexual abuse case; and
- *Doug*, a class representative in that same sexual abuse case.

We feel confident that the variety of types of cases is significant enough to provide an interesting, reliable portrait of class member and class representative experience. Again, this impression is supported by the fact that a lot of the same ideas were repeated through the interviews. Notwithstanding this, it is important to recognize that the role of the representative plaintiff may vary tremendously given the nature of the action, and the types and quantum of individual damages involved. A representative plaintiff may be much more involved in a sexual abuse case where secrecy and susceptibilities are high, and where there are serious but heterogeneous individual damages. As for class member experience, again, the context and nature of the class action directly impacts this experience, as one can presume that a member in an abuse case will be much more involved and concerned with the proceedings than one in a commercial fraud case. Our choice of cases and interviewees attempted to reflect the different dynamics involved.

The interviews were conducted in a semi-structured manner, with the following open-ended questions:

1. What was your general experience with class actions?

2. How did you first get involved in a class action? Did you make the first steps, or were you instead first contacted by an attorney in that regard?

3. What was your initial motivation to be a part of the class action as representative?

4. In your own words, could you please describe what is a class action representative?

5. In your own words, could you please explain the purposes and objectives of class actions?

6. How did you first come into contact with other potential or existing class members?

7. How many individuals were concerned by and eligible to participate in the class action initially?

8. How did you communicate with class counsel during the proceedings? At what frequency? Were you asked for your opinion and/or consent about decisions made in the course of the class action?

9. Were you informed of developments in the class action? If so, at what frequency and how?

10. Did you inform other members of developments in the action? If so, at what frequency and how?

11. Did any of the members opt-out and/or object at any point in the proceedings? If so, why?

[Questions 12-14 applicable to settlement context – if applicable]

12. Can you please explain how the class action settlement negotiations went about and concluded, if applicable?

13. Can you please explain how the settlement approval hearing was organized and conducted, as well as who was present and what the outcome was?

14. Did you believe that the settlement agreed to between the parties was in the best interest of the members? How did you make that determination?

15. Did you observe a conflict of interest with other potential members, or involving class counsel?

16. What was the defendant's reaction when the class action was initially filed?

17. How did you benefit from the class action?

18. Were you paid an honorarium for your participation as class representative, if applicable?

19. Please describe your impressions about the class action and its outcome following the end of distributions (were you satisfied with the outcome of the class action?)

20. Do you feel that you were provided access to justice in the class action you were involved in? Please explain.

21. Are there any ways in which class member experience could be enhanced in class actions? Please explain.

22. Do you have any further comments regarding any of the following topics: delays, communications with members, settlement negotiations or approval, class counsel fees, class distributions, class notices, class action certification, behaviour modification of defendants, etc.?

23. Is there anything else you would like to tell me (us)?

Our interviewees' experiences are presented in two parts: first, their "access" to justice and involvement with the decision-making process, and second, their perception of "justice" and overall experience in the class action context.

"Access" of the Representative Plaintiffs and Members to Decision-Making

To begin, our interviewees were asked *how they first got involved in a class action*. With this question, we were curious to learn the process required in class action proceedings for choosing and appointing the class representative, and for those individuals who were regular class members, how they came to hear about the class action.

Two of the four representatives, Doug and David, initiated the class actions they were involved in, while the other two, Diana and Daniel, were approached by class counsel to take on the role of class representative. Interestingly, after many years of personal struggle, Doug decided to pursue a legal action and contacted large firms to see if they would take the case. He also contacted journalists and told them the truth about his story. His goal was threefold: to have the truth come out, to be personally indemnified, and to see others compensated for the harm suffered. David was introduced to lawyers wanting to bring the case to court, and he volunteered to be a class representative. Out of the two class members interviewed, Don became involved after seeing a newspaper notice, and Donna attended a meeting organized for similarly victimized individuals.

Doug and David put incredible effort, time and activism to raise awareness of their legal claims for 5–10 years until those claims were taken seriously. After being dismissed by police for a report they filed of the harm experienced, Doug approached a well-known class action law firm but was refused on the basis that the litigation would not have a high enough financial return. Prior to initiating the class action, David was a well-recognized activist on the issue, participating in daily online forums that connected thousands of

individuals who share their legal issue. This interviewee was referred by a friend to a young lawyer. Therefore, in both situations, for these representatives, there was a fortunate combination of determination and personal contacts. Importantly, both interviewees demonstrated leadership, interest and motivation — characteristics of an adequate representative.

The experience of interviewees in terms of *participation in the decision-making process* differed between those who were class representatives and those who were mere class members. Don, a class member, said, "our mandate was to not participate, we submit our narrative and then we wait." In contrast, Doug, a class representative, noted that he had been consulted for every important litigative decision and, in particular, for settlement negotiations. As a class representative, David also actively participated in the decision-making process. However, when subsequently asked about the settlement negotiations, he mentioned that he was absent but "generally aware" that the settlement negotiations were going on. He justified his absence by his trust in counsel to make the best decision. In contrast, when asked about settlement negotiations, Donna said that "everyone was present." However, as she referred to herself as an "observer of the negotiations," we infer that her presence at the settlement negotiation may not have been very active. Thus, the very preliminary impression felt from our small subset of interviewees was that participation in decision-making varied for class representatives, but that on the whole, these representatives generally tended to rely upon counsel to represent them and make decisions.

Next, interviewees were asked about *their relationship with class counsel*, in particular, their level of communication, and whether their opinion was sought. All six interviewees described their relationship as positive. Their confidence in counsel was rooted in transparency and communication about timelines of when particular steps would be accomplished. All interviewees found the lawyers to be open-minded and ready to meet in person, whether as class representatives or class members, and to readily explain complex and technical legal

terms or proceedings. One class member noted that class counsel was empathetic. Describing their experience to the lawyer was like opening a door to the past "to share the worst parts of your life." The lawyers offered support and advice on how to most effectively present these difficult details to the court. Donna explained: "without our lawyers, we would have never gotten through it, we would have never gotten very far!" While these positive comments about their relationships with class counsel are encouraging, we are quite confident that this portrait is unfortunately not representative of relationships between counsel and class members/class representative.

Interviewees further commented about *the frequency of their communications with class counsel*. All four of the class representatives commented that their level of communication with class counsel depended upon the stage of the class action. When they were close to a court date or settlement negotiation meeting, the contact and communication could be daily or more. Meanwhile, when awaiting a judge's decision, several months could pass without communication. Accordingly, we conclude that there are no rules or guidelines for counsel as to how frequently they should communicate with members and representatives.

Interviewees were then asked about *their relationship with the other members of the class*. We asked them if they communicated with the other members, and how often they did, as well as by what means and for what reasons. The responses were quite diverse. David and Daniel seemed to communicate the most frequently prior to the action, having been involved in online forum discussions, reuniting individuals in similar situations. Thus, when the action was authorized, and David and Daniel's names were public, many of the same individuals with whom they had been communicating prior to the action contacted them anew. Communication with the members was made via social media and e-mail. Both David and Daniel stated that they were motivated to communicate, but had no legal training to do so and often found the exercise overwhelming. This, tied with the

fact that they were emotional about the case, made communication on social media channels more of a detriment than a blessing, resulting in back-and-forth arguments about legal technicalities David described as "above their head."

Donna, a class member, and Diana, a class representative in the same class action, had formed a team to organize communications. As class representative, Diana communicated with class counsel, and Donna developed a communications strategy to keep class members informed. Donna said that her role in communications was never official but happened naturally because of her bilingualism, personal experience and knowledge of the case. Her experience seemed to be different from that of other members, who generally were much less involved. In the case of Donna, the first communication with class members was made via an e-mail chain sent to approximately four hundred members. Later on, a Facebook page was set up, and members could share their stories with one another and updates could be posted. This forum provided an arena to gather class members' input on the proposed settlement before the settlement conference. This communications role was completely voluntary on the part of Donna; she explained that she "took communication on as [their] role because people were starved for information!"[3] All of Donna's actions to keep the other members informed were motivated by the best interest of the class, and even taking certain Facebook comments to the settlement conference illustrates how this class member communicated the interests of the class to Diana, the class representative, and to counsel, to incorporate into the case's decision-making process.

In contrast, interviewees Doug and Don, who were respectively class representative and class member of a class action limited by confidentiality due to its nature, obviously, had a distinct experience

[3] This situation is particularly interesting, as this class action seemed to have had a twofold named plaintiff. The named representative plaintiff was Diana, but Donna, although a mere class member, demonstrated an extreme level of initiative, altruistic motive and interest to help the cause of the other members of the class.

with communications with other class members. Don, as class member, cited the confidentiality of the action to explain the lack of information as to the composition of the class. Doug noted that he had communicated with two other class members, and told them that they should call him whenever they wanted or needed to, so that he could help them. This offer was taken up on a couple of occasions, where they conversed about what they were going through. Doug noted that despite these discussions, the action felt like a "personal journey."

In summary, overall the quality of communication demonstrated by the class representatives (or their communication "attachés" in the particular situation of Donna and Diana) was adequate, or better. They tried to keep everyone informed. Due to the restrictions imposed by confidentiality, in the situation of Don and Doug, class counsel —not the class representative — was responsible for communications, which, according to Don, was done adequately and on a timely basis.

In light of these perspectives on their involvement, communication with class counsel and communication with other members, one can see how the adequacy of the class representative is quintessential to the access to justice of the other class members. When communications were increased, interviewees felt more involved. Certainly, in the case of Donna, a great contribution to access to justice was felt when she brought with them to the settlement negotiation the input of several members from the Facebook group. Indeed, for the most part, from the class representatives that were interviewed there was a trend of motivation, interest and actions in the best interest of the class that all contributed to access to justice for the class members. While this literal access is directly influenced by the class representative's motivation and competence, the feeling of having received justice is equally important. Examining the perceived sentiment of "justice" of the interviewees will provide a more complete understanding of their overall experience with the class action procedure.

Perceived Sentiment of "Justice" and Overall Experience of the Class Action Procedure

To examine the perception of "justice" felt in class actions, interviewees were asked to explain what purpose they believed the class action served, and how they viewed the role of the class action representative, or what the role should be.

Regarding the *perception of the role of class representative,* as a class member, Don acknowledged the financial and personal commitment of their class representative who himself initiated the class action. Don noted that this initiative "took guts." Another class member interviewed, Donna, described the role of class representative Diana as the "driving force" of the litigation. These comments provide a sense of respect and recognition towards the class representatives that led the actions.

Three of the four class representatives shared their perceptions of the role of a representative. First, they commented on personal characteristics that a representative likely possessed. Diana stated that the person chosen to be class representative is likely to be (one of) the most active class member. Interestingly, Don mentioned that one of his main motivations to commence the class action was the desire to see the total truth come out, as well as the need for seeing members compensated.

However, these representatives also noted their personal desire to see their own claim litigated was part of their motivation to be class representative. They commented this role allowed them to kick-start their own litigative process. For these interviewees, there was a tension between their personal self-interest in the action and their altruistic interest to represent the best interests of the class. In addition, they noted the onerous burden involved in being a class representative, and stated that this person should be financially compensated for their involvement.

Demonstrating characteristics of a fiduciary for their class, David was the most active of all the representatives interviewed. He described the class action as a multi-pronged attack with the lawyers and their connections with local government officials. As class representative, he participated in applying political pressure and addressing the media in order to bring attention to the class action. Interestingly, David mentioned that his role as representative was at times challenging as he carried the burdens of other class members' trauma. As to his motivation for taking up this role, he said that compared to the other members of the class, he was relatively healthier, and therefore was better placed to be class representative. He shared that he told himself that he would see the class action through until the end. In other words, he took his role as class representative very seriously.

In addition, the three class representatives interviewed noted the representative's altruistic responsibility, in integrating the other class members within the action. For example, Doug felt this role included the encouragement of other class members to participate in the action, including attending court hearings. David described his role of representative as one to promote the case on behalf of the class and to be a leader for the action. Overall, the role of class representative was perceived as an altruistic responsibility whereby the representative must protect the interests of the absent members, and lead the action to expose the truth, to obtain justice. This perception, although based on a limited sample of interviews, is coherent with the state of the law in that respect.

Importantly, the interviewees were asked to share their perception of the *role and purpose of class action procedure*. All of the answers indicated that interviewees perceived the class action to promote access to justice. According to Don, the role of the class action is "to make law more democratic and more accessible." David stated that he believed the class action was the medium by which legal change could come about, which in his case was necessary as he felt the case had reached a political dead end. Donna referred precisely to access

to justice when she commented that her vision of the class action is an attractive medium for litigation, as the absence of any upfront costs permits those who have lost everything to participate in a legal action. In her case, the class action procedure was what permitted her own access to justice. Finally, Daniel said that the class action procedure was a procedural mechanism to financially repair the harm caused. However, he explained that as the case went on, it became much more than that — he then perceived the class action as a "social tool." In other words, he explained that the case became about more than just the money. Daniel's commentary echoes the holistic definition of access to justice in a class action context, thereby suggesting that in order for members to experience complete access to justice, the action must involve more than financial compensation.

Importantly, while interviewees entertained ideal views of what the class procedure should ultimately achieve, the majority of them were left unsatisfied in the end. When asked about their *satisfaction with the outcome (financial or otherwise)*, they felt the outcome was insufficient. Don felt that the compensation he received seemed like an "arbitrary decision," and expressed dissatisfaction with the fact that he was not able to participate in the process that determined how much money he was to receive. He felt that the defendant should have been "hit" much harder, and that the slim compensation could not result in any behaviour modification. This left him thinking "what was the learning?"

Furthermore, Doug also expressed a negative view of the amount of compensation received. The amount awarded was not equivalent to the value required to fully compensate the class members. He commented that if defendants are not made to fear practical liability, behaviours like the defendants' will not be modified. He noted the unsatisfactory compensation could be interpreted as society's level of tolerance for widespread abuse. Overall, Doug thought the settlement was underestimated financially and said that other class members were outraged. While he was content to have "won," he did not understand why they did not receive more by way of compensation.

The most positive of all those interviewed was David, who described the compensation received as adequate, fair and appreciated. While, like other class members, he would have appreciated a greater compensation, he recognized that his compensation for his role as class representative was very satisfactory, considering the time, investment and stress related to the class action took on his personal life. An overall satisfaction with the outcome was mentioned by Donna. She explained that because the majority of class members initially had not hoped to receive anything, receiving a compensation made them extremely happy. While it would have been interesting to reflect on whether the interviewees' perception of fairness of compensation was influenced by the amount of personal compensation received as class representative, our interview sample is too slim to conclude on that point.

Finally, class representative Daniel explained that as soon as the compensation was announced, he knew that class members would not be satisfied. He noted that there were discussions with the lawyers on how far to bring the class action, and whether or not they would win on appeal. He said that to minimize the risk of loss at trial, a settlement was eventually reached, which left members dissatisfied with the amount of compensation. Interestingly enough, at the beginning of the action, Daniel felt the 25 percent accorded for the counsel fees was unfair, but at the end of the case, he then felt that it actually was very fair.

In summary, considering the overall satisfaction of class members with the compensation received, the interviewees' general perception (with the exception of David's) is that justice could have been better served in all accounts if more compensation had been received by members of the class.

In addition to financial satisfaction, we asked the interviewees about *their overall experience with the class action procedure*. Did it bring about justice? Did they feel like they accessed justice? In general, despite the general positive experience of the class action,

interviewees expressed that justice lacked because of the length and slowness of the procedure and process.

Don noted that there was a lack of human element in resolving the claim, especially in the context of his case, which was a sexual abuse class action. The process left him wanting, and he asked: "What do you get when you put your heart out there?" In order to be compensated, he "peeled a scab off" and asked, "now what?" Doug noted that while he was unsatisfied with the final amount of financial compensation, as soon as it became apparent that the amount was final, the experience became more of a social accomplishment. Interestingly, he noted that receiving an apology was important as he felt it was an acknowledgement of the truth.

David considered the overall class action experience to be positive. Considering the conclusion of the action, he described reading the Justice's words in the judgment as very validating, both to him and to the class. He considered the strong language used by the court to condemn the action of the defendants as validation. In addition, he explained that he was satisfied with the overall outcome of the class action because not only did the members receive compensation, but public policy was changed. This commentary further affirms that access to justice in class actions should be considered as a holistic objective that cannot be achieved by simply distributing compensation for harm.

Donna had a positive experience with the class action. However, her feeling was that there was no ensuing behaviour modification. According to Donna, class actions create very powerful relations: "they have offices of lawyers. Very powerful — it was just a little punch to them." She participated more actively in the class action despite being a mere member; she assisted the class representative and handled the communication with the other members, reportedly, because she felt there was a need to do something positive to deal with the injustice that occurred. Donna explained: "going to court

was like our spa day," which we interpret as a feeling of true justice being felt by this individual.

Diana explained that the procedure did not make her believe in justice because it was much too long, slow and costly. On a macro level, it is the class members who pay the price when lawyers have the luxury of delaying a settlement. Finally, she concluded by saying that while she sought "justice," a delay of seven to eight years to obtain compensation is not what she considers as "justice." This commentary illustrates that while Diana — and others — may be provided with "access" to the courts and to a class action, they may not perceive to have experienced "justice." In other words, access to justice is more than having one's day in court, and the adage "delaying justice is denying justice" (Senate of Canada, 2017) remains very true, especially in the context of a class action.

Finally, class representative Daniel explained that overall, he felt he obtained justice, and that participating in the class action was an enriching experience. However, he also felt, in general, that the class action procedure took much too long. Unfortunately, in the years that the action took to conclude, many class members passed away, and were thus prevented from seeing the class action to an end.

Conclusion and Recommendations for Enhanced Access to Justice

After consideration of the statutory and jurisprudential requirements applicable to the "adequacy of representation" standard, the above commentary from our four class representatives and two class members illustrates that — at least in these class actions — the representatives acted in the best interest of the class members and acted as true fiduciaries for the class. This proposition is supported by the interviewees' description of the role of class representatives. As for the class members, our interviews highlight some communication problems with members, as well as a discrepancy between their understanding and expectations of the case, and the reality of proceedings and outcome.

In terms of class member experience, we conclude that there is a lot of room for improvement to enhance access to justice in class action procedures, especially regarding transparency of procedures and substantive fairness of outcomes. Accordingly, inspired by the feedback obtained during our interviews, we wish to make the following broad recommendations for enhanced access to justice in class actions:

1. *Operating the class actions as a "portal" for vulnerable members of society in order to obtain more complete justice*. Access to justice in class actions is not considered — nor perceived by the class members — as mere access to a form of compensation. The overall experience of class actions is tremendously important for class members and representatives, as herein discussed. Criticized as a primitive tool that does not provide *complete* justice, it is recommended that the class action better coordinate with other professional systems (educational and psychology systems, among others). Instead of operating in a silo, as the procedure is said to function presently, the class action procedure has the opportunity to be a portal for vulnerable members of society to not only obtain financial redress for harm, but also to connect these groups of vulnerable people to the services that they require to administer a "complete justice." Only when the class action links victims to other systems, providing them with the necessary social services (or at least serving as a stepping stone to connect the members of the class with these services) may recovery and reconciliation of the harm experienced commence. Accordingly, we believe that while class actions should focus on securing a meaningful benefit to class members (Piché, Fourth Dimension, 2018), class members should be encouraged by judges and counsel to access other professional systems.
2. *Enhancing interactions and communications between class members and class representatives, as well as with class counsel.* One proxy came up repeatedly to indicate that there was a

perception of justice linked to the level of communication in the class action. Our interviewees indicated that communication was vital to the justice obtained, but that this communication was sometimes deficient. They acknowledged the efficiency and utility of social media platforms, which we also support as an efficient, lost-cost manner of reaching out to the members. However, they also cautioned against overuse of these platforms by the class representative, particularly to communicate legal details.

Interviewees noted that the emotions held by class members can be intense, and the stakes quite high. In these instances in particular, attributing the responsibility of communicating and explaining legal details that may be beyond the class representative's comprehension or comfort level risks overwhelming them. In other instances, such as some larger-scale class proceedings, one must caution that class members may not know that they are class members and may not want to be contacted or directly involved in the lawsuit, given that their individual claim is small.

In sum, communication ensures a greater access to justice to members, but communicating is not solely the responsibility of class representatives. Class counsel must work with class representatives to develop a strategy to manage and direct the level of communication with class members.

3. *The standard of adequate representation should be more closely scrutinized judicially.* Our interviews have shown that there is an extensive reliance in class proceedings on the lawyers' representations and blind confidence in their representation of the class' best interests. Are class member interests truly adequately protected? No one knows for sure. Class action proceedings are described as extensively driven by the lawyers. In our view, stricter standards of adequacy of representation are needed. One way of ensuring this representation would be that class counsel and representatives systematically be required at the onset of

> proceedings to contact a few "key" members who reflect the composition of the class, in order to ensure that at least this consultative unit has a sufficient understanding of the procedures, and that the interests of a significant proportion of members are then adequately protected through this most "adequate" representation (Piché, 2011).

In this article, we have sought to demonstrate the importance of representation in class actions, and how class members experience access to justice in class actions. Through the perspectives of six class members and representatives, we have explained that while members rely on and have confidence in their counsel, communications enhance member experience and the sentiment of justice. Further, we have discussed the levels of motivation of the class members in participating in class actions, and their overall (in)satisfaction with outcomes. This extent of member satisfaction appears to be conditioned upon seeing larger levels of compensation being paid out by the defendants, and in a more rapid timeframe.

In our overburdened and prohibitively expensive court system, the class action procedure provides members with the possibility of vindicating rights and pursuing justice. The one oddity with the class action device is that class counsel in many ways literally *frame* the interests of their client — in a manner said to be "entrepreneurial." The representative plaintiff, whose role is critical to the class action's "representative" nature, in practice exercises a lesser responsibility than their class counsel in representing the members. Categorized by some as "a fungible," in the face of the many other plaintiffs seeking compensation for mass wrongdoings, the representative by and large is led blindly by their "champion for access to justice" counsel (*Sondhi v. Deloitte Management Services LP*, at para. 56). Nevertheless, the proposed representative plaintiff must be genuine with a real role to play and not be a mere placeholder (*ibid*, at para. 44).

Class representatives should not be so unaware. Since class actions extinguish the individual right to control and decide the litigation by

transferring control over absent class members' claims to class representatives, the role of these representatives is quintessential to class action legitimacy, and, ultimately, to members' access to justice.

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