MULTILAYER ACCESS TO ENVIRONMENTAL JUSTICE: A CRITICAL POLICY ANALYSIS OF ONTARIO'S CLASS ACTION REGIME, 1992-2017

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A DISSERTATION SUBMITTED TO THE FACULTY OF GRADUATE STUDIES IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

GRADUATE PROGRAM IN POLITICAL SCIENCE
YORK UNIVERSITY
TORONTO, ONTARIO

MARCH 2018

Abstract

This study is an access to justice analysis of class actions in Ontario from 1992 to 2017, with a focus on environmental claims. Its central argument is that the primary policy objective of the *Class Proceedings Act, 1992* of increasing access to justice, a fundamental human right, has largely not been fulfilled during this period for environmental claims, particularly those involving historical contamination and human health-impairment. This is a striking discovery given that environmental class actions were originally posited as paradigmatic class actions in Ontario since such actions typically involve negative value claims with diffuse harms across vast spatial and temporal contexts with acute power imbalances between victims and perpetrators in light of the negligible public enforcement of environmental regulations. The findings of this study uncover and explain the gap between this traditional perspective and the bleak reality of the floundering of environmental class actions in Ontario, with resultant negative implications for the capacities of residents to access justice in environmental matters.

Departing from the proceduralistic and individualistic emphases of traditional class action and access to justice research, this study critically explores Ontario's class action regime for environmental claims by considering various contextual variables that are not commonly addressed in the established literature. By examining the exclusionary dynamics that operate to impede multilayer access to environmental justice in light of the power, production, and social reproduction associated with toxic exposures, this study expands the ambit of environmental class actions beyond the traditional confines to the broader political economy of pollution. In so doing, this study incorporates descriptive and normative aspects of classical access to justice research with explanatory argumentation for an

integrated approach to evaluating multilayer access to environmental justice in Ontario. This contextual approach reveals a more complicated and socially reflective picture of environmental class actions than has heretofore been available in extant scholarship. By uncovering the exclusionary dynamics of class actions in the political economy of pollution, this study provides greater clarity about the type of environmental justice that is presently achieved and achievable in Ontario's class action regime.

Acknowledgements

It goes without saying, but it must be said: my sincere thanks are extended to my supervisor, Isabella Bakker, whose invaluable commitment and guidance has contributed to my personal and professional development in incalculable ways. I am deeply grateful for Isa's sage insights and incisive contributions throughout the writing of this dissertation, as well as her kindness and generosity, which go above and beyond what a student can expect of a supervisor. I consider myself fortunate to have worked for years with a person who is not only a world-renowned scholar, but also a trusted friend. I also owe a debt of gratitude to my second committee member, Trevor Farrow, whose astute comments and contributions have shaped and bettered this project in several important ways. Finally, I am tremendously thankful to my third committee member, Shannon Bell, whose support of my intellectual development has been unfailing since the earliest days of my graduate career.

A special thanks must also be extended to an individual who has exemplified what it means to be a scholar and a teacher of the highest order: I am sincerely grateful for the invaluable lessons that Stephen Gill has taught me. There are several other professors who have shaped my intellectual development in different ways, not least of which is Garry Watson, to whom I owe a great debt for his gracious cultivation of my interest in class actions, Bryn Greer-Wooten, whose methodological insights helped shape this project, as well as numerous others, including Ian Greene, Matthew Hennigar, Lesley Jacobs, Jennifer Nedelsky, Stephen Newman, Peter H. Russell, and Ambassador David Wright.

The administrative staff of York University's Department of Political Science and Osgoode Hall Law School must also be gratefully acknowledged. Most of all, Judy Matadial and Marlene Quensenberry deserve special thanks for their constant support.

Education does not solely take place in classrooms, but also in corridors, cafés, restaurants, park benches, and every other place where people can have a conversation. Among those conversationalists, George Mantzios and Bruce Lai have taught me the most, as well as Michelle Lovegrove Thomson, Suzanne Hawkins, Charlotte Calon, Seon Tyrell, Dock Currie, and countless others with whom I have debated anything and everything in a spirit of camaraderie. My initial interest in class actions was sparked many years ago by the dearly departed Rick Scott during one such conversation. This dissertation was completed on a little island outside Stockholm. I want to thank Moa and Ingemar Hedlund with all my heart for welcoming me into their loving family. Last but not least, I have to thank my family, Parvin, Shourideh, and Masoud, for their boundless love and support. Without them, this dissertation would not exist.

Before the law stands a gatekeeper.

Franz Kafka

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INTRODUCTION

> "Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims."[1]
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> - Chief Justice Beverley McLachlin

In Canada today, calls for increased access to justice are reaching deafening levels. As the Canadian Forum on Civil Justice observed in a 2017 report, Canada is experiencing an access to justice "crisis."[2] This precarious situation is occurring during a historical period of rising mass environmental harms that has precipitated Canadians to bind together to seek legal redress, the forms of which include accountability, monetary compensation, and social recognition of loss. Given economic constraints (as well as social and psychological barriers), attaining justice for environmental harms often requires collective action. This has primarily manifested in the form of class action litigation. It is therefore not surprising that class actions have been widely viewed as promoting access to justice in environmental matters. In the face of mass environmental harms affecting entire communities and groups of similarly situated individuals, class actions are continually posited as beneficial instruments for increasing access to justice, a fundamental human right.[3] What is

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[1] *Western Canadian Shopping Centres v. Dutton*, 2000 S.C.J. 63, [2001] 2 S.C.R. 534 at 28.

[2] Action Committee on Access to Justice in Civil & Family Matters, *Canadian Access to Justice Initiatives: Justice Development Goals Status Report*, Ottawa, Canada (2017): 18. See also, Action Committee on Access to Justice in Civil & Family Matters, *Colloquium Report*, Ottawa, Canada (2014): 12. The Canadian Bar Association has similarly observed that the state of access to justice in Canada is 'abysmal.' Melina Buckley, "Reaching Equal Justice: An Invitation to Envision and Act," *Canadian Bar Association* (2013): 6.

[3] Garry Watson, "Class Actions: The Canadian Experience," *Duke Journal of Comparative and International Law* 11, no. 2 (2001): 269-89; Janet Walker, "Who's Afraid of US-style Class Actions?" *Southwestern Journal of International Law* 18, no. 2 (2012): 509-66; Lorne Sossin, "The Justice of Access:

surprising, however, is the relative paucity of research that critically examines this widespread belief.

"The importance of access to justice," Deborah Hensler has observed, "as a fundamental human right which ought to be readily available to all, is clearly a new consideration that stimulates fresh thinking about representative or 'grouped' proceedings."[4] In this context, the paucity of research into the crisis of access to justice is disconcerting for scholars and stakeholders in several interrelated fields of inquiry, including empirical legal studies, human rights, political economy, environmental and public health, and public policy. To evaluate the progress of class actions, scholars have generally invoked the three policy objectives enumerated by courts and provincial legislatures: judicial economy, access to justice, and behaviour modification. In this tripartite division, access to justice has dominated the jurisprudence and commentary as the primary policy objective. In point of fact, access to justice was the main policy objective of Ontario's groundbreaking (in common law jurisdictions) *Class Proceedings Act, 1992*. But how has this policy actually manifested? What type of *access* and what type of *justice* is being increased, and *for whom*?

These questions are particularly striking in the context of environmental class actions. Environmental claims were originally posited as paradigmatic class actions in Ontario for several reasons, including the diffusiveness and collective traits of the harms involved, their general characteristics as negative value claims, as well as the negligible

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Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?" *University of British Columbia Law Review* 40 (2007): 727-44.

[4] Deborah Hensler, "The Globalization of Class Actions: An Overview," *Annals of the American Academy of Political and Social Science* 622, no. 1 (2009): 7-29.

enforcement of environmental regulations by public agencies which has precipitated demands for class actions as instruments of social protection. Heather McLeod-Kilmurray has further articulated the paradigmatic quality of environmental class actions in light of the fact that the class action (a) "reflects the reality of environmental harms as a shared problem"; (b) "demonstrates the full scope and extent of the harm"; (c) "strengthens the argument for injunctive relief by accurately reflecting the nature and strengths of interests to be balanced"; (d) "can result in damages large enough to alter behaviour." According to Kilmurray, this is why "alternative avenues of redress are not adequate replacements for the class action, and why class actions can be very useful tools in environmental litigation."[5]

As this study explicates, however, the development of Ontario's class action regime betrays this originary promise. Not a single environmental class action has been successful at trial on its merits and the overlapping uncertainties and risk exposures involved in environmental claims (particularly historical contamination claims) have disfavoured the pursuit of environmental class actions and contributed to the production of an anemic class action regime dominated by investor rights and securities actions over claims with stronger public interests. This study seeks to uncover the dynamics that have facilitated this situation and its implications for substantive environmental justice. In so doing, this study poses two major overlapping questions, in addition to those posed above: To what extent have class actions promoted multilayer access to environmental justice? What are the limitations of class actions for environmental justice-seekers?

[5] Heather McLeod-Kilmurray, *The Process of Judging the Environment: Civil Procedure, Environmental Ethics and their Effects on Environmental Law* (SJD, University of Toronto, 2007) [unpublished].

By addressing these fundamental questions and situating class actions within their broader social, political, and economic context, this dissertation contributes through a holistic method in filling a major knowledge gap that scholars have identified but struggled to address[6]; that is, providing a critical analysis of the extent to which class actions have increased *multilayer access to justice in environmental matters*.[7] As the Canadian Bar Association observed in its *Reaching Equal Justice* report, "Canada is plagued by a paucity of access to justice research."[8] Deborah Hensler has similarly observed this contextual void in class action scholarship, noting that "[n]either scholars nor policy-makers typically pay much attention to the circumstances that give rise to the mass claims that [class actions] address, the cultural values and institutions that shape beliefs about when people and businesses should be compensated for losses, the economic arrangements that facilitate or

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[6] Michael Molavi, "Beyond the Courtroom: Access to Justice, Privatization, and the Future of Class Action Research," *Canadian Class Action Review* 10, no. 1-2 (2015): 8-31; Matthew Good, "Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions," *Alberta Law Review*, 47, no. 1 (2009): 185-227; Deborah Hensler, "Developing an Empirical Research Agenda on Access to Justice in Class and Mass Actions," in *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley*, ed. Jasminka Kalajdzic (Toronto: LexisNexis, 2011), 49-57. A recent edited volume has similarly recognized this contextual void in class action scholarship and provided a multi-national overview of factors beyond substantive law and procedural rules, see, Deborah Hensler, Christopher Hodges, and Ianika Tzankova, eds., *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Northampton, MA: Edward Elgar, 2016).

[7] The phrase "access to justice in environmental matters" is derived from the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, commonly referred to as the Aarhus Convention, given its signing in Aarhus, Denmark on 25 June 1998. The Aarhus Convention requires signatories to develop provisions for information, participation, and litigation in environmental matters for individuals and collectives. In this context, 'access to justice' applies primarily to litigation rights; in contrast to competing concepts of 'access to justice' that expand its scope to include information, decision-making, and other types of active participation. Canada is a member state of the UNECE, but not a contracting party to the Aarhus Convention, although Canada did participate in negotiations of the Convention. The term 'multilayer' refers to the three layers of interests involved in class actions: individual, collective, and public. This term was originally introduced by Stefan Wrbka, Steven Van Uytsel, and Mathias Siems, in their edited volume, *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (Cambridge: Cambridge University Press, 2012). With this in mind, the phrase *multilayer access to justice in environmental matters* refers to access to justice in the context of class actions involving environmental concerns. Moving forward, 'multilayer access to justice' is employed as a shorthand to refer to access to justice in the context of class actions.

[8] Buckley, "Reaching Equal Justice," 147.

deter litigation and the politics that shape decisions about who will be responsible for paying compensation to whom and how much."[9] In fact, the study of class actions from a social science perspective has been largely underdeveloped; as one of the foremost global scholars in socio-legal studies, Michael McCann, has pointed out, "social scientists have devoted very little study to class action litigation" and in light of "the highly political character and huge consequences of such litigation, it seems like a ripe area for research by social scientists."[10] In this interdisciplinary study, I address this underexplored area and contribute to several interrelated fields (identified above) under the aegis of the emerging field of critical policy studies.[11]

This introductory chapter starts with a brief overview of the global resurgence of access to justice in the early twenty-first century, with a focus on the sub-field of collective access to justice in the form of class actions (re: 'multilayer access to justice'). It then identifies the scholarly contribution of this study, further elaborates on the methodology and rationale for focusing on environmental class actions, and provides a chapter-by-chapter outline of this study's major arguments and sub-arguments.

1. GLOBAL RESURGENCE OF ACCESS TO JUSTICE

A global resurgence of access to justice is currently underway. As a central principle of civil justice, the concept of access to justice grew in popularity during the height of the

[9] Hensler, "Class actions in context," 387.
[10] Michael McCann, "Litigation and Legal Mobilization," in Gregory A. Caldeira et al, eds., *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2009): 536.
[11] Michael Orsini and Miriam Smith, eds., *Critical Policy Studies* (Vancouver: University of British Columbia Press, 2007).

post-war Keynesian welfare state and its associated frameworks of social provisioning; however, with the advent of neo-liberalism, access to justice experienced a sharp curtailment from its universalistic premises as a "social right"[12] from the early 1980s onwards.[13] The post-1980 historical conjuncture conceived access to justice more as a "social luxury."[14] To the extent that access to justice remained a priority area for public policy and academic research during this latter period, it was largely articulated through market-oriented strategies and rationalities of economic efficiency and privatization (i.e. alternative dispute resolution mechanisms) that operated within the budgetary confines imposed by neo-liberal governance frameworks and regressive taxation systems. In recent years, however, a burgeoning interest in access to justice has resurfaced both domestically

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[12] Mauro Cappelletti and Bryant Garth, "General Report," in *Access to Justice – A World Survey*, eds. Cappelletti and Garth (Alphen aan den Rijn: Sijthoff and Noordhoff, 1978), 9.

[13] Access to justice has remained a staple objective of the Canadian legal community for several decades, although recent years have seen an expansion of the scope of the concept beyond legalistic approaches. See, for example, Sarah Staszak, *No Day in Court: Access to Justice and the Politics of Judicial Retrenchment* (Oxford: Oxford University Press, 2015); Deborah L. Rhode, *Access to Justice* (Oxford: Oxford University Press, 2004); Allan C. Hutchinson, *Access to Civil Justice* (Toronto: Carswell, 1990); British Columbia, *Responses to Access to Justice: The Report of the Justice Reform Committee* (Victoria: Ministry of the Attorney General, 1988); Roderick A. Macdonald, *Prospects for Civil Justice* (Toronto: Ontario Law Reform Commission, 1995); Lord Woolf, *Access to Justice: Final Report* (London: The Stationery Office, 1996); Mary Jane Mossman, "The Charter and Access to Justice in Canada," in *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics*, eds., David Schneiderman and Kate Sutherland (Toronto: University of Toronto Press, 1997); William Harnett, *Access to Justice: An Inquiry Into Legal Aid in Ontario* (Toronto: Canadian Bar Association, 1986); Windsor Yearbook Access to Justice, "Twentieth Anniversary Special Section," *Windsor Yearbook Access to Justice* 19 (2001) 263-417; Patricia Hughes and Janet E. Mosher, eds., "Access to Justice," *Osgoode Hall Law Journal* 46 (2008); Ottawa, *National Symposium: Expanding Horizons, Rethinking Access to Justice in Canada* (Ottawa: Department of Justice, 2000); Lisa Addario, *Getting A Foot in the Door: Women, Civil Legal Aid and Access to Justice* (Ottawa: Status of Women Canada, 1998); Micah B. Rankin, "Access to Justice and the Institutional Limits of Institutional Courts," *Windsor Yearbook of Access to Justice* 30 (2012): 101-38; Action Committee on Access to Justice in Civil & Family Matters, *Colloquium Report*, Canadian Forum on Civil Justice 2014. Online: <http://www.cfcjfcjc.org/sites/default/files/docs/2014/ac_colloq-uium_web_FINAL.pdf>. Elizabeth Chambliss, Renee Newman Knake, and Robert L. Nelson, "What We Know and Need to Know About the State of 'Access to Justice' Research," *South Carolina Law Review* 67 (2016): 193-201; Jean-Francois Roberge, "'Sense of Access to Justice' as a Framework for Civil Procedure Justice Reform: An Empirical Assessment of Judicial Settlement Conferences in Quebec (Canada)," *Cardozo Journal of Conflict Resolution* 17 (2016): 323-361.

[14] Roderick A. Macdonald, "Access to Justice in Canada Today," in *Access to Justice for a New Century: The Way Forward*, eds., Julia Bass, W.A. Bogart, and Frederick H. Zemans (Toronto: Law Society of Upper Canada, 2005), 32.

and globally, including the newest wave of access to justice research in Canada which moves towards embracing a public-oriented approach that focuses on everyday legal problems and the various (economic, social, etc.) costs of justice.[15]

In the global order, 'access to justice' has emerged as a major focus in the domain of law and development.[16] It has regularly been invoked by the United Nations Development Programme (UNDP), the Organization for Economic Cooperation and Development (OECD), and the World Bank, among other global actors. As the UNDP observes, the "poor and marginalized are too often denied the ability to seek remedies in a fair justice system,"[17] which has prompted the UNDP to promote "effective, responsive, accessible and fair justice systems as a pillar of democratic governance."[18] Such references often appeal to the enshrinement of 'access to justice' in the tripartite framework of international human rights: (1) Articles 7 and 8 in the *Universal Declaration of Human Rights* (UDHR); (2) Articles 2, 8, 14, and 26 of the *International Covenant on Civil and Political Rights* (ICCPR); (3) Preamble to the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). This enshrinement has precipitated a form of 'new rights advocacy' popularized in the 1990s and 2000s in which international human rights are mobilized by non-governmental organizations (NGOs) and civil society actors in

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[15] Trevor C. W. Farrow, "A New Wave of Access to Justice Reform in Canada," in *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession*," eds., Adam Dodek and Alice Woolley (Toronto: University of British Columbia Press, 2016): 164-85. The Canadian Forum on Civil Justice has been a leader on this front, see, e.g. Farrow et al, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (2016), online: http://www.cfcj-fcjc.org/sites/default/files/ Everyday%20Legal%20 Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf.

[16] See, e.g., Yash Ghai and Jill Cottrell's recent volume, *Marginalized Communities and Access to Justice* (New York: Routledge, 2010), which examines access to justice initiatives in several developing states, including Pakistan, Kenya, South Africa, Cambodia, Colombia, and Peru.

[17] "Access to Justice and Rule of Law," United Nations Development Programme. Online: <http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law.html>.

[18] Ibid.

furtherance of domestic and foreign developmental goals, with a focus on poverty and inequality.[19]

Despite proliferating appeals to 'access to justice' as a fundamental human right, Bryant Garth, a founding scholar in access to justice research alongside Mauro Cappelletti, observes that this "international revival of concerns with access to justice [...] emphasiz[es] the importance of property rights,"[20] as opposed to rights of human security, health, education, food, water, labour, or broader protections for the vast range of social reproductive activities structuring the maintenance of the species. Recent advancements in Canada that seek to reconceptualize access to justice towards a public-oriented approach can be viewed as complementary to Garth's criticism of the international revival. As Trevor C. W. Farrow observes, as access to justice scholars, "[w]e need to start seeing our role as providers of justice in terms of the real stuff of life: help with addictions, food, housing, empowerment, and dignity."[21]

Notably, this predominantly individualistic resurgence of 'access to justice' has largely neglected collective dimensions, such as the myriad environmental injustices associated with resource extraction, industrial manufacturing, biomedical industries, and a host of other enterprises affecting entire communities or groups of people. The strong possessive individualistic character of this resurgence mainly reinforces the classically

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[19] Paul J. Nelson and Ellen Dorsey, *New Rights Advocacy: Changing Strategies of Development and Human Rights NGOs* (Washington, D.C.: Georgetown University Press, 2008).
[20] Bryant Garth, "Comment: A revival of access to justice research?" in *Access to Justice (Sociology of Crime, Law and Deviance, 12)* ed., Rebecca Sandefur (Bingley, U.K.: Emerald Group Publishing, 2009): 255-260. Jesse C. Ribot and Nancy Lee Peluso have relatedly attempted to develop a theory of access that transcends the emphasis on property relations towards broader societal power relations. See Jesse C. Ribot and Nancy Lee Peluso, "A Theory of Access," *Rural Sociology* 68, no. 2 (2003): 153-81.
[21] Farrow, "A New Wave in Access to Justice Reform in Canada," 167.

liberal view of human beings as autonomous individuals possessing civil or political rights (chiefly rights of private property), as opposed to social, economic, or cultural rights possessed by collectives.[22] The World Bank's recent assessment of its juridical involvement corroborates this focus on private property rights with its maintenance that "[i]ts initial impetus was the pursuit of stable, efficient regimes of civil legal enforcement in order to enable investment and growth,"[23] and although the vast majority of its juridical involvement is directed towards capitalistic enterprises, "a portion" of this promotive activity has "sought to improve 'access to justice,' complementing the aim of growth promotion with a concern for the justice problems of ordinary people."[24] Needless to say, the extent to which this secondary objective of the 'justiciable problems'[25] of ordinary people serves as a legitimating function in the new constitutionalism of disciplinary neo-liberalism warrants greater consideration, particularly the ways in which multilayer access to environmental justice is incongruous with the World Bank's primary objectives of promoting global trade and facilitating capital accumulation.[26] The concept of 'new

[22] The concept of 'possessive individualism' and its concomitant critique of classical liberalism is articulated in C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 2010).
[23] Vivek Maru, "Access to Justice and Legal Empowerment: A Review of World Bank Practice (World Bank Justice Reform Practice Group, 2009). Online: <https://openknowledge.worldbank.org/bitstream/handle/10986/18102/518430NWP0Acce10Box342050B01PUBLIC1.pdf?sequence=1>.
[24] Ibid.
[25] The terms *justiciable problems* or *justiciable events* are defined as "a matter experienced by a respondent which raised legal issues, whether or not it was recognized by the respondent as being 'legal' and whether or not any action taken to deal with the event involved the use of any part of the civil justice system," in Hazel Genn, *Paths to Justice: What People Do and Think About Going to Law* (Portland, Oregon: Hart Publishing, 1999): 12; as quoted by Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians*. Ottawa: Justice Canada. http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf.
[26] This is primarily informed by Isabella Bakker and Stephen Gill, eds., *Power, Production, and Social Reproduction* (New York: Palgrave Macmillan, 2003); Stephen Gill and Claire A. Cutler eds., *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2015). Garth similarly points out that "the legitimacy of the legal system requires that those who cannot afford legal services should be provided access to legal rights and remedies." Garth, 258. For a trenchant critique of such developments, see also Byron M. Sheldrick, "Legal Empowerment, Access to Justice and Poverty

constitutionalism of disciplinary neo-liberalism' has been developed by Stephen Gill that can be briefly described as the juridical-political component of neo-liberalism, referring to the constitutional institutionalization of neo-liberal principles and policies with the immediate effect of insulating these from democratic controls by 'locking in' these commitments and 'locking out' democratic alternatives: "[t]he aim of the new constitutionalism is to allow dominant economic forces to be increasingly insulated from democratic rule and popular accountability,"[27] particularly from "control over crucial economic, social and ecological policies."[28] The disciplining aspect of the new constitutionalism generally refers to the ways in which public institutions and governments are increasingly accountable and disciplined by capital forces and financial markets rather than democratic forces (i.e. the will of the *demos*).

As it pertains to multilayer access to environmental justice, the new constitutionalism of disciplinary neo-liberalism can be viewed (for example) as restraining the capacities of states to implement stronger environmental and public health protections, facilitating the privatization of regulatory enforcement (Chapter 2), and exacerbating the crisis in social reproduction in numerous ways, such as increasing the burdens on household workers (labour largely undertaken by women) through the promotion of precautionary consumption strategies as well as destabilizing the biological and ecological

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Alleviation: Governance Challenges to Linking Legal Structures to Social Change," *Canadian Journal of Poverty Law* 2, no. 1 (2013): 1-20.

[27] Stephen Gill, "New Constitutionalism, Democratisation and Global Political Economy," in *Pacifica Review* 10, no. 1 (1998): 23. As Gill observes, a primary issue is the extent to which the new constitutionalism of disciplinary neo-liberalism serves to "'lock in' commitments to liberalization, whilst 'locking out' popular-democratic and parliamentary forces from control over crucial economic, social and ecological policies."

[28] Stephen Gill, *Power and Resistance in the New World Order* (New York: Palgrave MacMillan, 2003), 214.

basis for social reproduction on a wider scale. This is the broader political economy context in which multilayer access to environmental justice is situated in this study.

2. COLLECTIVE DIMENSIONS OF ACCESS TO JUSTICE

Although the resurgence of access to justice has predominantly focused on individual access to justice (i.e. self-represented litigants), it has become increasingly apparent that collective dimensions of access to justice must form an integral part of research programmes and policy initiatives moving forward. Societies are not reducible to atomistic possessive individuals who require individuated solutions to their justiciable problems—societies are constituted by social entities whose justiciable problems are often shared collectively, such as environmental injustices, which have traditionally been viewed as paradigmatic cases for collective claims-making vehicles like class actions.[29]

It has by now become axiomatic that the economic externalities and social dislocations of advanced capitalist societies require collective forms of (1) accessibility promotion and (2) injustice prevention—the dual features of access to justice in the early twenty-first century.[30] Even classical authors such as Cappelletti pointed out that "modern societies are characterized by mass production, mass commerce and consumption, mass

[29] This directly contrasts the infamous neo-liberal dictum of Margaret Thatcher: "[T]here is no such thing as society. There are individual men and women, and there are families." Andy McSmith, *No Such Thing as Society: A History of Britain in the 1980s* (London: Constable & Robinson Ltd., 2010), 17.
[30] See, *supra* note 5.

urbanization, and mass labour conflicts,"[31] and mass litigation (i.e. class actions) is a natural outgrowth of such societal massification:

> [B]ecause of the "massification" phenomena, human actions and relationships assume a collective, rather than a merely individual, character; they refer to groups of categories, and classes of people, rather than to one or a few individuals alone. Even basic rights and duties are no longer exclusively the individual rights […] inspired by natural law concepts, but rather meta-individual, collective, "social" rights and duties of associations, communities, and classes. This is not to say that individual rights no longer have vital place in our societies; rather, it is to suggest that these rights are practically meaningless in today's setting unless accompanied by the social rights necessary to make them effective and really accessible to all.[32]

Simply put, the collective dynamics of social relations and environmental injustices have necessitated forms of collective claims-making in ongoing contestations over social protection and the encroachment of market fundamentalism in democratic societies. In this context, the modern class action has occupied a distinctive (and politically contested) position in both classical approaches to access to justice and its contemporary resurgence.

The collectivism of class actions and their counterbalancing role in favour of vulnerable people against powerful adversaries has precipitated fierce debates over their basic legitimacy in individualistic liberal legal systems. Such bifurcated debates have typically assumed a strong ideological character in which progressive forces have advocated in favour of class actions and conservative forces have opposed their institutionalization.[33] In Canada, Jacob Zeigler has emphasized such ideological

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[31] Mauro Cappelletti, "Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study," in *Access to Justice: Promising Institutions*, eds., Mauro Cappelletti and John Weisner (Alphen aan den Rijn: Sijthoff and Noordhoff, 1979), 861.

[32] Mauro Cappelletti (1927-2004) as cited by Francisco Valdes; see "Procedure, Policy and Power: Class Actions and Social Justice in Historical and Comparative Perspective," *Georgia State University Law Review* 24, no. 3 (2008): 626-27. See also, Jenny Steele and William H. van Boom, eds., *Mass Justice: Challenges of Representation and Distribution* (Northampton: Edward Elgar, 2011).

[33] Martin Redish has posited that political analyses of class actions have "broken down along ideological lines: the political left has reflexively favoured the device and the political right has reflexively opposed it."

contestations, observing that the New Democratic Party has passed class action legislation in common law provinces in Ontario, Saskatchewan, British Columbia, and Manitoba, following the civil law introduction in Quebec by a government that was "very socially minded and generally had an anti-capitalist bias."[34] According to Martin Redish, this ideological divide is primarily a consequence of "litigation socialism," which gestures towards the operative function of class actions as "designed to redistribute wealth from large concentrations of economic power" to vulnerable people and communities.[35] This redistributive feature is typically highlighted by hostile critics who challenge the theoretical premises of redistributive justice at an ideological level, as well as the validity of achieving redistributive justice through class actions. For Redish, the class action is an "island of collectivism in a sea of individualized dispute resolution,"[36] which effectively serves as a "rejection of liberal process-based individualism."[37] This rejection of liberal individualism is the "elephant in the room" to the extent that the "inherent collectivism" of class actions creates a tension with legal systems premised on liberal principles of individual autonomy and identity.[38] David Rosenberg similarly opines that class actions "loom as a subversive element" and "[f]rom the perspective of the common law tradition of individual justice, class actions are a necessary evil, but an evil nonetheless."[39]

Martin Redish, "Rethinking the Theory of the Class Action: The Risks and Rewards of Capitalistic Socialism in the Litigation Process," *Emory Law Journal* 64 (2014): 113.

[34] Jacob Zeigler, "Political Ideology and Class Action Legislation," in *Class Actions in Canada: Cases, Notes, and Materials*, eds. Janet Walker and Garry Watson (Toronto: Emond Montgomery, 2014), 43.

[35] Redish, 113.

[36] Martin H. Redish and Clifford W. Berlow, "The Class Action as Political Theory," online: <http://ssrn.com/abstract=1071191>.

[37] Ibid., 80.

[38] Ibid.

[39] David Rosenberg, "Class Actions for Mass Torts: Doing Individual Justice by Collective Means," *Indiana Law Journal* 62 (1987): 561.

In contrast to such critiques, proponents of class actions recognize the behemoth of civil justice as a "weapon of the people"[40] against corporations and governments. For example, Wendy Brown has observed that class actions "have long been crucial instruments of worker and consumer resistance to discriminatory, deceptive, or fraudulent corporate behaviour, from underpaying and overcharging to polluting or violating health and safety laws."[41] As Brown observes, class actions are the "primary legal means by which consumers or workers band together to fight corporate abuses" and crucial vehicles of "organized popular power."[42] Amid the central contradiction of capital and social reproduction, class actions have been mobilized for greater social protections and human security, including in struggles over the maintenance of sustainable conditions of social, biological, and ecological reproduction associated with pollution, housing, food, education, and health. This deployment of class actions as 'crucial instruments of resistance' against the encroachments of market fundamentalism into material life can be viewed in light of what Isabella Bakker identifies as the "intensifying contradiction"[43] between the power of capital and its accumulative logic and the destabilizing repercussions for social reproduction which ensures the maintenance of the species (and capital accumulation, by extension).

Finally, the bifurcated political debate in the present historical conjuncture over the legitimacy of group litigation may be illuminated by considering the *longue durée* of

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[40] Herman Schwartz, "The Death of the Class-Action Lawsuit?" *The Nation* 24 September 2015, online: https://www.thenation.com/article/the-death-of-the-class-action-lawsuit/.
[41] See Wendy Brown, "Law and Legal Reason," in *Undoing the Demos* (New York: Zone Books, 2015), 152.
[42] Ibid., 153-54.
[43] Isabella Bakker, "Social Reproduction and the Constitution of a Gendered Political Economy," in *New Political Economy* 12, no. 4 (2007): 547; See also, Nancy Fraser, "Contradictions of Capital and Care," in *New Left Review* 100 (2016): 99-117.

collective claims-making: although class actions have come to be viewed as the "dominant judicial innovation of the late twentieth century,"[44] the existence of collective claims-making in English common law predates the advent of classical liberalism and its individualistic premises.[45] Class action historian Stephen C. Yeazell has observed that "[m]odern class actions are part of a much longer tradition" of English group litigation from medieval times, which was "a natural outgrowth of social organization."[46] Yeazell observes:

> Where villages, parishes, guilds and other unites [*sic*] provided the center of economic and social life, the appearance of these groups in court, litigating through representatives, was no more noteworthy than the court appearance of a corporation would be today.[47]

According to Yeazell, class actions in the present historical conjuncture only appear as innovative vehicles of collectivism given the dominance of liberal individualism—in fact, Yeazell suggests that "the modern class action provides a microcosmic laboratory in which to examine legal intuitions about the relative claims of individualism and collective organization, and the justification for both."[48] Broadly speaking, the political tensions between the classical liberalism that informs the paradigm of Canadian law and the social collectivism that remains an intrinsic part of Canadian society are partially crystalized in the treatment of class actions.[49]

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[44] John C. Coffee, *Entrepreneurial Litigation: Its Rise, Fall, and Future* (Cambridge: Harvard University Press, 2015), 2.
[45] Needless to say, English common law forms the basis of the Canadian legal system, as well as the American system, which introduced the modern class action in 1966.
[46] Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (New Haven: Yale University Press, 1987), 21.
[47] Ibid.
[48] Ibid., 7.
[49] Given Canada's nascent class action history and its strong American influence, these political tensions are more noticeable in the American context. However, divided opinions in Canada similarly reflect political evaluations on the legitimacy of collectivist legal vehicles. Objections raised include (1) jurisprudential, (2) consequentialist, and (3) ideological objections, such as the (1) difficulties associated with undemocratically representative plaintiffs and absent class members, (2) the negative economic

These political tensions similarly extend to conceptualizations of access to justice in the context of class actions. As Roderick A. Macdonald has observed, the "access to justice idea that ought to animate class action proceedings is more political" as opposed to other areas of the law in which individualistic justice-seeking predominates.[50] In contrast to collective claims advanced under the equality provisions of s.15(1) of the *Canadian Charter of Rights and Freedoms*—provisions that controversially exclude economic criteria—class actions are "vehicle[s] that socio-economic coalitions can deploy to effect changes in government policy."[51] More to the point, the mobilization of class actions as instruments of resistance against powerful adversaries such as corporations and governments suggests that collective access to justice occupies a potentially liberatory space in the broader political economy. Within Bakker and Gill's schema of the social forces associated with social reproduction, class actions can be conceptualized as "power potentials" which involve the "mobilization of resources, capabilities, enforcement mechanisms or power potentials of political and social actors."[52] Even classical approaches highlighted the unique challenges faced by collective actions against more powerful adversaries. Notably, Cappelletti and Garth observed in *The Florence Access to Justice Project* (*'Florence Project'*) that groups and individuals "have most trouble asserting their

repercussions for the usage of scarce judicial resources, and (3) ideological incompatibility of collectivist vehicles in a liberal legal paradigm.

[50] Macdonald, "Access to Justice in Canada Today," 64.

[51] Ibid. In this light, the enormous *Charter* scholarship that has proliferated since 1982 is distinct from class action scholarship. S.15 of the *Canadian Charter of Rights and Freedoms* holds that: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." *Canadian Charter of Rights and Freedoms*, s. 15(1), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c.11. See also, Sophie Harnay and Alain Marciano, "Seeking rents through class actions and legislative lobbying: a comparison," in *European Journal of Law and Economics* 32 (2011): 293-304.

[52] Bakker and Gill, eds., *Power, Production, and Social Reproduction,* 25.

rights when the vindication of those rights entails legal actions [...] against powerful organizations."[53] This is particularly apparent in cases of environmental injustices, which have been widely recognized by courts and commentators as the paradigmatic type of class actions.[54] As explained below, this study proceeds by substantively evaluating environmental class actions rather than providing a formal or cursory analysis of the multiple and diverse types of class actions at a heightened level of generality.

3. METHODOLOGY AND SCHOLARLY CONTRIBUTION

While the rapid growth of class actions in Canada since the passage of Ontario's groundbreaking legislation has received significant coverage in the mainstream media, this important political-legal development has not received commensurate academic attention, at least not in the Canadian context. This proliferation has largely occurred in the early twenty-first century as a result of a trilogy of cases[55] that has breathed new life into the legal vehicle, as well as the long-standing American tradition that has served as an instructive model for accelerating Canadian developments. However, as W.A. Bogart, Frederick Zemans, and Julia Bass plainly observe in their foundational overview of access

[53] Cappelletti and Garth, *General Report*, 20. The authors also provide instantiations of the problems at stake in collective access to justice for diffuse interests: "The new substantive rights which are characteristic of the modern welfare state, however, have precisely these features: on the one hand, they involve efforts to bolster the power of citizens against governments, consumers against merchants, people against polluters, tenants against landlords, and employees against employers (and unions), and, on the other hand, the monetary interest of any one individual—as plaintiff or defendant—is likely to be small."
[54] See *supra* note 5.
[55] *Western Canadian Shopping Centres v. Dutton*, 2000 S.C.J. 63, [2001] 2 S.C.R. 534; *Hollick v. Toronto (City)*, 2001 3 S.C.R. 158 [2001] S.C.C. 68; *Rumley v. British Columbia*, 2001 3 S.C.R. 184 [2001] S.C.C. 69.

to justice in the twenty-first century, "[s]ometimes, American research is assumed to be applicable to Canada and to other societies when this may not be the case."[56]

In Canada, existing research on class actions has tended to focus on procedural rules and jurisprudential developments.[57] Where substantive concerns have been raised, these have mainly focused on single high-profile cases (i.e. Residential Schools) as opposed to developing more systematic analyses.[58] Are such cases representative of Ontario's (or other provincial) class action regime(s) or notable exceptions to the rule? Although existing research on access to justice has been decidedly less proceduralistic in its various manifestations, it has largely focused on individuated access to justice (i.e. self-represented litigants) rather than collective dimensions as found in class actions. The relationship between collective actions and access to justice has been largely neglected in Canadian scholarship with few exceptions, such as Jasminka Kalajdzic. By extension, the intersections of access to justice, environmental justice, and class actions – an intersection that I have rearticulated in this study as 'multilayer access to environmental justice' – has similarly experienced neglect from these respective fields: (1) access to justice research tends to have an individualistic focus; (2) class action research is largely proceduralistic with select high-profile cases garnering isolated attention (i.e. Residential Schools); (3)

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[56] Julia Bass, W.A. Bogart, and Frederick H. Zemans, "Introduction," in *Access to Justice for a New Century: The Way Forward*, eds., Bass et al (Toronto: Law Society of Upper Canada, 2005), 12.
[57] Hensler, "Class actions in context," in *Class Actions in Context,* 387. See, e.g., Craig Jones, *Theory of Class Actions* (Toronto: Irwin Law, 2003); John C. Beyer, "The Role of Economics in Class Certification and Class-Wide Impact," in *Litigating Conspiracy: An Analysis of Competition Class Actions*, ed., Stephen G.A. Pitel (Toronto: Irwin Law, 2006): 325-35; John Kleefeld, "Class Actions as Alternative Dispute Resolution," *Osgoode Hall Law Journal* 39, no. 4 (2001): 817-41; Janet Walker, "Who's Afraid of US-style Class Actions?" *Southwestern Journal of International Law* 18, no. 2 (2012): 509-66.
[58] The notable major cases that have attracted scholarly attention have included the Residential Schools and Chinese 'head tax' claims. See, e.g., John Borrows, "Residential schools, respect, and responsibilities for past harms," *University of Toronto Law Journal* 64, no. 4 (2014): 486-504; David Dyzenhaus and Mayo Moran, eds., *Calling Power to Account: Law, Reparations, and the Chinese Head Tax Case* (Toronto: University of Toronto Press, 2005).

environmental justice research in Canada generally does not engage with the legal dynamics of class actions. Needless to say, this does not suggest that legal environmental justice scholarship is inexistent,[59] but rather that much of this scholarship insufficiently examines access to justice considerations and generally posits class actions as available vehicles for environmental justice-seeking without fully considering the exclusionary dynamics of class action regimes as uncovered in this study. This project is situated within the under-explored cross-section of these interrelated fields of research. Finally, by exploring the exclusionary dynamics that operate to impede multilayer access to environmental justice in light of the power, production, and social reproduction[60] associated with toxic exposures, this study expands the ambit of environmental class actions beyond the traditional proceduralistic confines to the broader political economy of pollution. In so doing, this study incorporates descriptive and normative aspects of traditional access to justice research with explanatory argumentation for an integrated approach to evaluating multilayer access to environmental justice in Ontario.

Given the resurgent popularity of access to justice discourses, Garth has raised concerns that access to justice has been mobilized for ideological purposes and advocates for contemporary research to embrace critical social science approaches:

> [T]he key to advancement of any access to justice agenda […] is its relationship to critical scholarship informed by the theories and methods of social science, especially sociology. Sociology has a particular focus on hierarchy and inequality, which makes its methods well designed for taking on issues that are too easily defined by a professional agenda and

[59] For example, leading Canadian environmental law scholars Heather McLeod-Kilmurray and Lynda Collins are referenced throughout this study, particularly in Chapter 4.
[60] The basic contradiction of the power of capital and its accumulative impetus and processes of social reproduction is the central hypothesis of Isabella Bakker and Stephen Gill's volume, *Power, Production and Social Reproduction*, which informs this analysis, *supra* note 11.

> ideology. Law without the sociology of law easily slips into the reiteration of legitimating rhetoric.[61]

The current project of critically examining environmental class actions through a political economy approach that recognizes issues of power, production, and social reproduction unites Bakker's proposition that future research into the crisis of social reproduction needs to incorporate collective actions with Garth's methodological advocacy of embracing critical social science approaches in future access to justice research.[62] The starting point of this analysis is that multilayer access to environmental justice must be situated in the context of the broader political economy.

In order to uncover the dynamics of environmental class actions in Ontario and their implications for substantive environmental justice, I have used a multi-level, integrative mixed-methods approach that includes doctrinal and theoretical analysis and qualitative approaches to empirical data collection, including purposive case study analysis, archival research, theoretical and empirical texts bearing on the substance of the topic, relevant jurisprudence, and in-depth interviews with class and defense attorneys currently practicing in Canada, with a focus on Ontario.

The province of Ontario was selected as a jurisdiction of analysis given that class actions in Canada are dominated by Ontarian actions (with British Columbia a distant second and Quebec the third most voluminous jurisdiction). This selection permitted the most expansive range of potential actions within the legislative confines of a single

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[61] Garth, 258. See also Jennifer Earl's "sociology of troubles" for an indication of the type of socio-legal approach that incorporates critical social science in access to justice research. Jennifer Earl, "When Bad Things Happen: Toward a Sociology of Troubles," in *Access to Justice (Sociology of Crime, Law and Deviance, 12)* ed., Rebecca Sandefur (Bingley, U.K.: Emerald Group Publishing, 2009): 231-54.
[62] Bakker, 547.

province as a case study. Ontario's influential *Class Proceedings Act, 1992* was the first legislation introducing class actions in Canadian common law provinces. Although the focus of this study is Ontario's class action regime, the study periodically develops sub-state comparative analyses of other provincial jurisdictions (particularly British Columbia and Quebec) as appropriate, in addition to inter-state comparative analyses (primarily American developments given the origins of the modern class action, but also Australian developments on issues of litigation financing given their forerunning status). This integrated multi-level comparative approach allows for optimal balance between a methodological focus on a single provincial regime in light of similar or contrasting regimes in other state and sub-state formations.

The in-depth interviews with 21 class and defense attorneys were conducted from April 2015 to March 2016.[63] This time period includes the completion of action research cycles and member checks for maximum accuracy and transferability of collected data. The confidential interviews ranged from 15 minutes to 2.5 hours with a median length of 30 minutes. Although interviews had conversational adaptability, interactions were guided by a series of predetermined themes and areas of focus permitting standardized yet open-ended interviews. A sample template of guide-based interview questions is provided in the Appendix. Initial participants were selected based on experience, relevance, and

[63] It was my determination that a data saturation point was achieved with this number of qualitative participants with strong factual confluence. As numerous methodological researchers have observed, this is within the parameters of the typical point of saturation beyond which qualitative data collection yields 'diminishing returns', with some investigations yielding such points much earlier, depending on the type of investigation. See, e.g., Barbara DiCicco-Bloom and Benjamin F. Crabtree, "The Qualitative Research Interview," in *Medical Education*, Vol. 40, No. 4 (2006): 314-321; Greg Guest, Arwen Bunce, and Laura Johnson, "How many interviews are enough? An experiment with data saturation and variability," in *Fields Methods* 18, no. 1 (2006): 59-82; Jane Ritchie and Jane Lewis, eds., *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (London: Sage Publications, 2003).

availability, with subsequent participants recruited using a chain-referral sampling technique ("snowball sampling") which effectively expanded the breadth of participants and permitted greater access via introductions to previously inaccessible participants.

This study has attempted to explore the dynamics of multilayer access to environmental justice through theoretical and empirical investigation, however, given the resource constraints of a doctoral project in terms of time and financial expenditures, as well as various logistical impediments in data collection on a mass scale, empirical data collection from past and present class members has not been included in this study. The exceedingly high number of class members involved in past and present actions requires extensive resource expenditures in order to satisfy basic methodological requirements. This knowledge gap is a promising area for future research.

4. CHAPTER OUTLINE

The empirical reality of Ontario's class action regime starkly contrasts with the widespread belief of class actions as promotive vehicles for greater access to environmental justice. This was the preliminary hypothesis of this dissertation. I argue that the exclusionary dynamics structuring the practice and development of environmental class actions have produced an anemic regime in Ontario (particularly for environmental health-impairment claims). The primary policy objective of the *Class Proceedings Act* has gone largely unfulfilled as it pertains to environmental class actions, which were ironically originally posited as paradigmatic actions. Although this preliminary hypothesis has been qualified

and strengthened with greater theoretical and empirical nuance over the completion of this dissertation, the basic tenets have remained intact as explicated in the following chapters.

Chapter 1 proceeds by tracing the development of 'access to justice' from classical approaches to the contemporary resurgence through the discursive heuristic proposed by the *Florence Project* of the waves of access to justice. In so doing, every successive wave is critically assessed from the perspective of collective actions aimed at protecting multilayer interests with an emphasis on the social variables associated with inaccessibility, including gender, race, ability, and class. Following this critical conspectus, the role of class actions in promoting multilayer access to justice is explored in light of recent jurisprudential developments. Finally, the appeal to incorporate critical social science approaches in access to justice research is addressed through the pursuit of a political economy approach that recognizes issues of power, production, and social reproduction in the context of multilayer access to environmental justice.

Chapter 2 pursues this critical approach by contextualizing environmental class actions in the broader political economy. This chapter examines what I call the central paradox of class actions: the contradiction between class actions as 'crucial instruments' of social protection against the destabilizing tendencies of the capitalist system of accumulation and class actions as 'policy instruments' in the institutionalization of private enforcement regimes that permit this accumulative logic to determine social priorities of regulatory enforcement through entrepreneurial litigation. In so doing, I posit that class actions are 'crucial instruments' of social protection to the extent that they *complement* public agency enforcement, especially in cases where governments are recalcitrant to enforce regulations; however, the neo-liberal shift towards a *co-optative* role of class

actions as vehicles that replace rather than support public agencies serves to destabilize the very processes of social reproduction that class actions in their complementary role can be mobilized to protect. Chapter 2 is primarily concerned with the limitations of Ontario's emerging private enforcement regime from the perspective of multilayer access to environmental justice. To this end, the chapter begins by sketching out the ideological parameters of private enforcement in light of the retrenchment of access to justice through what Wendy Brown calls *de-democratization*. The term *de-democratization* refers to the substantive "hollow[ing] out [of] the practices and institutions of liberal democracy," according to Brown, who has cited the retrenchment of access to justice in the context of class actions as an important facet of the "law's contribution to neo-liberal de-democratization" by restricting the capacity of collectivities from accessing the "primary legal means by which consumers or workers band together to fight corporate abuses."[64] Thereafter the chapter critically focuses on the pivotal agent in a private enforcement regime—Private Attorney General—before situating the analysis within the historical context of Ontario's class action regime through an examination of the *Class Proceedings Act, 1992*. Finally, the exclusionary facets of Ontario's entrepreneurial class action regime are examined with a focus on the gatekeeping role played by Private Attorneys General.

Chapter 3 extends the analysis of the neo-liberalization of civil justice developed in previous chapters by examining the emerging third party litigation finance industry in Ontario's class action regime. The demand for litigation finance has been prompted by the

[64] For Brown, class actions are a crucial "level of organized popular power and collective consciousness" in a legal form. See Wendy Brown, "Law and Legal Reason," in *Undoing the Demos* (New York: Zone Books, 2015), 153-54. For a detailed exploration of the various facets of *de-democratization*, see Wendy Brown, "We Are All Democrats Now..." in *Democracy in What State?* ed., Giorgio Agamben et al (New York: Columbia University Press, 2011), 44-57.

dual factors of (1) risk aversion and (2) budget constraints on the part of Private Attorneys General. Such financialization may offset these burdens by (1) indemnifying claimants and (2) providing financing to maintain claims, thereby promoting a type of multilayer access to justice. Through the integration of consequentialist, jurisprudential, and axiological concerns about litigation finance, this chapter develops and expands the political-economic analysis of this study by examining the key dynamics of the monetizing, liberalizing, and privatizing imperatives of the emerging industry in Ontario. These dynamics include the liberalization of maintenance and champerty laws that have traditionally prohibited the financial activities promoted by this industry, the regulatory gap, and the broader marketization of civil justice, including the prospective securitization of litigation. As this chapter explicates, the social and political impacts of privatizing regulatory enforcement (Chapter 2) can be compounded by the financialization of litigation (Chapter 3) which intensifies the power of market forces to influence which collective claimants are able to access justice. The outcomes of such developments are distributed unevenly across Ontario's class action regime to the benefit of investor rights and securities actions and to the detriment of more socially beneficial actions, including environmental claims. The impacts for multilayer access to environmental justice of this type of financialization are highlighted throughout this chapter.

Chapter 4 examines the significant gap between the widespread view of environmental class actions as paradigmatic claims and the abysmal reality of their floundering in Ontario's regime in light of the politico-economic developments discussed in previous chapters. A critical analysis of the ways in which the political economy of pollution constructs barriers to multilayer access to environmental justice is developed by

exploring the paradigm of scientific uncertainty that structures environmental claims, including the complexities of health-based harms associated with toxic consumption, the lack of empirical data to substantiate claims of health-impairment, and the discursive misalignment of scientific inquiry and legal reasoning. Chapter 4 proceeds by (1) exploring scientific uncertainty in toxic consumption and (2) identifying the problematics of establishing toxic causation in environmental health-impairment claims. These two sections comprise the parameters of the central argument of this chapter that Ontario's class action regime systematically privileges private property over human health in environmental justice. A series of representative case studies are subsequently presented that empirically substantiate this argument.

Chapter 5 moves beyond the largely proceduralistic analysis of multilayer access to environmental justice by addressing substantive dimensions of class actions as vehicles of redistributive justice. The chapter proceeds by sketching out the parameters of Ontario's class action settlement culture, before exploring a series of crucial facets that determine outcomes for collective claims-makers in form and substance, including potential conflicts of interest and the possibility of collusion, the adversarial void, take-up rates and notice practices, and the efficacy of objectors. These dynamics are situated within a broader political economy analysis that concomitantly considers Ontario's settlement paradigm as part of the privatization of civil justice and its adverse impacts for social and democratic values. The chapter subsequently considers the intricacies of the *cy près* doctrine in light of the secondary policy objective of the *Class Proceedings Act* of behaviour modification. This acquires heightened significance given the mobilization of class actions as 'policy instruments' in the implementation of a private enforcement regime in Ontario. Throughout

the chapter, the particularities of environmental justice-seeking and the substantive justice associated with such claims are highlighted.

Finally, in the Conclusion, I consider the implications of this study moving forward. I argue that despite their paradigmatic character, environmental class actions face mounting obstacles in promoting multilayer access to justice. In so doing, I demonstrate that the history of environmental class actions has been bleak—a bleakness that extends to their future prospects. This indicates that the type of *ex post facto* justice presently achieved or achievable in Ontario's class action regime leaves much to be desired from the perspective of access to environmental justice. I conclude with a brief review of the major arguments and sub-arguments of this study, before exploring a series of future research questions.

SPEAKING JUSTICE TO POWER:

MULTILAYER ACCESS TO ENVIRONMENTAL JUSTICE

> "[J]ustice is a basic good in our society to which every woman, man and child should have access, regardless of how much money they have or who they know. Justice is a basic social good, like food, shelter, and medical care."[65]
>
> - Chief Justice Beverley McLachlin

INTRODUCTION

This chapter proceeds by tracing the development of 'access to justice' from classical approaches to the contemporary resurgence through the discursive heuristic proposed by the *Florence Project* of the waves of access to justice. In so doing, every successive wave is critically assessed from the perspective of collective actions aimed at protecting multilayer interests with an emphasis on the social variables associated with inaccessibility, including gender, race, and class. Following this critical conspectus, the role of class actions in promoting multilayer access to justice in Canada is explored in light of recent jurisprudential developments. Finally, the appeal to incorporate critical social science approaches in access to justice research is addressed through the pursuit of a political economy approach that recognizes issues of power, production, and social reproduction in the context of multilayer access to environmental justice.[66]

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[65] Action Committee on Access to Justice in Civil and Family Matters, *Colloquium Report* (Ottawa: Action Committee on Access to Justice in Civil and Family matters, 2014), 5. Online: http://www.cfcj-fcjc.org/sites/default/files/docs/2014/ac_colloquium_web_FINAL.pdf

[66] This is informed by the innovative framework developed by Bakker and Gill, see Introduction.

1. WAVES OF ACCESS TO JUSTICE

The cornerstone of twentieth-century scholarship on access to justice is the multivolume research project initiated in the 1970s by Mauro Cappelletti and Bryant Garth: *The Florence Access to Justice Project* ('*Florence Project*').[67] Guided by the recognition that access to justice is a "fundamental social right"[68] and a "social problem, or a basic social need,"[69] as well as the "most basic challenge to our modern legal systems,"[70] the *Florence Project* developed a comparative analysis of the costs of justice and the various reform initiatives developed by contemporary states to address the problem of inaccessibility. At root, the *Florence Project* was premised on the view that "social justice, as sought by our modern societies, *presupposes* effective access."[71] As Cappelletti and Garth observe:

> [T]he right of effective access is increasingly recognized as being of paramount importance among the new individual and social rights, since the possession of rights is meaningless without mechanisms for their effective vindication. Effective access to justice can thus be seen as the most basic requirement—the most basic "human right"—of a modern, egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all.[72]

Access to justice as 'the most basic human right' acquires the characteristics of a meta-right—a right that precedes other rights insofar as it operates as a mediality through which other rights can be vindicated. This meta-right status partly explains why access to justice has emerged as a major focus in the domain of law and development, given the thriving

[67] Mauro Cappelletti and Bryant Garth, eds. *Access to Justice – A World Survey* (Alphen aan den Rijn: Sijthoff and Noordhoff, 1978). The project was commenced in 1973 and completed in 1977-78.
[68] Ibid., *General Report*, 9.
[69] Ibid., *Foreword*, viii.
[70] Ibid.
[71] Ibid., *General Report*, 6.
[72] Ibid., 9.

intersection between human rights discourses and the development of "new rights advocacy,"[73] which focuses on inequitable poverty through the integration of human rights principles and socio-economic development by NGOs and civil society actors.

In the decades since Cappelletti and Garth's globalization of access to justice scholarship, the *Florence Project* has been elevated as a seminal study in the field. One of its enduring discursive contributions has been its division of access to justice into metaphoric waves of reforms and developments. The wave metaphor has been applied in various contexts, most notably as a model to delineate feminist activism in the history of the Western women's movement. In this context, the wave metaphor has been problematized by numerous scholars who critique its potential homogenizing and ahistorical aspects, particularly as it pertains to racialized women and LGBTQ activism.[74] Such critiques have not materialized in the context of access to justice, although it must be noted that the historical periodization offered by this model is not universally applicable and varies across states and sub-state formations. Nevertheless, the wave metaphor has enjoyed general acceptance in access to justice scholarship and provides a practicable model for mapping developments and policy reforms. As Roderick A. Macdonald observes, the five waves of access to justice broadly correspond to ten-year cycles: 1960-1970; 1970-1980; 1980-1990; 1990-2000; 2000 to the present.[75] Notably, a new (sixth) wave of access to justice has also become discernible in Canada, as explored further below.

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[73] Paul J. Nelson and Ellen Dorsey, *New Rights Advocacy: Changing Strategies of Development and Human Rights NGOs* (Washington, D.C.: Georgetown University Press, 2008).
[74] An instructive symposium on the topic of the wave model can be found in Kathleen A. Laughlin, Julie Gallagher, Dorothy Sue Cobble, Eileen Boris, Premilla Nadasen, Stephanie Gilmore, and Leandra Zarnaw, "Is It Time to Jump Ship? Historians Rethink the Waves Metaphor," *Feminist Formations* 22, no. 1 (2010): 76-135.
[75] Macdonald, "Access to Justice in Canada Today," 20.

A. FIRST WAVE – LEGAL AID FOR THE POOR

The first wave (1960-1970) is characterized by an emphasis on legal aid regimes designed to mitigate the costs of court proceedings for the poor. Cappelletti and Garth stress the importance of Judicare systems in which individuals with insufficient economic resources (who satisfy state qualification criteria) are provided with state-funded legal services.[76] Such systems operate on the principle whereby "legal aid is established *as a matter of right* for all persons eligible under the statutory terms, with *the state paying the private lawyer* who provides those services."[77] The source of remuneration is perhaps the most distinctive feature of Judicare systems: the state assumes all legal costs. In other words, the underlying objective is affording clients the same legal services, irrespective of their ability to pay for a lawyer.[78] In Canada, litigation costs have increased dramatically since the 1970s indicating that such concerns rightfully occupy a significant role in contemporary scholarship and policy debate on access to justice. Given its focus on prohibitive costs, the first wave of reforms advocated a proceduralistic conception of access to justice as 'access to courts'. Simply put, this wave recognized the onerous costs associated with litigation by emphasizing the importance of economic resources in accessibility promotion.

It goes without saying that several other types of barriers—social, psychological,

[76] Ibid., 24-7. Of course, much policy debate has raged on these qualification criteria as persons with insufficient financial means for legal services do not exclusively belong to those living below the poverty line. A main objection of this emphasis has been its traditional exclusion of the unmet legal needs of those who do not qualify for legal aid. For a contemporary Canadian discussion of this difficult topic, see *supra* note 12.

[77] Cappelletti and Garth, *General Report*, 25. (emphasis in the original)

[78] Ibid.. "The goal of Judicare systems is to provide the same representation for low income litigants that they would have had if they could afford a lawyer. The ideal is to make a distinction only with respect to the billing: the state, rather than the client, is charged the cost."

cultural, geographical, and so forth—are inadequately addressed in first wave initiatives.[79] Moreover, the proceduralistic focus of this period unduly diminishes issues of substantive justice that are highlighted in later developments of access to justice. Above all, as Cappelletti and Garth point out, the normative basis of Judicare systems is highly individualized: "[J]udicare treats the poor as individuals to the neglect of the poor as a class."[80] While this form of individualization is partially mitigated in different legal aid models, such as the Public Salaried Attorney Model (wherein legal aid offices are staffed with attorneys working on salaries) or models combining PSAM and Judicare, there remain significant areas of *diffuse interests* that are largely unaddressed (i.e. environmental injustices).[81] Such diffuse interests are largely beyond the scope of individualized approaches to access to justice. However, although the liberal proceduralist character of first wave approaches precipitated socially progressive developments that incorporated issues of substantive and collective justice, the universality which marked such approaches in their earliest incarnation in the 1960s and 1970s testifies to their social ambitions. For Macdonald, the central paradox of Judicare models in Canada is the contradiction between the universality of this social ambition and the "inconceivable" status of such social expenditures in the present historical conjuncture:

> The social ambition is universality: no one should be deprived of the most basic services of a lawyer for lack of money. The economics dictate a different taxation and expenditure goal:

[79] Ibid., 27. The Judicare model "relies on the poor to recognize legal claims and seek assistance; it fails to encourage or even allow for efforts by individual practitioners to help the poor understand their rights and identify the areas where they may be entitled to legal remedies… Moreover, even if they recognize their claims, poor people may be intimidated from pursuing them by the prospect of going to a law office and discussing them with a private lawyer. Indeed, in societies where the rich and poor live apart, there may be geographic as well as cultural barriers between the poor and private bar."
[80] Ibid., 27.
[81] Ibid., 28-35.

> society simply does not have the resources to apply the Canadian medical care model to legal services.[82]

The political economy analysis of this study rests upon the recognition of the budgeting preferences and taxation policies of successive provincial and federal governments. As a matter of economic policy, it may be reasonable to suggest that the central issue is resource allocation rather than resource availability.[83] Finally, the 'inconceivability' of the social ambition of universality in basic legal aid programs is a condition of the parameters imposed by regressive taxation policies under neo-liberal governance in which major socialization initiatives are viewed as beyond the realm of possibility, or to borrow Richard Falk's terminology, beyond the "horizon of feasibility."[84] Although access to justice advocates continue their demands for greater resource allocation for the "most important issue facing the legal system," as the Chief Justice of Ontario and the Chief Justice of Canada both observe, many advocates have adjusted to this restrictive budgeting climate by exploring innovative strategies and technologies of accessibility promotion and injustice prevention.[85]

B. SECOND WAVE: MULTILAYER INTERESTS

The second wave (1970-1980) seeks to address the problem of diffuse interests through its focus on the justiciable problems of groups of similarly situated individuals or cohesive

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[82] Macdonald, 34.
[83] Macdonald recognizes that universal legal aid may be financed through general taxation, however, he remains decidedly pessimistic about this possibility in the contemporary political-economic climate. Ibid., 40.
[84] Richard Falk as quoted by Stephen Gill and A. Claire Cutler, "New Constitutionalism and World Order," 19.
[85] Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, "The Challenges We Face," Remarks delivered to the Empire Club of Canada. Toronto, Ontario, 8 March 2007. Online: http://www.scc-csc.ca/court-cour/judges-juges/spe-dis/bm-2007-03-08-eng.aspx.

collective actors. This wave tends to emphasize the public interest dimensions of law. Cappelletti and Garth famously invoke the example of environmental harms to identify potential sites where individual and collective interests are intertwined.[86] Perhaps the major barrier to access to justice in such situations is that the economic and/or non-economic costs of advancing claims are too prohibitive for any single individual to undertake. In point of fact, issues of environmental health and the maintenance of the biological, agricultural, and ecological foundations upon which human health is premised and reproduced structurally affect entire communities as opposed to isolated individuals. An individualistic legal paradigm—and concomitantly, an individualistic approach to access to justice—insufficiently accounts for the collective dimensions of environmental injustices. Accordingly, the second wave has sought to expand the prevailing "individualistic vision" of access to justice towards a "social, collective conception."[87] There are also doctrinal difficulties confronted by collective actors of environmental injustice, such as the difficulty of achieving legal standing—although the Supreme Court of Canada has increasingly emphasized access to justice as a factor in the granting of standing.[88] For the purposes of the present analysis, the second wave of access to justice is directly relevant since it encompasses class action litigation.

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[86] Cappelletti and Garth recognize that an emphasis on diffuse interests necessarily entails a widening of the scope of access to justice, given that multiple classes of people are affected by cases involving environmental pollution, consumer protection, and other causes of action typically suitable for mass litigation. Cappelletti and Garth, *General Report*, 18, 45.

[87] Ibid., 36.

[88] Lorne Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?" *University of British Columbia Law Review* 40 (2007): 727-44. See also, Dana Phillips, "Public Interest Standing, Access to Justice, and Democracy under the *Charter*: *Canada (AG) v. Downtown Eastside Sex Workers United Against Violence*," *Constitutional Forum* 22, no. 2 (2013): 21-31; Jane Bailey, "Reopening Law's Gate: Public Interest Standing and Access to Justice," *University of British Columbia Law Review* 44 (2011): 255-276; Cappelletti, "Advocates for the Public Interest," in *Access to Justice Vol. II, Promising Institutions* (Milan: Sijthoff and Noordhoff, 1979): 859-60. The Supreme Court of Canada recently elucidated the issue of standing in *Canada (Attorney General) v. Downtown Eastside*

Notably, Cappelletti and Garth describe the interests involved in collective actions as 'diffuse' in order to connote that these are not concentrated in a single spatial area or temporal period. Simply put, diffuse interests may be spread across an expansive region and/or over a prolonged period of time.[89] This introduction of spatiality and temporality is one of the distinguishing conceptual features of second wave scholarship. The concept of diffuse interests, however, has not remained unchallenged. In a recent overview of collective actions, Stefan Wrbka, Steven Van Uytsel, and Mathias Siems have suggested that the term "multilayer interests"[90] might be more appropriate given that such disputes are not reducible to individual and collective dimensions; that is to say, disputes which give rise to collective actions often involve a *public* dimension as well. For example, toxic emissions from a factory in Sarnia's Chemical Valley might negatively affect the health of residents within a certain geographic region over the duration of the factory's operation, but the repercussions are not limited to any single individual or collective, since the "rising health care costs resulting from an increase in disease"[91] are assumed by the public health care system. The major distinction between public and collective interests in this

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Sex Workers United Against Violence Society 2012 SCC 45, observing that "courts must consider three factors: whether the case raises a serious justiciable issue; whether the party bringing the case has a real stake in the proceedings or is engaged with the issues that it raises; and whether the proposed suit is, in all of the circumstances and in light of a number of considerations, a reasonable and effective means to bring the case to court. A party seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favor granting standing. All of the other relevant considerations being equal, a party with standing as of right will generally be preferred" (525).

[89] H.U. Jessurun d'Oliveira has noted that diffuse interests tend to connote the interests of "weaker members of society," while also remarking that "diffuse, fragmented and collective interests lend themselves only to ostensive definitions and general indications on their characteristics." See, "Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation," *Netherlands International Law Review* 30, no. 2 (1983):161-186. See also Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce: A Multidimensional Analysis of Consumer Protection Mechanisms* (New York: Springer, 2014): 41-43.

[90] Stefan Wrbka, Steven Van Uytsel, and Mathias Siems, "Access to justice and collective actions," in *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (Cambridge: Cambridge University Press, 2012).

[91] Wrbka, Van Uytsel, and Siems, 8.

formulation is the directness of the repercussions: collective interests are understood as those of groups that are directly affected by a dispute, whereas the public interest is often indirectly affected.[92] Moreover, given the deterrence function of collective legal vehicles such as class actions—behaviour modification is a secondary policy objective of the *CPA*—the public interest is served through the prevention of future harms through the deterrence of wrongful conduct by similarly situated corporations or governments (re: potential wrongdoers). Given that disputes which give rise to collective actions involve these tripartite interests—individual, collective, and public—Wrbka, Van Uytsel, and Siems have proposed that the term 'multilayer interests' exhibits greater reflection of the dynamics of collective actions. This term can be viewed as problematizing the rigidities of the public/private distinction by reconfiguring the traditionally perceived private legal vehicle of class actions as necessarily involving public interests.[93]

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[92] Ibid., 8-9. "Negative results caused by a lack of access to justice for public interests do not emerge directly or as fast as would be the case with diffuse interests."

[93] Ibid., 9. This rearticulation is warranted insofar as the three categories of interests are explicitly represented—in Cappelletti and Garth's original formulation, the public interest was largely implicit. At the same time, the concept of 'multilayer interests' may serve less as a replacement and more as a complement to the earlier concept of 'diffuse interests'. In their rearticulation, Wrbka, Van Uytsel, and Siems rearticulate the concept of *diffuse* interests to signify collective or fragmented interests: "If one understands *diffuse interests as collective or fragmented interests* belonging to groups of people who are usually un- or underrepresented, but still directly affected by a dispute, *public* interests should be separately mentioned." [emphasis added] Elsewhere, Stefan Wrbka makes this reduction more explicit: "[T]he second wave deals with diffuse interests, i.e. collective interests…" in *European Consumer Access to Justice Revisited* (Cambridge: Cambridge University Press, 2014), 24; Wrbka, Van Uytsel, and Siems, 8. This conceptual reduction does not fully account for one of the distinguishing features of the interests involved in collective actions: *diffuseness*. This involves the recognition of spatiality and temporality in considering affected interests; that is to say, *diffuseness* involves an explicit recognition of interests that are *not concentrated* in a single geographic area or affected at a single juncture. Moreover, the category of diffuse interests in public policy and socio-legal scholarship is often associated with the interests of marginalized citizens and "weaker members of society," an association that is not insignificant when evaluating access to justice for vulnerable groups.

C. THIRD WAVE – ALTERNATIVE DISPUTE RESOLUTION

In the early 1980s, the third wave (1980-1990) of access to justice sought to expand the very basis of reforms from an emphasis on formal court procedures to alternative dispute resolution mechanisms (ADRs). With the emergence of the neo-liberal conjuncture, restrictions in social expenditures and increasing costs associated with pursuing claims in the justice system precipitated governance strategies that moved beyond concerns of "finding effective *legal representation* for interests otherwise unrepresented or underrepresented"[94] by focusing on "the full panoply of institutions and devices, personnel and procedures, used to process, and even prevent, disputes in modern societies."[95] Notably, shifting strategies in this conjuncture favouring privatization informs these processes, such as arbitration, which typically involves power imbalances and procedural deficiencies. Although the effectiveness of ADRs has been incontrovertible in practical terms according to the standards of 'case management' and the preservation of 'scarce judicial resources' (i.e. backlog reduction), serious concerns have been raised about the potential democratic ramifications of this reliance on privatizing initiatives.[96] While the strongest formal justification for such private alternatives has been its promotion of access to justice (in a rather restrictive understanding of this concept) for those who otherwise suffer from inaccessibility, this justification is inextricably bound to an efficiency-based rationality that favours cost-effective and expeditious solutions over other considerations, including basic democratic values such as transparency and fairness. As Trevor C. W.

[94] Cappelletti and Garth, *General Report*, 49.
[95] Ibid.
[96] See, e.g., Trevor C. W. Farrow, *Civil Justice, Privatization and Democracy* (Toronto: University of Toronto Press, 2014).

Farrow has extensively observed, this privatizing trend raises serious concerns about the type of access to justice that is being increased (as discussed further below).[97]

In the context of class actions, the most problematic development of the third wave of reforms might be the advent of mandatory arbitration clauses. The basic objective of such clauses is the diversion of justiciable problems out of the public court system and into private arbitration, which often involves extreme power imbalances and procedural deficiencies. This has been particularly controversial in the context of consumer contracts whereby individuals are effectively prevented from participating in class actions. While the Supreme Court has consistently upheld the legitimacy of mandatory arbitration clauses in a series of decisions,[98] there have been several interventions by provincial legislatures (notably, Ontario, Quebec, and Alberta) which have sought to safeguard the interests of their residents by expressly prohibiting or overriding such clauses in their respective consumer protection frameworks.[99] In Ontario, the relevant provision of the *Consumer Protection Act, 2002* confirms the precedence of the policy objectives of the *Class Proceedings Act, 1992* irrespective of any preexisting mandatory arbitration clause:

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[97] In addition to several notable concerns raised by this trend toward privatization, including concerns over procedural fairness, the development of the common law, and broader democratic ramifications, Farrow observes that "the access to justice case that is typically made in support of the privatization trends […] largely equates access to justice with access to courts and legal services." A less restrictive and more aspirational understanding of access to justice might expand its scope to include "much more of what are considered to be the basic tools of living and operating in a modern society (including, for example, healthcare, food and housing, access to information and education, voting rights, and so on)." Ibid., 265, 274-335.

[98] See, e.g., *Bisaillon v. Concordia*, [2006] 1 SCR 666; *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 SCR 801; *Seidel v. TELUS Communications Inc.,* [2011] 1 SCR 531.

[99] A different approach can be seen in British Columbia where courts do not automatically override or invalidate mandatory arbitration provisions, but rather consider their existence in light of the determination of preferability at the certification stage (i.e. whether the class action is the preferable procedure over arbitration). Janet Walker and Garry Watson, eds., *Class Actions in Canada: Cases, Notes, and Materials* (Toronto: Emond Montgomery, 2014): 116-17.

> 8. (1) A consumer may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992* or may become a member of a class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.[100]

Comparatively speaking, there has been a noticeable shift in American civil procedure towards *class arbitration* as a form of dispute resolution[101]—*class arbitration* can be broadly described as a combination of private arbitration and traditional class actions. Whereas arbitration has historically been a bilateral process (or, at any rate, has tended to involve a limited number of parties), class arbitration has a representative character and may involve significantly more parties, rather like traditional class proceedings. However, class arbitration remains a distinctly American procedure that has not yet been introduced to Canada. Given Canadian statutory frameworks and ongoing jurisdictional concerns, as well as the contentious state of arbitration in the context of class actions more generally, the prospect of class arbitration in Canada in the foreseeable future appears fortunately remote.[102]

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[100] *Consumer Protection Act, 2002*, c. 30, Sched. A, s. 8 (1).

[101] As part of a broader curtailment of mass litigation in the United States, even class arbitration has come under criticism and to varying degrees been curtailed. See, e.g., Georgene Vairo, "Is the Class Action Really Dead? Is that Good or Bad for Class Members?" *Emory Law Journal* 64 (2014): 477-529. Class arbitration in the United States has its origins in the early 1980s, but gained increased momentum following *Green Tree Financial Corp. v. Bazzle*, [2003] 539 US 444, wherein the United States Supreme Court "implicitly approved the procedure."

[102] For an overview of class arbitration and its potential introduction in Canada, see Michael Schafler and Amer Pasalic, *Is Canada Ready For Class Arbitration?* Presented at ADRIC 2013 – Gold Standard ADR, Friday, October 25, 2013. Accessed on March 15, 2015: <http://www.dentons.com/~/media/PDFs/Insights/2013/October/Is%20Canada%20ready%20for%20class%20arbitration%20ADRIC%20version.pdf> See also, Margaret L. Waddell, *Is a Class Arbitration Do-able?* Accessed on March 15, 2015: < http://paliareroland.com/docs/default-source/articles/is-a-class-arbitration-do-able_.pdf?sfvrsn=2>

D. FOURTH WAVE – PREVENTATIVE APPROACHES

In a seminal work in Canadian access to justice scholarship, "Access to Justice in Canada: Scope, Scale and Ambitions," Roderick A. Macdonald expanded Cappelletti and Garth's metaphor by conceptualizing two additional waves. In this expanded framework, the fourth wave emerged in the 1990s and "reflected the recognition that true access to justice had to encompass multiple non-dispute resolution dimensions,"[103] particularly preventative approaches and conflict avoidance. In other words, the notion that access to justice entails the dual features of accessibility promotion and injustice prevention.

Richard Susskind has encapsulated the fourth wave of thinking with a popular metaphor culled from risk management studies: "[M]ost people would surely prefer a fence at the top of the cliff rather than an ambulance at the bottom (no matter how swift or well-equipped)."[104] The basic premise of this preventative approach is that people "would surely prefer to avoid legal problems altogether rather than to have them well resolved,"[105] which suggests that "access to justice is as much about *dispute avoidance* as it is about dispute resolution."[106] Interestingly, Susskind expands the medical analogy by drawing a parallel with shifts in public health policy toward health-promoting activities (i.e. aerobic exercise) and dietary habits:

> The idea is not only to prevent ill-health but to promote our physical and mental well-being. Similarly, the law can also provide us with ways in which we can improve our general well-being; and not simply by helping to resolve or avoid problems. Instead, there are many

[103] Macdonald, "Access to Justice in Canada Today," 22.
[104] Richard Susskind, *The End of Lawyers? Rethinking the nature of legal services* (Oxford: Oxford University Press, 2010), 231.
[105] Ibid.
[106] Ibid. [emphasis in original]

> benefits, improvements, and advantages that the law can confer, even when there is no perceived problem or difficulty. And yet, many people are lamentably unaware of the full range of facilities available today… I look forward to the day when we will be committed to *legal health promotion* underpinned by community legal services that are akin perhaps to community medicine programmes."[107]

The merits of such promotive activities are straightforward: encouraging individuals and collectivities to actively participate in their own well-being. However, when such promotive activities are posited as substitutes (rather than supplements) of state expenditures, the problematics of individualizing structural problems are compounded. Critical scholars in health and food security studies have long recognized the limits of behavioural approaches to ill-health and food insecurity by pointing toward the structural inequities that systematically disadvantage many vulnerable groups. Notably, Julie Guthman has critiqued the questionable "if they only knew"[108] logic that has gained prominence in recent years by exposing the "structural privileges"[109] and "historical and social processes of racialization"[110] that have contributed to ill-health and food insecurity among ethnic and racial minorities. In similar fashion, Elizabeth McGibbon and Charmaine McPherson have emphasized the structural causes of ill-health over promotive initiatives premised upon "individual-based lifestyle [choices]"[111] in their analysis of the social

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[107] Ibid., 231-32. "The medical analogy also helps identify a third sense of access to justice. I am thinking here of relatively recent work on health promotion—we are advised today to exercise aerobically for at least 20 minutes, three times a week, not just because this will reduce our chances of, for example, coronary heart disease but because it will make us feel a whole lot better."

[108] Julie Guthman, "If They Only Knew: Color Blindness and Universalism in California Alternative Food Institutions," *The Professional Geographer* 60 (2008): 387-397.

[109] Ibid., 390.

[110] Ibid.

[111] The authors provide a succinct formulation of this approach: "A social determinants of health (SDH) perspective increasingly takes aim at the structural causes-of-the-causes of social and material deprivation that lead to ill health." Elizabeth McGibbon and Charmaine McPherson, "Applying Intersectionality & Complexity Theory to Address the Social Determinants of Women's Health," *Women's Health & Urban Life* 10, no. 1 (2011): 67.

determinants of women's health. Although these analogical critiques do not diminish the relative merits of legal health promotion—clearly disseminating legal information and preventative techniques in an accessible manner is a social good[112]—they nevertheless highlight the limitations of behavioural approaches to structural problems and the broader responsibilization thesis of neo-liberal governance strategies. It should also be noted that the indistinct boundary between the provision of legal information and the delivery of legal services creates serious challenges for fourth wave access to justice programs given that the legal profession in Canada is governed by private self-regulatory bodies that remain vigilant in protecting the interests of legal professionals as the sole providers of legal services.[113] One promising development in this area is the promotion of new legal service providers (i.e. paralegals) by reducing or eliminating the monopoly on legal services currently enjoyed by the Canadian legal profession.[114]

Above all, in the context of multilayer access to environmental justice, these analogical critiques become directly applicable to inaccessibility concerns. The consumption of chemicals from contaminated food, water, and air, resulting in health-impairment and food insecurity cannot be uniformly avoided with promotive activities. For example, the capacity of negatively harmed individuals to engage in 'precautionary consumption' (i.e. screening for toxic contaminants in commodities, notably food and

[112] Then again, the promotion of legal information might also lead negatively affected individuals or groups to the false belief that their justiciable problems can only be resolved through formal legal means. See, e.g., Ottawa, *National Symposium: Expanding Horizons, Rethinking Access to Justice in Canada* (Ottawa: Department of Justice, 2000).
[113] See, e.g., Jennifer Bond, David Wiseman, and Emily Bates, "The Cost of Uncertainty: Navigating the Boundary Between Legal Information and Legal Services in the Access to Justice Sector," *Journal of Law and Social Policy* 25 (2016): 1-25.
[114] For an argument in favour of new legal service providers, see Alice Woolley and Trevor C. W. Farrow, "Addressing Access to Justice Through New Legal Service Providers: Opportunities and Challenges," *Texas A&M Law Review* 3, no. 3 (2016): 549-81.

hygienic products) is limited by socio-economic status, spatial proximity to alternative sources, and a host of other barriers.[115] Such consumer-oriented approaches (although necessary in terms of transparency and informational disclosures) ultimately emphasize individual responsibility in the consumption of chemicals rather than eliminating toxicants from consumer products; that is, individuated responses to toxic exposures such as 'precautionary consumption' overemphasize the consumption of chemicals to the detriment of the production of chemicals and the power dynamics in the political economy that operate in pursuit of such productive activities. Such individualized regulatory regimes have strong gendered dimensions insofar as decision-making burdens are privatized and downloaded onto primary caregivers in households (work that is disproportionately undertaken by women), thereby contributing to the 'care burden' of social reproduction and reinforcing the gendered division of household labour.[116] These issues of power, production, and social reproduction require structural changes in the context of multilayer access to environmental justice.

Fundamentally, toxic exposures are not evenly distributed across social locations and the extent to which harmed groups can engage in preventative activities is often dependent on broader structural forces. For example, the Aamjiwnaang First Nation experiences the highest air pollution in Canada as a result of its proximity to chemical manufacturers in nearby Sarnia.[117] The extent to which Indigenous residents can engage in

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[115] See Norah MacKendrick, "Protecting Ourselves from Chemicals: A Study in Gender and Precautionary Consumption," in ed., Dayna Nadine Scott, *Our Chemical Selves: Gender, Toxics, and Environmental Health* (Vancouver: University of British Columbia Press, 2015), 58-77.
[116] Antonella Picchio, *Social Reproduction: The Political Economy of the Labour Market* (Cambridge: Cambridge University Press, 1992); Susan Buckingham and Rikibe Kulcur, "Gendered Geographies of Environmental Injustice," *Antipode* 41 (4): 659-83.
[117] Sarah Marie Wiebe and Erin Marie Konsmo, "Indigenous Body as Contaminated Site? Examining Struggles for Reproductive Justice in Aamjiwnaang," in eds., Stephanie Paterson, Francesca Scala, and

individuated preventative activities (i.e. face masks, remaining indoors, etc.) is limited to the reservation borders and does not extend to physical relocation. From a methodological standpoint, behavioural approaches often do not account for perceptual disparities, such as the presence of a form of differential legal consciousness as a result of past negative experiences with state institutions which directly affects the ability of harmed individuals or groups to access justice through institutional mechanisms.[118] As the Supreme Court recently recognized, "alienation from the legal system as a result of negative experiences"[119] remains a significant barrier to accessing justice. The extent to which preventative measures—either health-based or legal—address the environmental injustices to which such Indigenous groups are exposed remains negligible.

While it may be self-evident that people would prefer to avoid legal problems altogether, the extent to which promotive activities effect such changes is not evenly distributed across social locations. Rebecca Sandefur has observed that "people whose social position is near the bottom of an unequal structure will be less likely to take actions that might protect or further their own interests, whether those actions involve seeking information or advice."[120] Similarly, Constance Backhouse's expansive body of research indicates that this orientation toward the structural roots of inequities is imperative in evaluations of inaccessibility across the familiar social locations in Canada (i.e. race,

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Marlene K. Sokolon, *Fertile Ground: Exploring Reproduction in Canada* (Montreal: McGill-Queen's University Press, 2014), 325-58.

[118] See Patricia Ewick and Susan Silbey's influential study, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998).

[119] *AIC Limited v. Fischer*, at para. 27.

[120] Rebecca Sandefur, "The Importance of Doing Nothing: Everyday Problems and Responses of Inaction," in eds., Pascoe Pleasance, Alexy Buck, and Nigel Balmer, *Transforming Lives: Law and Social Process* (London: HMSO, 2007), 117.

gender, class, etc.).[121] Simply put, structural barriers to accessing justice are not *reducible* to knowledge gaps and the availability of legal information. Finally, the limitations of the individuated solutions of legal health promotion are strikingly apparent in the context of collective claims-making which definitionally involve issues that are beyond individuation. That is not to say that dispute avoidance as a principle is inapplicable in this context, but rather that its purview must be extended beyond the individualistic measures associated with interpersonal disputes.

In point of fact, the strongest application of the logic of preventative measures in the context of multilayer access to environmental justice may be adherence to the Precautionary Principle in environmental governance. This globally recognized concept holds that scientific uncertainty or incomplete scientific knowledge should not preclude the prevention of a proposed activity; in other words, the potential of environmental harm (that has not been conclusively determined according to positivistic standards) is sufficient for states to prohibit any proposed activity.[122] The basic impetus of this preventative approach is the recognition that the rigid standards of positivistic knowledge-formation may contribute to the deterioration of environmental health and safety. Although critics have

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[121] See, e.g., Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999).

[122] The Precautionary Principle originates in its contemporary form in the German policy of *vorsorgeprinzip* from the 1970s which broadly required that any proposed activity that could potentially cause environmental harm should not be allowed until and unless this potentiality was scientifically proven to be false; in other words, the absence of a scientific consensus on the possibility of environmental harm should not prevent the impermissibility of the proposed activity. In its original formulation, the Precautionary Principle entailed the following: "(1) socialized planning and heavy state influence; (2) forward-looking, active, and participatory measures to avoid harm; (3) measures to stimulate the economy through replacement of polluting technologies with 'green' alternatives; (4) decisions based on a number of criteria, including, but not limited to, 'sound science' with the aim of pursuing 'complementary goals without becoming subject to the accusation of irrationality' and including social and political as well as environmental harms; and (5) a strong moral requirement to avoid damage." For an overview of the Precautionary Principle, see P. Saradhi Puttagunat, "The Precautionary Principle in the Regulation of Genetically Modified Organisms," *Health Law Review* 9, no. 2 (2001): 10-18.

posited that adoption of the Precautionary Principle is an intrusion upon the 'spontaneous ordering of the market' in delivering social goods by radical environmentalists, a comprehensive report commissioned by the European Environmental Agency, "Late Lessons From Early Warnings: The Precautionary Principle, 1896-2000," provides a strong historical account of the social benefits of such preventive measures in the context of environmental injustices.[123] The critique of *ex post facto* accessibility promotion encapsulated by Susskind's widely cited refrain—"[M]ost people would surely prefer a fence at the top of the cliff rather than an ambulance at the bottom (no matter how swift or well-equipped)"[124]—finds strong resonances with the 'common sense' approach of the Precautionary Principle rooted in nineteenth-century adages, such as "an ounce of prevention is worth a pound of cure."[125]

In Canada, the Precautionary Principle is evident in the preamble to multiple environmental statutes, including the *Canadian Environmental Protection Act, 1999*.[126] As it pertains to environmental class actions, the incorporation of the fourth wave logic of preventative measures in the form of the Precautionary Principle broadly aligns with an aspirational understanding of access to justice that recognizes both formal legal and non-legal avenues of accessibility promotion and injustice prevention. In Ontario's class action

[123] *Late Lessons From Early Warnings: The Precautionary Principle, 1896-2000* (Copenhagen: European Environment Agency, 2002). Online: http://www.eea.europa.eu/publications/ environmental_issue_report _2001_22.
[124] Susskind, *The End of Lawyers? Rethinking the nature of legal services*, 231.
[125] Naomi Oreskes and Erik M. Conway, *The Collapse of Western Civilization: A View From the Future* (New York: Columbia University Press, 2014), 46.
[126] The preamble to CEPA upholds the need for "pollution prevention," as well as explicitly recognizing the Precautionary Principle: "Whereas the Government of Canada is committed to implementing the Precautionary Principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. *Canadian Environmental Protection Act, 1999*. S.C. 1999, c. 33.

regime, moreover, the secondary policy objective of the *Class Proceedings Act* of ensuring behaviour modification addresses the prevention of injustices by similarly situated parties (i.e. corporations) insofar as successful class actions acquire a deterrence function; in this sense, behaviour modification complements the primary policy objective of access to justice. Ultimately, the conceptualization of the Precautionary Principle through the fourth wave logic of preventative action provides a productive bridge connecting 'access to justice' and 'environmental justice'.[127]

E. FIFTH WAVE – EVERY FACET OF SOCIAL LIFE

Starting in the early 2000s, a fifth wave of reforms sought to expand the scope of access to justice to include "every facet of the social life of citizens."[128] According to this expansive vision, "[t]here is no issue of interpersonal or group relationships that does not call forth considerations of substantive justice, procedural fairness and equal access to legal institutions."[129] At root, this expansion into social life has been largely governed by an aspirational conception of access to justice that recognizes the lived experiences of citizens and the multiple sites of injustices in contemporary societies. Christine Parker has articulated this promise of fifth wave reforms as "speaking justice to power,"[130] a formulation that explicitly recognizes power imbalances in social relations that contribute

[127] In other words, the conceptualization of the Precautionary Principle through the critical frame of 'speaking justice to power' extends such preventative dimensions beyond the specific context of any particular case (that might implicate similarly situated parties) towards the broader political economy of pollution addressed by the Precautionary Principle in environmental justice discourses.
[128] Ibid., 23.
[129] Ibid.
[130] Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford: Oxford University Press, 1999), 174-205.

to everyday injustices. "People experience domination," Parker observes, "in the places where they spend their daily lives in the presence of more powerful others—families, schools, workplaces, shops, government departments, and community organizations."[131] Clearly the conception of 'justice' that animates the fifth wave has progressed beyond the largely proceduralistic conception of earlier waves. Marc Galanter has described this conceptual progression as reflecting the essential feature of 'justice' as a "fluid, moving, and labile thing,"[132] which suggests that the normative goal of 'access to justice', by extension, remains a constantly "moving frontier."[133]

This progressive conception has necessitated similar developments in strategies of accessibility promotion and injustice prevention. Policy reforms focusing exclusively on formal legal channels have started to be viewed as insufficient measures of dealing with the multidimensionality of Canada's access to justice crisis. The demand for dynamic and proactive strategies which include "establishing partnerships with health and social services agencies"[134] has been grounded on appreciating the "correlation between health, social service, employment, security from violence and access to civil justice."[135] It is therefore neither surprising nor inconsequential that Macdonald concludes his influential overview of access to justice in Canada by remarking that ultimately "disparities in social power, and our seeming unwillingness as a society to do much about them—much more than procedural glitches in processes of litigation—are the root cause of injustice."[136] More

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[131] Ibid., 174.
[132] Marc Galanter, "Access to Justice as a Moving Frontier," in eds., Julia Bass, W.A. Bogart, and Frederick H. Zemans, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005), 147-53.
[133] Ibid.
[134] Macdonald, 23.
[135] Ibid.
[136] Ibid., 107.

to the point, these socially exclusionary and oppressive dynamics are "not randomly distributed," but are rather distributed along the social locations familiar to critical social scientists (i.e. race, gender, class, age, etc.).[137]

Needless to say, the progression of access to justice discourse has not occurred in a political economic vacuum. The social conditions under which this expanded scope of access to justice has developed are significantly removed from those of earlier waves. Although access to justice in its earliest manifestations under the Keynesian welfare state was characterized by the liberal proceduralism of its analyses and reforms, it nevertheless contained a normative universality that was not constrained by the prevailing restrictions of contemporary neo-liberal governance. Whereas Parker's notion of 'speaking justice to power' adopts a progressive understanding of the multiple sites of injustices in advanced capitalist societies, the manner in which these injustices are addressed is generally limited by the "new regulatory state"—although "regulatory capitalism"[138] might be a more appropriate, less state-centric term—which promotes self-regulatory models of accessibility promotion and injustice prevention. For example, environmental injustices are notionally addressed in Parker's proposal through corporate self-regulation, such as compliance reports and environmental impact statements. This proposal favours regulated self-regulation—in other words, it is a meta-regulatory strategy aiming towards "regulating organizations to self-regulate injustice prevention and provision of access to justice."[139] According to Parker, this form of environmental meta-regulation is in the long-term

[137] Ibid.
[138] See, e.g., John Braithwaite, *Regulatory Capitalism* (Northampton: Edward Elgar, 2008).
[139] This meta-regulatory strategy would certainly also include some type of access to justice accreditation agency to monitor reports and corporate conduct. Braithwaite, *Regulatory Capitalism*, 187.

interests of corporations who ostensibly find it "desirable to initiate their own compliance audits before outside regulators do it for them."[140]

Although the capacity of such meta-regulatory strategies to address environmental justice concerns remains to be seen, the limited extent to which corporate self-regulation has served to improve the prevalence of environmental injustices such as chemical consumption and toxic pollution does not inspire confidence in the commitment of corporate actors to ensure substantive justice for negatively affected individuals and collectivities. Practically speaking, the efficacy of meta-regulatory strategies is dependent upon the strength of binding mechanisms associated with ensuring compliance. As Stephen Gill has pointed out, the laws "governing corporate social responsibilities for the environment [...] are soft and non-binding"[141] which serves a "legitimizing role by facilitating the enforcement of hard corporate rights [...] in the face of the soft corporate social responsibilities."[142] Gill and Cutler have appropriately referred to these regulatory schemas as emblematic of the "new informality"[143] in regulatory compliance. As explored in Chapter 2, environmental class actions are paradigmatic claims largely because environmental regulations have historically been negligibly enforced (and adhered to) by

[140] Parker, 188-89. This policy direction may be critically viewed as a modification of the responsibilization thesis of neo-liberal governance, which aims to devolve state responsibilities onto private individuals and organizations. Parker is quite clear that "moving responsibility for creating and financing a large proportion of day-by-day justice options from the state to the organizations in which they occur" is a major aspect of this policy stance. Ibid., 203. It should be clear, however, that Parker's proposed meta-regulatory strategy should (at minimum) be mandatory, including severe penalties for non-compliance; in short, take on the characteristics of *hard* law.

[141] This does not foreclose the possibility of the mobilization of *soft* law, particularly internationally, as part of a broader counter-hegemonic strategy. Richard Falk, "New Constitutionalism and geopolitics: notes on legality and legitimacy and prospects for a just new constitutionalism," in eds., Stephen Gill and A. Claire Cutler, *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2015), 295-312; see also Hilal Elver, "New Constitutionalism and the Environment," in eds., Gill and Cutler, *New Constitutionalism and World Order*, 261-276.

[142] Ibid.

[143] Gill and Cutler, 7.

governments and corporations alike, thereby precipitating demands for a collective claims-making vehicle to ensure enforcement and compliance where governments are recalcitrant to enforce regulations.

F. Sixth Wave – Public-Centred Access to Justice

In recent years in Canada, a new wave of access to justice research has become discernible. One of the distinguishing facets of this new wave has been the embrace of a public-centred approach that seeks to prioritize the perspectives of the public in access to justice discourse and policy. This is borne out of the recognition that 'access to justice' as a field of inquiry has been dominated since the earliest days of the *Florence Project* by the perspectives of lawyers, academics, judges, and other justice stakeholders in relatively privileged social positions. To the extent that 'access to justice' reforms are designed to address the needs of the public, the proactive inclusion of public perspectives in access to justice discourse and policy formation is a welcome development.

In a pivotal study in this new wave—"What is Access to Justice?"[144]—Farrow seeks to develop precisely such a public-centred approach to access to justice by soliciting and incorporating public perspectives on a range of access to justice issues. In an observation that is emblematic of this new wave of thinking, Farrow notes that "[t]he public, which uses the system, needs to be at the centre of how we think about, understand, and reform the system."[145] The study's findings coalesce around several important themes, including

[144] Trevor C. W. Farrow, "What is Access to Justice?" *Osgoode Hall Law Journal* 51, no. 3 (2014): 957-87.
[145] Ibid., 961.

the importance of both procedural and substantive justice, alienation from the justice system, the need for increased state support, and the unequal distribution of accessibility, among other themes.[146] In the Canadian context, this new wave of access to justice reforms has benefited from the guidance of the Action Committee on Access to Justice in Civil and Family Matters ('Action Committee'), an organization that has embraced a collaborative approach among justice stakeholders in addressing the everyday legal problems faced by Canadian residents; in so doing, the Action Committee has embraced a public-centred understanding of access to justice which draws on the major insights of previous iterations of access to justice reform, including the need for preventative approaches, simplifying procedures, public education and increased legal literacy, as well as laying the foundation for greater collaboration and coordination between and among justice stakeholders in Canada.[147] For example, this focus on everyday legal problems and the various costs associated with inaccessible justice has been tackled directly by the Canadian Forum on Civil Justice in a recent study—"Everyday Legal Problems and the Cost of Justice in Canada"—that documented the various economic and non-economic costs of inaccessible justice, including "decreasing physical health, high levels of stress and emotional problems, and strains on relationships among family members."[148] The findings of the study indicate that the various costs of not dealing with the access to justice problem are

[146] Farrow identifies the following ten themes: "justice is about fairness, equality, morality, and active societal participation; procedural and substantive justice are both important; not everyone has equal access to justice; people often feel alienated by the system; people should have a right to justice; justice is a fundamental issue; more government support should be provided; justice should be made simpler, cheaper, and faster; education, prevention, and understanding are important aspects of justice; the cost of not making justice accessible needs to be further considered." Ibid, 968.
[147] Farrow, "A New Wave of Access to Justice Reform in Canada," 164-85.
[148] Farrow et al, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (2016), online: http://www.cfcj-fcjc.org/sites/default/files/ Everyday%20Legal%20 Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf.

significant, not merely for the individuals who suffer from inaccessible justice, but also for the state through increases in various types of costs, including $248 million annually in social assistance payments, $450 million annually in employment insurance payments, and $101 million annually in health care costs.[149]

Although the full implications of this new wave of access to justice reforms for the types of collective claims involved in class actions remain to be seen, one significant aspect of this recent development that is immediately relevant to multilayer access to justice is the increased focus on civic engagement and the urgency of raising 'access to justice' as an important social, political, and economic issue. Clearly 'access to justice' has historically been viewed as a 'poor cousin' in comparison to other facets of the welfare state, such as health care or education, however, the renewed commitment to increase awareness and politicize 'access to justice' as an important area worthy of greater public and state attention (and action) certainly bodes well moving forward.

2. MULTILAYER ACCESS TO JUSTICE IN CANADA

In 1978, Quebec became the first Canadian jurisdiction to introduce class action legislation with *An Act Respecting the Class Action*—a second wave reform that explicitly sought to facilitate social justice for collectivities. Despite the relatively early adoption of American-style class actions, common law provinces did not adopt similar legislation until Ontario passed the groundbreaking *Class Proceedings Act* in 1992, precipitating British Columbia

[149] Ibid.

to adopt similar legislation in 1995, followed by Saskatchewan and Newfoundland in 2002, and Manitoba and Alberta in 2003 and 2004. These provincial class action regimes have been shaped by a trilogy of decisions released by the Supreme Court in the early 2000s.[150]

A. CLASS ACTION TRILOGY

The first of these landmark decisions was *Western Canadian Shopping Centres Inc. v. Dutton* (2000) in which the Supreme Court determined that class actions possessed sufficient public importance to warrant adoption into Canadian common law (irrespective of provincial statutory regimes).[151] Apart from Prince Edward Island, every province that had not passed class action legislation at the time of the decision has since introduced such legislation. In *Dutton*, Chief Justice McLachlin provides one of the most succinct defenses in Canadian jurisprudence of the public importance of class actions:

> The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated vis-à-vis the defendants. In other cases, an important aspect of their claim is common to all complainants. The

[150] *Western Canadian Shopping Centres v. Dutton*, 2000 S.C.J. 63, [2001] 2 S.C.R. 534; *Hollick v. Toronto (City)*, 2001 3 S.C.R. 158 [2001] S.C.C. 68; *Rumley v. British Columbia*, 2001 3 S.C.R. 184 [2001] S.C.C. 69.
[151] Janet Walker and Garry Watson, eds., *Class Actions in Canada: Cases, Notes, and Materials* (Toronto: Emond Montgomery, 2014), 6.

> class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.[152]

Chief Justice McLachlin also reconfirmed the three main advantages of class actions as promoting judicial economy,[153] access to justice,[154] and behaviour modification.[155] Within these parameters, access to justice and judicial economy have been posited as primary policy objectives, whereas behaviour modification has been posited as a secondary policy objective.

Interestingly, the two primary policy objectives are not necessarily compatible. The formal logic underlying judicial economy as a policy objective holds that class actions preserve scarce judicial resources by allowing for the aggregation of individual claims that would otherwise clog the courts into a single procedural vehicle, thereby allowing for a mass resolution of the aggregated claims and preventing the expenditure of judicial resources on repetitive individual claims. By the same token, the formal logic underlying the policy objective of access to justice holds that individual claims would not be pursued without a vehicle for collective claims-making such as a class action. The contradiction is self-evident: if such claims are individually non-viable, then they would not otherwise clog the courts in absence of an aggregative vehicle; if such claims would otherwise clog the

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[152] *Dutton*, at 26.

[153] This benefit of judicial economy are understood to extend to both plaintiffs and defendants. "[B]y aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need to litigate the disputed issue only once, rather than numerous times)." *Dutton*, at 27.

[154] Ibid., at 28.

[155] "[C]lass actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing a suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation." Ibid., at 29.

courts, then they are not individually non-viable. However, this distinction is a consequent of a difference in the character of the respective claims; that is, negative value claims are those that would not be pursued without a class action, whereas positive value claims are those that would be pursued with or without a class action. In the former case, the class action promotes access to justice, whereas in the latter case, the class action promotes judicial economy. In fact, the class action may also be construed as promoting access to justice in the latter case insofar as collective claims-making produces a strength-in-numbers dynamic against powerful defendants. Nevertheless, to the extent that class actions promote meritorious negative value or individually non-viable claims that would not otherwise have been pursued, this promotion contradicts the policy objective of judicial economy. From a strictly economical perspective, any increase in litigation contradicts the objective of preserving scarce judicial resources, irrespective of the merits or frivolity of the claim.

As it pertains to access to justice, the Supreme Court observed that "by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually."[156] To emphasize the public importance of class actions in promoting access to justice, particularly for negative value claims, the Supreme Court confirmed that "[w]ithout class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims."[157]

[156] Ibid., at 28.
[157] Ibid.

Delivering the decision of the Supreme Court in *Hollick v. Toronto* (2001)—the second case in the trilogy—Chief Justice McLachlin reiterated the economistic conception of access to justice outlined in *Dutton* that "class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own."[158] The lasting impact of *Hollick* rests largely on the flexible and generous approach to certification set forth by the Supreme Court (this has come to be known as "the *Hollick* approach").[159] Since pre-trial certification is the most critical juncture for prospective class actions (as explored more fully in Chapter 4), the *Hollick* approach signaled a positive development for access to justice advocates.

In the final case of the trilogy, *Rumley v. British Columbia* (2001), the Supreme Court expanded the concept of access to justice beyond exclusively economic factors by recognizing potential social and psychological barriers to accessing justice for collective claims-makers. The extraordinary character of the claim—institutional abuse of blind and deaf children—was cited by the Court as a primary factor with the observation that permitting the "suit to proceed as a class action may go some way toward mitigating the difficulties that will be faced by class members."[160] Subsequent class actions involving historical wrongs, such as the Residential Schools and the Chinese 'head tax' class actions, testify to the social benefits of a collective claims-making vehicle in overcoming social and psychological barriers to multilayer access to justice.

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[158] *Hollick*, at 15. See also at 33.
[159] This flexible and generous approach was informed by the context and legislative intent behind the *Class Proceedings Act, 1992*: "The legislative history of the *Class Proceedings Act, 1992*, makes clear that the Act should be construed generously." *Hollick*, at 14.
[160] *Rumley*, at 39. The Supreme Court stressed this point, observing that "it is necessary to emphasize the particular vulnerability of the plaintiffs in this case."

In hindsight, the cumulative effect of *Dutton*, *Hollick*, and *Rumley* served to entrench class actions into the fabric of Canada's civil justice system. From an access to justice perspective—despite heavy reliance on predominantly economistic rationales—the Supreme Court has sought to expand the scope of the concept to include non-economic factors. Given Canada's relatively nascent class action history, the extent to which non-economic factors prefigure into judicial decision-making remains to be seen. For now, the consistent emphasis on overcoming barriers, as opposed to ensuring substantive results, indicates a strong procedural conception of multilayer access to justice.

Nonetheless, in 2013 the Supreme Court released its decision in *AIC Limited v. Fischer*;[161] a decision that may be indicative of a commitment to an expansive conception of multilayer access to justice. Firstly, the Supreme Court reiterated that although economic barriers are more prevalent, social and psychological barriers also warrant consideration.[162] The Supreme Court subsequently enumerated several non-economic barriers faced by potential plaintiffs:

- Ignorance of the availability of substantive legal rights;
- Ignorance of the fact that significant injuries have occurred;
- Limited language skills;
- Elderly age of the claimants;
- Frail emotional or physical state of the claimants;

[161] *AIC Limited v. Fischer*, 2013 3 S.C.R. 949 [2013] SCC 69. In this case the Supreme Court augmented the 'access to justice' criterion in the preferability test determining certification by engaging in an economic cost-benefits analysis in order to evaluate the preferability of the class proceeding over other vehicles and forms of recovery.
[162] Ibid.

- Fear of reprisals by the defendant; and,
- Alienation from the legal system as a result of negative experiences.[163]

Additionally, the Supreme Court recognized that access to justice cannot be reduced to access to court procedure, noting the interconnected nature of procedural and substantive concerns. The Supreme Court held that these are "interconnected because in many cases defects of process will raise doubts as to the substantive outcome and defects of substance may point to concerns with the process."[164] It goes without saying that simply allowing claimants access to court procedure does not necessarily ensure substantive results. While the latter is dependent upon the former, a restrictive conception of access to justice fails to address the multidimensionality of justice and the interconnectedness of procedural and substantive concerns. This view is echoed by the Honourable Frank Iacobucci (also quoted in *Fischer*), who remarks:

> I find it difficult to accept that providing injured parties with a process to pursue their claims can be divorced from ensuring that the ultimate remedy arising from the process provides substantive justice where warranted. A definition of access to justice that does not include a substantive result is simply incomplete.[165]

Such shifting perceptions on access to justice testify to the development of the concept from its proceduralist origins in earlier waves towards substantive justice considerations. Although this progressive development is identifiable throughout access to justice scholarship, it is particularly relevant to class actions. Indeed, it is questionable how the

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[163] Ibid., at 27. The last barrier, "alienation from the legal system as a result of negative experiences," constitutes and is constituted by the legal consciousness of the affected individual or group; in the case of groups, differential legal consciousness may be a more suitable term. I am using the concept of "legal consciousness" in light of Patricia Ewick and Susan Silbey's influential study, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998).
[164] Ibid., at 23.
[165] Iacobucci, "Access to Justice in the Context of Class Actions," 20.

preferability of a collective claims-making vehicle that possesses a *social dimension*—as the Supreme Court has posited on several occasions[166]—can reasonably be evaluated on strictly procedural grounds.

International actors such as the UNDP similarly endorse a substantive conception of access to justice by observing that it "entails much more than improving an individual's [or group's] access to courts or guaranteeing legal representation"[167] and demands to be "defined in terms of ensuring that legal and judicial outcomes are just and equitable."[168] In the context of multilayer access to justice, the 'strength-in-numbers' logic of class actions effectively contributes to substantive results, particularly when such collective claims-making is undertaken against powerful adversaries such as corporations and governments. Iacobucci rightly observes that "class actions can facilitate the substantive element of access to justice"[169] by virtue of this collectivist dimension given that an unified class is stronger than atomistic individuals and can "exert greater pressure"[170] which "may lead to a more restorative result."[171] It goes without saying that this expansive understanding of access to justice was not promoted at its proceduralist origins, but rather has progressively developed since Cappelletti and Garth's *Florence Project*.

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[166] See *Bisaillon v. Concordia University*, 2006 1 S.C.R. 666 [2006] SCC 19; *Dell Computer Corp. v. Union des consommateurs*, 2007 2 S.C.R. 801 [2007] SCC 34.
[167] United Nations Development Program (UNDP) 2004 *Access to Justice Practice Note*. Online: <www.undp.org/governance/docs/Justice_PN_En.pdf>.
[168] Ibid.
[169] Iacobucci, "Access to Justice in the Context of Class Actions," 21.
[170] Ibid.
[171] Ibid.

B. MULTILAYER ACCESS TO ENVIRONMENTAL JUSTICE

Since the mid-1990s, a growing body of scholarship has emerged on the concept of Environmental Justice that broadly refers to environmental policy, enforcement, laws and regulations, and public participation in decision-making processes.[172] One of the central principles of Environmental Justice has been the demand that harmed individuals and communities receive full compensation for their incurred environmental harms, including reparations for damage and clean-up of contaminated sites. In point of fact, the Environmental Justice Paradigm (EJP) elevates collective compensation to the level of a right.[173] However, despite the fact that Environmental Justice research generally corresponds to developments in access to justice, the two paradigms have largely operated in separated spheres. In contrast to other jurisdictions, such as the European Union, the synthesis of 'access to justice' and 'environmental justice' has been largely underexplored in Canada.[174] As a central principle of Environmental Justice, the right of compensation for environmental harms demands greater analysis. To this end, this project explores environmental harms through the scope of multilayer access to justice by focusing on environmental class actions, the paradigmatic types of actions.

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[172] See, e.g., Andil Gosine, *Environmental Justice and Racism in Canada* (Toronto: Emond Montgomery, 2008); Dorceta Taylor, "The Evolution of Environmental Justice Activism, Research, and Scholarship," *Environmental Practice* 13, no. 4 (2011): 280-301; Alexandre Berthe and Sylvie Ferrari, "Ecological Inequalities: Relating Unequal Access to the Environment to Theories of Justice," *Cahiers du GREThA – Working Paper Series* (2012): 1-20; Vandana Shiva, *Soil Not Oil: Environmental Justice in an Age of Climate Crisis* (Berkley: North Atlantic Books, 2015); Toban Black et al, eds., *A Line in the Tar Sands: Struggles for Environmental Justice* (Toronto: Between the Lines, 2014); Julian Agyeman, ed., *Speaking for Ourselves: Environmental Justice in Canada* (Toronto: University of British Columbia Press, 2010); Felicity Millner, "Access to Environmental Justice," *Deakin Law Review* 16, no. 1 (2011): 189-207.
[173]Dorceta Taylor, "The Rise of the Environmental Justice Paradigm: Injustice Framing and the Social Construction of Environmental Discourses," *American Behavioural Scientist* 43 (2000): 555.
[174] But see, e.g., Richard D. Lindgren and Theresa A. McClenaghan, *Ensuring Access to Environmental Justice: How to Strengthen Ontario's Environmental Bill of Rights* (Toronto: Canadian Environmental Law

To the extent that multilayer interests are implicated in environmental class actions—that is, environmental class actions are not solely aggregative vehicles for the pursuit of individual interests nor vehicles of collective interests, but rather extend towards the broader social context by advancing public interests—multilayer access to environmental justice can be articulated as a subfield within the EJP under the principle of compensation in the interests of individuals, collectivities, and the general public.

First and foremost, this project posits that the inequitable distribution of inaccessibility strongly correlates to the inequitable distribution of environmental injustices in Canada. Any synchronic analysis of this correlation neglects the impacts of historical oppression and power imbalances that have contributed to this inequitable distribution of inaccessibility and environmental harms. As it pertains to access to justice, Macdonald briefly addresses concerns over the distribution of social power and its concomitant implications for access to justice by observing that dominant groups in Canada "historically have been white, male, middle-aged, middle-and-upper-class, English- or French-speaking citizens"[175] and that "[e]very step away from that socio-demographic profile is a step away from access."[176] In response, Constance Backhouse examined the dominance of this socio-demographic group by focusing on the intersectional categories of gender, indigeneity, race and ethnicity, dis/ability, and class.[177] As Backhouse observes, the "hierarchies within our present society were erected upon discriminatory laws and

Association, 2016). Lindgren is counsel for the Canadian Environmental Law Association, the only major Canadian organization that employs the term 'access to environmental justice'.

[175] Macdonald, 28.

[176] Ibid.

[177] Constance Backhouse, "What is Access to Justice?" in Julia Bass, W.A. Bogart, and Frederick H. Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005), 113-146.

practices that prevailed for centuries."[178] The astonishing fact that the paradigmatic claims-maker in civil justice disputes has been "white, male, non-immigrant, English or French speaking, professional, well-educated, falling within the 40-80 percentile of wage earners and aged between 35 and 60"[179]—in other words, what Audre Lorde calls the "mythical norm"[180]—cannot be adequately comprehended without considering the historical foundations upon which "present-day realities"[181] are grounded. This 'mythical norm' reflects a privileged form of legal consciousness (and elevated sense of legal entitlement) which has been exposed in multiple arenas, perhaps most famously by Gwen Brodsky and Shelagh Day who observed that this socio-demographic group is the "most likely to bring *Charter* challenges alleging discriminatory treatment under the equality provision in section 15."[182] Simply put, the capacity of individuals and collectives to access justice has been historically contingent on oppressive structures of power. "Past inequities have left enduring legacies,"[183] as Backhouse observes, and the Canadian justice system "continues to reflect the same patterns of inequity."[184]

Notwithstanding this critical focus on social power and social locations, classical access to justice scholarship has largely viewed class actions (in general) and environmental class actions (more specifically) as developed to promote the interests of

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[178] Ibid., 114.
[179] Ibid., 113. Backhouse positions her critique in response to an empirical study (which Macdonald cited) of the Montreal Small Claims Court (approximately 9,000 cases were examined). This study found that the paradigmatic plaintiff possessed the above stated characteristics. In response, Backhouse seeks to explore "how variables such as Aboriginality, racialization, gender, disability, class, and sexual identity impact upon one's ability to obtain justice."
[180] Audre Lorde, "Age, Race, Class, and Sex: Women Redefining Difference," in *Sister Outsider: Essays and Speeches* (New York: Crossing Press, 2007), 116.
[181] Ibid., 114.
[182] Ibid., 122.
[183] Ibid., 124. See, e.g., Pascoe Pleasance et al, "Causes of Action: first findings of the LSRC periodic survey," *Journal of Law and Society* 30 (2003): 11-30.
[184] Ibid.

"the suburbanite [as opposed to] the ghetto [sic] dweller"[185] and generally not developed to "protect the very poorest in society."[186] In other words, environmentalism has been conceived as a 'post-materialistic privileged white concern' that does not address the material injustices faced by vulnerable communities along the familiar social gradients (i.e. race, class, gender, etc.). This dominant perspective of environmentalism as a post-materialistic and largely privileged white endeavour must be problematized in order to synthesize multilayer access to justice with environmental matters. As Dorceta Taylor observes, environmental considerations have historically been advanced along four principal pathways:

1. The wilderness path, which urged the protection of the natural environment alongside respect for wildlife. This path was dominated by well-financed white males in the late 19th century and began including middle-class white females in the 20th century. This remains the dominant approach in environmentalism.
2. The urban environmental path developed by middle-class participants which focused on urban parks and natural spaces, as well as broader public health considerations.
3. The working-class environmental path developed by progressive middle-class and working-class participants, typically with union support, with a focus on occupational health and safety.
4. The people-of-colour environmental path that explicitly linked social justice considerations like "self-determination, sovereignty, human rights, social inequality, access to natural resources, and disproportionate impacts of environmental hazards with traditional working-class environmental concerns like worker rights and worker health and safety."[187]

[185] Guido Calabresi, "Access to Justice and Substantive Law Reform: Legal Aid for the Lower Middle Class," in Mauro Cappelletti and Bryant Garth, eds., *Access to Justice*, Vol. II: 178, as quoted by Jasminka Kalajdzic, "Access to Justice for the Masses?" (LL.M. Thesis, University of Toronto, 2009), online: http://hdl.handle.net/1807/18780: 54.
[186] Ibid.
[187] Dorceta Taylor, "The Rise of the Environmental Justice Paradigm," 524-25.

More to the point, environmental justice scholarship has empirically investigated and corroborated linkages between gender, race, class, and age with environmental hazards. For example, environmental racism scholars have problematized the dominant perspective of environmental justice as a privileged white concern by observing that racism and classism are major determinants of the distribution of such justiciable problems.[188] A recent example that amply illustrates these racial and classist dimensions of environmental harms and their inextricable linkage with access to justice occurred in 2016 when a high-ranking executive for Range Resources, a resource extraction firm specializing in fossil fuels, explicitly acknowledged that Range Resources "sites its shale gas wells away from large homes where wealthy people live and who might have the money to fight such drilling and fracking operations."[189] Although the direct relationship between inaccessible justice and toxic exposures that fall along intersectional categories will be addressed in greater detail in Chapter 4, at present it suffices to observe that such concerted targeting of vulnerable communities that do not possess the capacity to access justice suggests that the concept necessarily entails the capacity to obtain protection of the law (in various forms) in addition to pursuing vindication of infringed rights. These incapacities do not merely prevent

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[188]See, e.g., Michael Mascarenhas Rensselaer, *Where the Waters Divide: Neo-liberalism, White Privilege, and Environmental Racism in Canada* (Toronto: Lexington Books, 2012); Dorceta Taylor, *Toxic Communities: Environmental Racism, Industrial Pollution, and Residential Mobility* (New York: New York University Press, 2014); Luke W. Cole and Sheila R. Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (New York: New York University Press, 2001); Charles Lee, *Toxic Wastes and Race in the United States: A National Study of the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites* (New York: United Church of Christ Commission on Racial Justice, 1987); Robert D. Bullard, "Anatomy of Environmental Racism and the Environmental Justice Movement," in ed., Robert D. Bullard, *Confronting Environmental Racism: Voices from the Grassroots* (Boston: South End Press, 1993), 15-39; Robert D. Bullard, *Dumping Dixie: Race, Class, and Environmental Quality* (Boulder: Westview Press, 1990); Robert D. Bullard, ed., *Unequal Protection: Environmental Justice and Communities of Color* (San Francisco: Sierra Club Books, 1994).
[189] Jessica Kozik, "Fracking Exec Reportedly Admits Targeting the Poor, Because They Don't Have 'The Money To Fight'," in *In These Times* (19 April 2016), online: http://inthesetimes.com/rural-america/entry/19069/exec-admits-fracking-targets-the-poor.

individuals and groups from accessing justice, but they also encourage the creation of justiciable problems for such vulnerable people in the political economy of pollution which directly targets the social reproductive activities of low-income, racialized communities with differential gendered and age-related health impacts—quite literally targeting those who do not 'have the money to fight' such environmental injustices. Such abusive practices indicate that analyses of multilayer access to environmental justice must be situated within the context of the broader political economy of pollution.

C. Political Economy of Pollution

In Ontario, a 'feminist political economy of pollution' has recently been proposed by Dayna Nadine Scott as a constructive approach to "contextualize the interconnectedness of environmental health harms, chemical production, gender, and consumption within historical and structural findings."[190] This specific political economy approach features a *social reproduction* framework[191] which examines the productive and reproductive

[190] Scott et al, 7.

[191] The concept of "social reproduction" originates in the work of Pierre Bourdieu. See Bourdieu, *Reproduction in Education, Society and Culture* (London: Sage Publications, 1977). Bourdieu also provides a working definition of neo-liberalism that animates this investigation as "[a] programme for destroying collective structures which may impede the pure market logic." See Bourdieu, "The Essence of Neo-liberalism," *Le Monde Diplomatique* (1998): 1. This understanding is complemented by that offered by Stephen Gill which views neo-liberalism "as a conscious political project that is connected to an identifiable set of social forces and practices." Gill and Cutler, 9. In the legal setting, David Singh Grewal and Jedediah Purdy have offered a defense of the continued usage of the term despite its often vague and polemical uses on the grounds that it would be a "serious intellectual loss" to discard the concept. The authors suggest that neo-liberalism is "an overlapping set of arguments and premises that are not always entirely mutually consistent, and that are united by their tendency to support market imperatives and unequal economic power in the context of political conflicts that are characteristic of the present historical moment." This is particularly evident at the current juncture in which neo-liberalism forms a set of claims in the "ongoing contest between the imperatives of market economies and nonmarket values grounded in the requirements of democratic legitimacy." David Singh Grewal and Jedediah Purdy, "Law and Neo-liberalism," *Law and Contemporary Problems* 77, no. 4 (2014): 2, 1-23.

activities involved in sustaining everyday life, with particular emphasis on environmental health-impairing events.[192] Social reproduction is a concept pioneered in the Canadian context by feminist political economy that challenges the tendency in classical political economy of neglecting the material foundations of social life. As Isabella Bakker aptly observes:

> [T]he lens of social reproduction offers a more holistic view of political economy—shifting the concept of 'the economy' away from merely market forces, relations or measures toward a more ample and dynamic understanding. This includes institutions (and social relations) that provide for socialization of risk, healthcare, education [...] The lens of social reproduction also clarifies questions of material living standards and wellbeing in the context of how neo-liberal disciplines are radically reordering social life and relations.[193]

During its origins in the 1970s and 1980s, social reproduction focused almost exclusively on the 'care economy' and the gendered division of domestic labour. At the most abstract and general level, social reproduction refers to the ways in which societies reproduce. The concept typically involves food provisioning, sheltering, caring needs, human security, education, health care, in addition to "the development and transmission of knowledge, social values, and cultural practices and the construction of individual and collective identities."[194] Despite this broad purview, many feminist political economists continue to prioritize the care economy and domestic labour, without fully considering the myriad ways societies reproduce beyond these restrictive confines. Notably, spatiality must

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[192] Although all the contributors examine issues directly affecting environmental health and social reproduction, Adrian A. Smith and Alexandra Stiver's contribution makes this theoretical foundation most explicit. See, "Power and Control at the Production-Consumption Nexus: Migrant Women Farmworkers and Pesticides," in *Our Chemical Selves: Gender Toxics, and Environmental Health* (Vancouver: University of British Columbia, 2015), 364-386.
[193] Isabella Bakker, "Social Reproduction, Fiscal Space and Remaking the Real Constitution," in eds., Stephen Gill and A. Claire Cutler, *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2015), 220-21.
[194] Kate Bezanson and Meg Luxton, *Social Reproduction: Feminist Political Economy Challenges Neo-Liberalism* (Montreal: McGill-Queen's University Press, 2006), 11.

prefigure into any analysis of social reproduction, particularly in the context of environmental injustices that are inequitably distributed across geographical regions.[195] In this context, injustices are clearly not limited to domestic spaces such as households. An expansive conception that moves beyond these rigid parameters is not only necessary, but will also provide a fertile basis for interdisciplinary research, such as the present project.

Bakker has developed precisely such an expansive theory of social reproduction that recognizes the spatial dimensions associated with the ecological and agricultural structures upon which the "biological reproduction of the species"[196] is founded. Bakker's theorization of social reproduction moves beyond the ideological rigidities of earlier approaches and thereby allows for broader applicability in emerging areas of critical concern, such as the "depletion and destruction of *ecological and biological* structures and systems that sustain life."[197] The standpoint that access to justice is about "access to a kind of life—and the kinds of communities in which—people would like to live"[198] (as Farrow notes in the newest wave of access to justice research) resonates in this expansive approach. This is similarly apparent in the environmental justice literature where intergenerational and intragenerational reproduction are highlighted in the enumerated Principles of Environmental Justice.[199] Clearly environmental health-impairing events directly impact

[195] Isabella Bakker and Rachel Silvey, "Introduction: Social Reproduction and Global Transformations—from the everyday to the global," in eds., Isabella Bakker and Rachel Silvey, *Beyond States and Markets: The Challenges of Social Reproduction* (New York: Routledge, 2008), 1-15. The authors note that they aim to "contextualize the transformations in social reproduction in […] specific locales and institutions." This involves the recognition that "current transformations in the global political economy are by no means part of a homogenous process but must also be understood in specific spatial contexts and in terms of the relationship between places." Ibid., 6.
[196] Bakker and Gill, "Ontology, Method, and Hypotheses," 17-18.
[197] Ibid., 26. [emphasis in original]
[198] Farrow, 983.
[199] Taylor, 539-41.

the biological reproduction of human life and the intergenerational maintenance of collective life. In environmental health studies, Michelle Murphy has argued that the "intensification of production and consumption in recent decades has […] alarming future effect[s],"[200] which Scott et al have emphasized in their feminist political economy of pollution, observing that this "raises the prospect of today's chemical consumption reaching forward, into future generations."[201]

The intergenerational and intragenerational dimensions of environmental injustices indicate that multilayer access to justice must involve both restitutionary and preventative dimensions—the former primarily through positive judicial outcomes or settlements for incurred environmental harms, injunctive relief, and clean-up of contaminated sites, and the latter through the deterrence of future misconduct by similarly situated parties.[202] This deterrence function suggests that behaviour modification—a secondary policy objective of Ontario's *Class Proceedings Act*—acquires a heightened significance in the context of environmental justice.

As Cindi Katz observed in a seminal contribution to social reproduction theory: "[t]he widespread and serious environmental problems symptomatic of capitalist relations of production have received plenty of attention, but generally not as problems of social

[200] Needless to say, Bakker's critical approach, which recognizes spatiality and intergenerationality in the realm of ecological and biological reproduction is better suited for such a feminist political economy of pollution. Scott et al, 13. The authors also point out that "[t]hese intergenerational equity aspects of our current production and consumption of chemicals have been brought forcefully to the fore by Indigenous activists in Canada." See, also, Allen Habib, "Sharing the Earth: Sustainability and the Currency of Inter-Generational Environmental Justice," *Environmental Values* 22, no. 6 (2013): 751-64.
[201] Ibid.
[202] This suggests that access to justice and behaviour modification are distinct but overlapping policy objectives in this particular context.

reproduction."[203] The same could be said of the continuingly 'abysmal' state of access to justice in Canada, which has dominated legal discourse for several decades, but has generally not been conceived through the political economic frame of social reproduction. This is patently apparent in the context of multilayer access to environmental justice, which is playing an increasingly critical role in combatting environmental injustices in domestic and foreign jurisdictions. As previously stated, for example, targeted environmental racism whereby "toxic waste repositories" and "noxious industries" are spatially situated in locations where vulnerable communities suffer from inaccessibility and cannot access legal protections against such encroachments—recall Range Resources's corporate strategy—is a prime example of the importance of access to justice in the political-ecological dimension of social reproduction. Only from such a material standpoint—which recognizes the racial hierarchies and gender orders that impact the capacity of vulnerable people to access justice—can the contemporary task of incorporating "every facet of the social life of citizens" be achieved.

Finally, one of the distinguishing features of this political economy approach is the conceptualization of multilayer access to environmental justice as a *field of contestation*. Wendy Brown has recently described a central feature of neo-liberal governance and its concomitant political rationality as instrumentally reducing public life and politics to "problem solving and program implementation" in contradistinction to the "political contestation" of twentieth-century social liberalism and more radical political projects.[204] Robert Cox has similarly distinguished between "problem-solving" theory that is primarily

[203] Cindi Katz, "Vagabond Capitalism and the Necessity of Social Reproduction," *Antipode* 33 (2001): 714.
[204]See Wendy Brown, *Undoing the Demos* (New York: Zone Books, 2015), 68-70, 127.

aimed at smoothening the edges of "the prevailing social and power relationships" and more critical approaches which problematize these relationships.[205] This project characterizes the crisis in multilayer access to environmental justice as borne out of a political contestation that systematically disadvantages vulnerable people in the political economy of pollution. In other words, this project considers the 'de-democratizing' initiatives by the polluter-industrial complex to curtail the purview of class actions with the objective of denying multilayer access to justice for collectivities who cannot otherwise vindicate their harmed interests (see Chapter 2) in order to facilitate the strengthening of "the political hand of capital," to invoke Brown's terminology.[206] To the extent that political economy is distinguished by the rejection of the artificial separation of the political and the economic into separate spheres, the retrenchment of class actions—particularly in the United States, where environmental class actions have effectively been neutralized and the "death of class actions"[207] is arguably forthcoming, but also in Canada where the "death of environmental class actions"[208] has similarly been posited—effectively amounts to a form of 'de-democratization.'[209] Insofar as the civil justice system is a fundamental institution in a democratic society, the forces actively seeking to prevent vulnerable people from accessing justice through this fundamental democratic institution are pursuing 'de-democratization' strategies.

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[205] Robert Cox as quoted by Gill and Cutler, "New Constitutionalism and World Order," 2.
[206] Wendy Brown, *Undoing the Demos*, 152.
[207] See, e.g., Herman Schwartz, "The Death of the Class-Action Lawsuit?" *The Nation* 24 September 2015, online: https://www.thenation.com/article/the-death-of-the-class-action-lawsuit/.
[208] Barry Glaspell, "Death of Environmental Class Actions Post-'Inco'" 2 January 2012, online: http://www.mondaq.com/canada/x/214096/Environmental+Law/Death+Of+Environmental+Class+Actions+PostInco+Well+Maybe+Not+Quite+Yet.
[209] Brown, 152.

Simply put, the present analysis examines those vulnerable people who cannot access justice for their reproductive needs in conjunction with the beneficiaries of inaccessibility, rather than solely focusing on the former and neglecting the latter. As Scott et al have demonstrated, the "consumption of chemicals in Canada is inseparable from the generation of pollution in this country."[210] To focus exclusively on people who suffer from environmental injustices without considering the powerful forces that are facilitating the production of such injustices and preventing justice-seeking by harmed people, thereby destabilizing processes of social reproduction that ensure the biological and ecological reproduction of life, yields an incomplete picture of the multidimensional accessibility crisis for collectivities in environmental matters. Such beneficiaries of inaccessibility in environmental justice are typically corporate actors in the political economy of pollution, including corporations involved with resource extraction, biomedicine, pharmaceuticals, chemical production, and industrial manufacturing. As Daniel Faber has documented, there is a polluter-industrial complex that capitalizes on environmental injustices whose expansive network of state and civil society institutions, including research centres, public relations firms, think tanks, and policy institutes, collectively mobilizes against multilayer access to environmental justice through various de-democratization strategies.[211] By conceptualizing multilayer access to environmental justice as a *field of contestation*, this project corroborates a principal insight of the 'feminist political economy of pollution' which recognizes the "inseparable links between profit incentives, the unsustainable production of waste, exploitative labour practices, racialization, and differential exposure

[210] The phrase "consumption of chemicals" broadly signifies the various ways in which toxicants might enter the human body (e.g. ingesting, breathing, epidermal contact, etc.). Scott et al, 3.
[211] Danier Faber, *Capitalizing on Environmental Injustice: The Polluter-Industrial Complex in the Age of Globalization* (New York: Rowman & Littlefield Publishers, 2008).

to pollutants."[212] As explored more fully in subsequent chapters, the political contestation of environmental accessibility is particularly striking in the context of class actions, which have historically been received along ideological lines.

In a review of civil justice scholarship, Rebecca Sandefur proposes a future research agenda that advocates for "a rejection of vague concepts like *disadvantage* in favour of a deep engagement with existing theories of inequality, particularly sociological theories about what race, class, and gender are and how they work."[213] This reorientation of access to justice research towards the racial hierarchies and gender orders that produce and reproduce injustices and inaccessibility aligns with Garth's advocacy for contemporary scholarship to embrace critical social science approaches that "focus on hierarchy and inequality."[214] Pursuant to these new directions, the present analysis examines multilayer access to environmental justice through a feminist political economy approach that recognizes that power, production and social reproduction are inextricably bound with multilayer access to environmental justice.

[212] Scott et al, 5, 16. From an environmental health perspective, this field of contestation is corroborated by the authors who posit that the "relationship between pollution and environmental health harms [is] both *chronic and intentional*." [emphasis added]
[213] Rebecca Sandefur, "Access to Civil Justice and Race, Class, and Gender Inequality," *Annual Review of Sociology* 34 (2008): 339-58.
[214] Garth, 258.

CONCLUSION

During the heyday of the post-war Keynesian welfare state with its normative vision of universality in social provisioning, access to justice was generally viewed as a "social right."[215] Although it never rose to the level of other social sectors, such as healthcare, being traditionally treated as a 'poor cousin' among the pillars of the welfare state, it is clear that under contemporary neo-liberalism, it has come to be viewed as more of a "social luxury."[216] The restructuring of the Canadian welfare state in the current historical conjuncture is inextricably linked to the retrenchment of access to justice into a social luxury—a 'de-democratizing' trend that has continued during the present era of austerity. This retrenchment (or de-democratization) has occurred despite the fact that access to justice has been globally recognized as a fundamental human right—a contradiction that should not be particularly surprising given the absence of binding mechanisms to ensure governmental compliance to social and economic rights obligations.[217] Needless to say, the dominance of market-oriented imperatives and policy instruments associated with the new constitutionalism of disciplinary neo-liberalism (i.e. privatization, devolution of responsibility, deregulation, reductions in social expenditures, commodification) demands greater visibility in analyses of multilayer access to justice in the twenty-first century. This project will seek to explore these processes in the context of environmental class actions in subsequent chapters. It is similarly important to recognize that the theoretical and

[215] Cappelletti and Garth, *General Report*, 9.
[216] Macdonald, *Access to Justice in Canada Today*, 32.
[217] As Bakker observes, such binding mechanisms are necessary to ensure that "governments will be held accountable for their obligations to fulfill economic and social rights under the United Nations Charter and international human rights covenants." Bakker, "Social Reproduction, Fiscal Space and Remaking the Real Constitution," 231. Bakker contends that ensuring compliance entails "the harnessing of national resources (e.g. via fiscal policies) to rights commitments."

empirical retrenchment of access to justice in political discourse and policy reforms has occurred concurrently with the repeated insistence by socio-legal scholars that inaccessible justice is an "important engine in reproducing inequalities."[218]

In this chapter, a critical overview of the progression of access to justice reforms and discourses from earlier waves that prioritized formal legal channels to later waves that reoriented the concept towards preventative measures and non-legal approaches has been provided. This progression has major implications for environmental justice; for example, the Precautionary Principle can be broadly articulated within the purview of multilayer access to environmental justice from a fourth wave preventative standpoint. Indeed, clearly the prevention of environmental injustices is preferable to a robust class action regime to redress such wrongs after they have already occurred. Yet the *ex post facto* character of environmental class actions testifies to the continuing failures of environmental governance to protect vulnerable communities from injustices. Such an ideal state of social protection requires active enforcement of existing regulatory standards, which remains a principal point of struggle for multilayer access to environmental justice: public enforcement of environmental regulations. In this context of negligible enforcement, collective claims-making vehicles such as class actions remain integral features of environmental justice programmes, notwithstanding the discursive and reformist progression of 'access to justice' beyond strictly legal channels. Simply put, the progression of access to justice reforms and discourses does not negate the indispensability of class actions as 'crucial instruments' of social protection. By the same token, the market-oriented strategies of neo-liberal governance are particularly apparent in the context of

[218] Sandefur, "Access to Civil Justice and Race, Class, and Gender Inequality," 3.

class actions as 'policy instruments' in the implementation of private enforcement regimes. The paradoxical tension between class actions as 'crucial instruments' of social protection and class actions as 'policy instruments' in the privatization of regulatory enforcement (which further removes enforcement from democratic controls and compounds the destabilization of the very processes of social reproduction that class actions as 'crucial instruments' serve to protect), along with the concomitant gatekeeping role played by Private Attorneys General in Ontario, is the critical focus of the next chapter.

GATEKEEPERS OF JUSTICE:

PRIVATE ATTORNEYS GENERAL OF ONTARIO

INTRODUCTION

The principal reason why environmental claims are paradigmatic class actions is the negligible enforcement of environmental laws and regulations in Ontario.[219] This failure in environmental governance has precipitated demands by social progressives for collective claims-making vehicles to address the diverse environmental injustices resulting from governmental recalcitrance to fully enforce regulations. These demands largely corroborate the viewpoint of class actions as 'crucial instruments' of social protection, particularly for low-income, racialized communities who disproportionately suffer from environmental injustices, with a strong gendered and age-related (i.e. children and the elderly are highly vulnerable) character of health-impairing effects within such geographical regions.[220] In the United States, environmental justice analyses have largely focused on the unequal burdens of toxic exposures and chemical contamination by African American

[219] The federal and provincial environmental regulatory framework is fairly extensive. At the federal level, environmental statutes include Canadian Environmental Assessment Act, 2012 (S.C. 2012, c. 19, s. 52); Hazardous Products Act (R.S.C., 1985, c. H-3); Species at Risk Act (S.C. 2002, c. 29); Transportation of Dangerous Goods Act, 1992 (1992, c. 34); Pest Control Products Act (S.C. 2002, c. 28); Fisheries Act (R.S.C., 1985, c. F-14); Canada Shipping Act, 2001 (2001, c. 26). At the provincial level, environmental statutes include Ontario Water Resources Act, R.S.O. 1990, c. O.40; Clean Water Act, 2006, S.O. 2006, c. 22; Environmental Bill of Rights, 1993, S.O. 1993, c. 28; Pesticides Act, R.S.O. 1990, c. P.11; Safe Drinking Water Act, 2002, S.O. 2002, c. 32; Environmental Assessment Act, R.S.O. 1990, c. E.18; Toxics Reduction Act, 2009, S.O. 2009, c. 19; Green Energy Act, 2009, S.O. 2009, c. 12; Nutrient Management Act, 2002, S.O. 2002, c. 4. The relevant ministries include the Ministry of the Environment, Ministry of Fisheries and Oceans, Ministry of Health, Ministry for Parks Canada, and the Ministry of Transport.

[220] Broadly speaking, the negligible environmental laws and regulations is a governance failure that amounts to "a political sanctioning of environmental injustice." John Byrne, Leigh Glover, and Cecilia Martinez, eds., *Environmental Justice: Discourses in International Political Economy, Energy and Environmental Policy* (London: Transaction Publishers, 2009), 6. Environmental justice is a multifaceted movement, one aspect of which is environmental racism, which itself has numerous facets, not only enforcement priorities, but also greater public participation in decision-making and policy formation.

communities, whereas in Canada these analyses focus primarily on Indigenous communities, with an emphasis on Anishnaabe, Mi'kmaq, Beothuk, Lubicon Lake Cree, Ardoch Algonquin, Inuit, Aamjiwnaang, Dene, and James Bay Cree peoples.[221] Although such vulnerable groups have borne the brunt of environmental harms in Ontario, elevating levels of toxic production have expanded the conventional borders of risk exposure towards middle-income and predominantly white regions traditionally perceived as insulated from such contamination, which has precipitated the mobilization of diverse social groups against common causes of action. At root, the social benefits of such private enforcement vehicles aligns with a conception of class actions as playing a *complementary* role to public agencies. In other words, in contrast to neo-liberal governance strategies that promote the privatization of regulatory enforcement, the socio-political objective of such progressive demands pragmatically recognizes the benefits of the availability of a collective claims-making vehicle in cases where regulations are negligibly enforced. This contrasts with the former process of privatization, which is informed by a *co-optative* conception that postulates class actions as replacing rather than supporting public agencies.

The *co-optative* conception involves a configuration whereby states deploy economic incentives for private actors (i.e. Private Attorneys General) to assume the enforcement duties of public agencies within a "private enforcement regime."[222] Under

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[221] See, e.g., Andil Gosine, *Environmental Justice and Racism in Canada* (Toronto: Emond Montgomery, 2008); Vandana Shiva, *Soil Not Oil: Environmental Justice in an Age of Climate Crisis* (Berkley: North Atlantic Books, 2015); Toban Black et al, eds., *A Line in the Tar Sands: Struggles for Environmental Justice* (Toronto: Between the Lines, 2014); Julian Agyeman, ed., *Speaking for Ourselves: Environmental Justice in Canada* (Toronto: University of British Columbia Press, 2010).

[222] Sean Farhang, *The Litigation State* (Princeton: Princeton University Press, 2010). Farhang provides a working definition of private enforcement regimes as the aggregative effect of legislative choices "concerning who has standing to sue, which parties bear the costs of litigation, what damages will be available to winning plaintiffs, whether a judge or jury will make factual determinations and assess damages, and rules of liability, evidence and proof that together can have profound consequences for how much or how little private enforcement litigation will actually be mobilized." Farhang, 3-4. See also,

such regimes, the central impetus is the production of "a form of auto-pilot enforcement, with market incentives."[223] Such reliance on private litigation as a policy instrument has been a distinctive feature of governance in the United States since the 1960s, giving rise to its designation as "the litigation state."[224] Yet despite the popularization of private enforcement regimes under disciplinary neo-liberalism, this development has received insufficient critical attention from policymakers and commentators; unsurprisingly, the majority of the established literature is focused on the United States. This critical emphasis is understandable given that the liberal American model of 'regulation through litigation' has often been contrasted with state-centric approaches that have historically prioritized regulatory enforcement by public agencies.

In recent years, however, Canadian scholars have begun to furtively engage in the relative merits and shortcomings of such private enforcement regimes. Whereas some commentators have advocated for deepening private enforcement through the statutory provisioning of additional economic incentives—for example, Craig Jones has advocated in favour of greater public interest considerations in Private Attorney General fee calculations, prohibition of mandatory arbitration clauses, legislative favouring of opt-out rather than opt-in class action regimes, and substantive amendments to toxic causation towards a probabilistic conception[225]—others such as Jasminka Kalajdzic have advocated

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Steven B. Burbank, Sean Farhang, and Herbert M Kritzer, "Private Enforcement," *Lewis & Clark Law Review* 17, no. 3 (2013): 637-722.

[223] Farhang, 5. See also W. Kip Viscusi, ed., *Regulation through Litigation* (Washington D.C.: Brookings Institution Press, 2002).

[224] The term *policy instrument* is applicable insofar as private enforcement regimes are effectively extensions of state power. As Farhang suggests, any given "state capacity is not exhausted by the actions of state personnel or the expenditure of state resources. If the object of interest is the state's capacity to implement its policy choices by controlling the behaviour of other entities, then one must attend not only to the direct actions of state officers, but also to more indirect pathways of regulatory control." Ibid., 7, 12-19.

[225] Craig Jones, "Litigate or Regulate? The Elusiveness of an Effective Consumer Protection Regime," *Canadian Business Law Journal* 53 (2013): 367-69; see also, Jacob Ziegel, "Class Actions to Remedy

for a balanced approach that strengthens the investigative powers of regulatory agencies.[226] At root, private litigation in the form of class actions and public enforcement are not necessarily oppositional; these can complement one another in various ways. For example, private litigation can prompt public agencies to initiate their own investigations, as well as compelling public agencies to adopt stricter regulations.[227]

Needless to say, a major factor in the development of private enforcement regimes has been the budgetary incapacities of regulatory agencies imposed by state restructuring and regressive taxation policies which have permitted the deeper penetration of market forces into state institutions. By the same token, it should be noted that private enforcement regimes have not emerged spontaneously, but are rather products of governance strategies that promote legislative adjustments in statutory frameworks associated with economic incentivization (i.e. contingency fees and damages; but also standing requirements, rules of proof and liability, etc.) with the objective of increasing the probability and profitability of private actors exercising public authority in order to relieve budget-constrained regulatory agencies of enforcement duties. In this light, a private enforcement regime can be viewed as constituting a structural reconfiguration of a state form (typically through the invocation of principles of economic efficiency), indicating that processes of

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Mass Consumer Wrongs: Repugnant Solution or Controllable Genie? The Canadian Experience," *Canadian Business Law Journal* 27 (2009): 879-94; Edward T. Schroeder, "A Tort by Any Other Name? In Search of the Distinction Between Regulation Through Litigation and Conventional Tort Law," *Texas Law Review* 83, no. 3 (2005): 897-931; Keith N. Hylton, "When Should We Prefer Tort Law to Environmental Regulation?" *Washburn Law Journal* 41, no. 3 (2002): 515-24.

[226] Michael Molavi, "Beyond the Courtroom: Access to Justice, Privatization, and the Future of Class Action Research," *Canadian Class Action Review* 10, no. 1-2 (2015): 8-31; Jasminka Kalajdzic, "Public Goals by Private Means & Public Actors Protecting Private Interests," *Canadian Business Law Journal* 53 (2013): 371-81.

[227] Deborah Hensler, "Class actions in context," in eds., Deborah Hensler, Christopher Hodges, and Ianika Tzankova, *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Northampton, MA: Edward Elgar, 2016): 399-401.

'privatization' extend beyond state assets and services to include the basic functioning of state agencies.[228]

This politico-economic context gives rise to a hypothesis of what I call the central contradiction between (1) class actions as 'crucial instruments' of social protection against the destabilizing tendencies of the capitalist system of accumulation and (2) class actions as 'policy instruments' in the institutionalization of private enforcement regimes that permit this accumulative logic to influence social priorities of regulatory enforcement through entrepreneurial litigation. This contradiction can be articulated through the analytical schema of *complementation* and *co-optation*.[229] To the extent that class actions operate as collective claims-making vehicles that *complement* public agency enforcement, they are 'crucial instruments' in promoting multilayer access to environmental justice, especially in cases where governments are recalcitrant to enforce regulations; however, the neo-liberal shift towards a *co-optative* role of class actions as vehicles that replace rather than support public agencies serves to destabilize the very processes of social reproduction that class actions in their complementary role can be mobilized to protect.

Fundamentally, the ramifications of co-optative private enforcement are troubling from the perspective of multilayer access to environmental justice. One of the distinctive features of class action regimes is the reversal of the traditional recruitment process: attorneys recruit clients as opposed to clients recruiting attorneys (which is the norm in other areas of the law). In such a paradigm, the conditions of recruitment acquire the

[228] This type of privatization corroborates a central insight of Isabella Bakker and Stephen Gill who observe that privatization extends to state forms. Isabella Bakker and Stephen Gill, eds., *Power, Production, and Social Reproduction* (New York: Palgrave Macmillan, 2003), 18-19.

[229] A third category of *coordination* can also be discerned which refers to arrangements whereby private actors require the explicit permission of public agents to pursue claims. Given space limitations, this chapter focuses on the major two categories of complementation and co-optation, although this third category could potentially yield interesting theoretical and empirical insights.

characteristics of barriers. Although recruiting strategies based primarily on profit-motives may *incidentally* benefit vulnerable people who disproportionately suffer environmental injustices, this incidental benefit occurs only insofar as the minimum qualifying criteria for representation is satisfied. Ultimately, the reversed recruitment paradigm indicates that a major accessibility barrier for multilayer justice is the gatekeeping role played by these private actors. At present, multilayer access to justice is determined by the profitability criteria of the gatekeepers of justice. Indeed, the case selection criteria employed by such private actors—which are largely informed by profitability and risk-exposure considerations—operate in exclusionary ways for vulnerable people whose incurred environmental harms are deemed insufficiently profitable. The downloading of enforcement duties to such private actors under a 'private enforcement regime' compounds the extent to which such market forces determine who deserves vindication for incurred harms.

This chapter is primarily concerned with the limitations of Ontario's emerging private enforcement regime from the perspective of multilayer access to environmental justice. To this end, the chapter begins by sketching out the ideological parameters of private enforcement by exploring libertarian criticisms—which are largely aimed at the *enforcement of regulation* as opposed to the *privatization of enforcement*—before proceeding to neo-liberal advocacy of this specific type of privatization. This paradigm will subsequently be explored in light of the retrenchment of access to justice through what Wendy Brown calls a 'de-democratization' process. The following section will critically focus on the pivotal agent in a private enforcement regime—Private Attorney General—before situating the analysis within the historical context of Ontario's class action regime

through an examination of the *Class Proceedings Act, 1992*. Finally, the exclusionary facets of Ontario's entrepreneurial regime are critically examined with a focus on the gatekeeping role played by Private Attorneys General (in the reversed recruitment paradigm). Throughout the analysis, the chapter is grounded in the viewpoint that public enforcement must remain an indispensible regulatory feature in the contemporary political economy of Canada. As such, increasing the regulatory capacities of public agencies by strengthening their "investigative, adjudicative, conciliatory and compensatory functions"[230] must take precedence over deepening private enforcement.[231] From a critical policy perspective, given the emphasis of deterrence in regulatory enforcement, the policy objective of behaviour modification (in Ontario's *Class Proceedings Act*) is particularly implicated in this analysis; for example, in numerous environmental claims, including *Hollick v. Toronto* and *Hoffman v. Monsanto*, certification was rejected on the grounds that deterrence was preferably achieved through environmental legislation rather than through the courts.[232] To conclude, the chapter reconfirms the importance of a *complementary* form of class actions in regulatory enforcement while simultaneously critiquing its *co-optative* form in private enforcement regimes.[233]

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[230] Kalajdzic, "Public Goals by Private Means & Public Actors Protecting Private Interests," 380.
[231] The policy objective of behaviour modification is especially implicated in this reiteration of the need for public enforcement and legislative action. In numerous class actions, notably *Hollick* and *Hoffman*, certification was rejected on the grounds that deterrence was most optimally achieved through environmental legislation rather than through the courts.
[232] This pertains to the certification criteria as elucidated in the *CPA* of whether a class action is the preferable procedure for the advancement of the proceeding. *Hoffman v Monsanto Canada Inc*. [2007] SJ No 182 (CA); *Hollick v. Toronto (City)*, 2001 3 S.C.R. 158 [2001] S.C.C. 68.
[233] This approach recognizes the importance of the availability of a vehicle of collective claims-making given the recalcitrance of successive federal and provincial governments to adequately enforce environmental rules and regulations, especially in cases where these involve or impede the resource extractive activities of the polluter-industrial complex in Canada. This is particularly true as it pertains to Indigenous groups. For successive federal and provincial governments, private litigation has proven to be one of the few avenues by which negatively harmed individuals and groups can effect positive change. As such, private litigation allows such collectives to hold governments accountable to the relevant regulations. As recently observed in British Columbia, "[v]iolating permitting rules or skirting proper consultation with

1. THE INVISIBLE FIST OF LAW

In a classic treatise of the libertarian tort reform movement, Walter Olson critiques a perceived 'litigation explosion' that has occurred in the United States since the 1960s—this widely refers to the proliferation of private litigation under the auspices of advancing public goals.[234] According to Olson, whereas lawsuits were traditionally viewed as "private quarrels between private parties for private gain,"[235] the contemporary period has witnessed the emergence of a profit-based industry based upon an emphasis on the purported benefits of private litigation for the public good. Notably, tort reformers claim that this distortion of private litigation objectives has been driven by the emergence of class actions, which are portrayed in the academic commentary and political discourse as unconstitutionally hindering 'free enterprise' for the economic benefit of supposedly frivolous claims-makers and entrepreneurial class action attorneys. In so doing, a reconceptualization of the

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First Nations seems to be part of the due process" on the part of provincial governments, "It's a spin of the dice, risk analysis on their part." See, Carol Linnitt, "New Public Interest Law Office to Fight B.C.'s Biggest Environmental Battles," 28 July 2016, online: http://www.desmog.ca/2016/07/28/new-public-interest-law-office-fight-b-c-s-biggest-environmental-battles.

[234] It is beyond the scope of this investigation to fully explore the politics of the tort reform movement. Further, although this libertarian critique has been decisively refuted by numerous scholars, the socio-cultural perception that the United States is an overly litigious society remains widespread. See, e.g., William Haltom and Michael McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* (Chicago: University of Chicago Press, 2004). As Haltom and McCann point out, the legal reform movement which touted the myth of the litigation explosion upheld the responsibilization thesis by attacking the alleged tendency of "citizens to avoid responsibility for the failings of personal behaviour by blaming a catalog of diseases, addictions, biological disorders, or even the malignant social order that overwhelm individual choice." Ibid., 58. This emphasis on self-reliance and moral responsibility to resolve outstanding legal problems and infringed rights has been a pillar of conservative tort reform advocacy. Pursuant to this defining characteristic, the authors observe the parallels between this individualistic tort reform movement and broader "assaults on welfare entitlement, affirmative action, anti-discrimination claims by gays and lesbians, fairness in the criminal justice system, and other basic rights." In other words, civil claimants receiving some form of redress are critiqued as being "undeserving in much the same way as are the welfare poor, the unemployed, the homeless, juvenile delinquents," and so forth. Ibid., 24. See also, Max Boot, *Out of Order: Arrogance, Corruption, and Incompetence on the Bench* (New York: Basic Books, 1998); Charles J. Sykes, *A Nation of Victims: The Decay of the American Character* (New York: St. Martin's Poor, 1992); Walter Olson, *The Excuse Factory: How Employment Law is Paralyzing the American Workplace* (New York: Martin Kessler Books, 1997); Patrick M. Garry, *A Nation of Adversaries: How the Litigation Explosion is Reshaping America* (New York: Plenum Press, 1997).

[235] Walter Olson, *The Litigation Explosion* (New York: Truman Talley, 1991), 50.

prevailing market ideology of neoclassical economics is provided (borne out of a misreading of Adam Smith):

> You might call it the invisible-fist theory. In Adam Smith's famous account, the butcher and the baker are led in their self-seeking as if by an invisible hand to further the general welfare: private striving leads to public benefit. The bold new twist was the idea that private *quarrels* also lead to public benefit.[236] [emphasis in original]

The devolution of the 'invisible hand' into the 'invisible fist' signifies the state's monopoly on violence upon which the law is ultimately premised; that is to say, noncompliance may result in enforced compliance through the use of coercive force against the losing party.[237] According to such libertarian critiques, this is objectionable insofar as private actors—Private Attorneys General—illegitimately co-opt the coercive power of the state in the pursuit of socially progressive goals.[238] The interrelated concerns over the democratic illegitimacy of this perceived co-optation and the notional injustices of the purposes for which this co-optation is undertaken are readily discernible. Given their redistributive character—'litigation socialism'—it should not be particularly surprising that class actions have borne the brunt of these critiques. Influenced by the dismissal of redistributive justice offered by Friedrich von Hayek, the libertarian tort reform movement perceives class

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[236] Ibid., 51.

[237] Court orders are ultimately enforceable by police powers.

[238] This perceived distortion of legal mechanisms is the primary objective of this group. Indeed, the political dynamics of this critique are evident insofar as the discourse of a 'litigation explosion' is emblematic of broader libertarian critiques of progressive litigation, particularly when claims are levied against the corporate sector through the class action. As numerous scholars have pointed out, the plaintiff's bar tends towards leftist politics—perhaps a lasting impact of the rights discourse of classical liberalism. Moreover, although the political contestation over the class action has remained most fervent in the United States, libertarian critiques of progressive litigation more broadly have been voiced in Canadian law and politics scholarship as well. Perhaps the most popular of these critiques can be found in F.L. Morton and Rainer Knopf, *The Charter Revolution & the Court Party* (Toronto: University of Toronto Press, 2000). Fortunately, the conservative discourse of over-litigiousness has not spread across the border to Canada. However, conceptualizing access to justice as a field of contestation entails remaining vigilant about this potential distortion civil justice litigation.

actions as illegitimate intrusions into the spontaneous ordering of the market and its associated distribution of benefits and burdens. According to Hayek, "[t]o demand justice from such a process [spontaneous ordering of the market] is clearly absurd, and to single out some people in society as entitled to a particular share evidently unjust."[239] In this light, the true injustice is not whichever cause of action prompted any given class action in the first place, but rather the redistribution of wealth towards collective claimants. The co-optation of the coercive force of the state for such redistributive purposes likely accounts for part of the polemical character of these critiques.[240]

Generally speaking, such critiques are primarily concerned with the underlying substantive issues—relating to exploitative labour practices, product liability, environmental health, discrimination against women, racial and ethnic minorities, LGBTQ groups, and other similar causes of action—rather than the shift in governance strategies towards private enforcement regimes.[241] As Deborah Hensler has observed, class actions empower vulnerable collectivities in capitalist societies with the "potential to disrupt the power structure"—a 'power potential' (to invoke Bakker and Gill's term) that accounts for the fervent opposition by powerful politico-economic adversaries: "The fear that collective procedures will disrupt the economic, political and social status quo powers much of the opposition to adopting class actions [...]."[242]

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[239] Friedrich von Hayek, "'Social' or Distributive Justice," in *Law, Legislation and Liberty: Volume 2, The Mirage of Social Justice* (London: Routledge, 1998), 65.
[240] It should be noted that simply because a critique takes on a populist or polemical character rather than a sober academic character, this does not indicate that it should not be taken seriously. In terms of the social production of knowledge, populist and polemical treatises can often be more influential than sober acamedic analysis.
[241] Employment discrimination has become the most common privately prosecuted type of litigation in the United States.
[242] Hensler, "Class actions in context," 401.

The deregulatory impetus of such critiques suggests that the objection to class actions is less about the privatization of regulatory enforcement and more about the regulations being enforced. Simply put, the object of critique is the *enforcement of regulation* as opposed to the *privatization of enforcement*. This is corroborated by the fact that the hegemonic logic of the invisible hand of the market which largely informs private enforcement regimes[243] is never questioned or problematized in any meaningful way—quite the contrary, this ideological device is affirmed as 'sound economics' while its legalization is simultaneously decried as an illegitimate encroachment into the spontaneous ordering of the market and the 'free' operations of economic institutions.[244] In other words, the extension of market logic into the realm of regulatory enforcement is viewed as threatening to "strangle the economy"[245] by enforcing regulations that purportedly impede 'free enterprise'—regulations that would otherwise remain negligibly enforced (or unenforced). As Brown notes, class actions as "legal supports for popular power are

[243] See, e.g., Alberto Cassone and Giovanni B. Ramello, "The Simple Economics of Class Action: Private Provision of Club and Public Goods," *European Journal of Law and Economics* 32 (2011): 205-224. "Yet this mechanism, endorsed by economic theory starting from the paradigm of the invisible hand, also underpins the economic analysis of law, given that many institutions, beginning with property rights, are designed to promote the collective interest through individual initiative." Ibid., 209.

[244] Despite repeated claims of contemporary laissez-faire economics that 'the invisible hand' of the market serves the common good through the private pursuit of individual profit-maximization, it should be noted that the phrase 'the invisible hand' does not actually appear in Adam Smith's *The Wealth of Nations* in this context. Its only appearance is in reference to the potential flight of British capital, wherein Smith postulates that British investors would remain in Britain and support domestic industry, rather than pursue higher rates of profit in foreign jurisdictions; according to Smith, these investors would be compelled to remain in Britain as if kept by an 'invisible hand.' The popularization of 'the invisible hand' of the market has been largely constructed as an ideological justification for neo-liberal reforms in the contemporary era. See, Adam Smith, *The Wealth of Nations* (Oxford: Oxford World Classics, 2000), 292. Others have postulated that the metaphor of 'invisible hands' was popularized in the eighteenth century by Scottish philosophers as a way to describe outcomes without reference to immediate intentionality, that is, as an explanatory metaphor for phenomena that are not reducible to human design. The metaphor thereby describes "dynamic social processes which explain aggregate and ordered social patterns and outcomes as specific kinds of unintended consequences of human action." For an overview of the discursive use of 'invisible hands', see Nils Karlson, *The State of State: Invisible Hands in Politics and Civil Society* (New Brunswick, New Jersey: Transaction Publishers, 2002).

[245] Sykes, 248.

discursively identified in neo-liberal reason as unacceptable blockades in a (mythical) free market, parallel to the ways that welfare provisions such as health care and even public services and public institutions come to be coded as socialist and cast as market democracy's antithesis."[246] Needless to say, such objections appear inexplicable at first glance: otherwise stalwart proponents of entrepreneurialism, privatization, and self-regulation vociferously object to entrepreneurial litigation, privatized enforcement, and demand strict and robust public regulation of litigation financing (see Chapter 3).[247]

From an access to justice perspective, the crucial point at stake for libertarian tort reforms has not been that market forces should not be allowed to determine social priorities, but rather that private enforcement regimes have served to illegitimately allow claims-makers access to justice through the use of vehicles such as class actions in order to vindicate their harmed interests.[248] The polemical critique of class actions does not excoriate private enforcement regimes for inadequately promoting greater access to justice or submitting regulatory enforcement to the dictates of the market, but rather for operating too effectively in promoting greater access to justice and redistributing wealth through the co-optation of the coercive force of the law, which ultimately restricts the behaviour of economic actors such as corporations. This indicates a significant departure from the guiding premise of the present analysis: far from being *too effective* in promoting access to justice, class actions have not been *effective enough*. Moreover, the availability of class

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[246] Brown, 153-54.

[247] This recalls Karl Polanyi's observation in *The Great Transformation* that where "the needs of a self-regulating market prove incompatible with the demands of laissez-faire, the economic liberal turn[s] against laissez-faire and prefer[s]—as any antiliberal would have done—the so-called collectivist methods of regulation and restriction." Updating this perspective, it may be possible to articulate this inexplicable situation as a confrontation between libertarianism and economic liberalism. Karl Polanyi, *The Great Transformation* (New York: Beacon Press, 2001), 155.

[248] This standpoint is indicative of the merits of conceptualizing access to justice as a field of contestation.

actions has been seized upon by state actors in order to privatize enforcement duties rather than to complement public agencies. Nevertheless, the empirical outcome of such ideological critiques has been the successful retrenchment of multilayer access to justice (especially in environmental matters) through a process that Brown has called 'de-democratization'.

2. DE-DEMOCRATIZATION & ACCESS TO JUSTICE

In the United States, libertarian tort reform advocacy has been fairly successful in shaping public perceptions of the civil justice system (and the broader socio-cultural discourse on litigiousness), as well as narrowing the purview of class actions through procedural reforms.[249] This hegemonic project has extended into the functioning of democratic institutions to the point where environmental class actions have effectively been neutralized as viable vehicles of collective claims-making through a series of legislative amendments and restrictive jurisprudential shifts. Broadly identifiable as a 'retrenchment of access to justice', this de-democratizing process has not only occurred through partisan legislation, but also through the technical rules determining access to courts, lending credence to E.E. Schattschneider's proceduralist dictum that "the rules of the game determine the requirements of success."[250] A similar restrictive development is underway in Canada where pre-trial certification hearings have consistently individualized collective harms and denied certification for environmental health-based claims (as explored in

[249] The social production of legal knowledge indicates that polemical treatises such as Olson's *The Litigation Explosion* are often more effective in shaping public discourse over more nuanced academic scholarship, as Haltom and McCann have observed. See, "The Social Production of Legal Knowledge," in *Distorting the Law*, 1-32.

[250] E. E. Schattschneider (1892-1971) as quoted by Sarah Staszak in *No Day in Court: Access to Justice and the Politics of Judicial Retrenchment* (Oxford: Oxford University Press, 2015), 211.

greater detail in Chapter 4). As some commentators have remarked, "the invention and development of the class action was the dominant judicial innovation of the late twentieth century,"[251] and "its dismantling appears to be the major procedural project of the conservative majority of the contemporary Supreme Court in the twenty-first century."[252] Moreover, numerous scholars[253] have observed that this retrenchment of multilayer access to justice has not been confined to juridical dismantling, but has rather occurred at all levels of government in the United States (as evidenced by the passage of the Class Action Fairness Act of 2005) in addition to an array of similar retrenchment initiatives.[254] Brown has described this juridical retrenchment as a form of "de-democratization" that serves to "strengthen the political hand of capital and weaken associations of citizens, workers, and

[251] John C. Coffee Jr, *Entrepreneurial Litigation: Its Rise, Fall, and Future* (Cambridge, Mass.: Harvard University Press, 2015), 2.

[252] On the curtailment of mass torts, Coffee Jr. claims that the retrenchment might be a pragmatic compromise given that mass torts often involve claims that are individually litigable, i.e. not negative value claims. In this light, Coffee Jr. argues that the merits of mass torts is largely reducible to the policy objective of judicial economy. This unduly diminishes the importance of the economies of scale that class actions provide, as well as the broader social mission of class actions—reducing the latter into individual adjudication. Finally, this pragmatic compromise fails to recognize non-economic barriers to access to justice (i.e. social and psychological) that are overcome through class actions. See John C. Coffee Jr, *Entrepreneurial Litigation: Its Rise, Fall, and Future* (Cambridge, Mass.: Harvard University Press, 2015), 2, 95-118. For a range of emblematic U.S. cases of this judicial retrenchment, see, for example, *(Walmart Stores, Inc. v. Dukes 131 S.C. 2541 (2011). 2011)*; *(AT&T Mobility LLC v. Concepcion, 131 S.C. 1740 (2011). 2011); (Smith v. Bayer Corp., 131 S.C. 2368 (2011). 2011)*; *(Erica P. John Fund, Inc. v. Halliburton Co. (Halliburton I), 131 S.C. 2179 (2011). 2011)*; *Comcast Corp. v. Behrend, 133 S.C. 1426 (2013).* 2013; *(Genesis Healthcare Corp. v. Symczyk, 133 S.C. 1523 (2013). 2013)*; *(Amgen Inc. v. Connecticut Retirement Plans & Trust Funds, 133 S.C. 1184 (2013). 2013).*

[253] See, e.g., Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton: Princeton University Press, 2008); Sarah Staszak, "Institutions, Rulemaking, and the Politics of Judicial Retrenchment," *Studies in American Political Development* 24, no. 2 (2010): 168-89; Judith Resnick, "Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: 'The Political Safeguards' of Aggregate Translocal Actions," *University of Pennsylvania Law Review* 156 (2008): 1929-69.

[254] As Sarah Staszak observes, "restrictions on Section 1983 actions for lawsuits against the government, attempts to cap punitive damages, changes to the Federal Rules of Civil Procedure promoting settlement and summary judgment, continued development of state sovereign immunity and qualified immunity for government officials, and promotion of binding arbitration and alternative dispute resolution more generally." Sarah Staszak, "Realizing the Rights Revolution: Litigation and the American State," *Law & Social Inquiry* 38, no. 1 (2013): 242.

consumers."[255] According to Brown, this de-democratization is particularly apparent in the context of class actions, which "have long been crucial instruments of worker and consumer resistance to discriminatory, deceptive, or fraudulent corporate behaviour, from underpaying and overcharging to polluting or violating health and safety laws."[256] Brown concludes by suggesting that class actions have been "effectively neutered"[257] in the United States as a result of this de-democratization.

During this same period of juridical retrenchment by American courts and legislatures, the Supreme Court of Canada has opened the door to American-style class actions.[258] Although the successes of tort reform advocacy have been most prominent in recent years, the retrenchment policies that have gained traction actually predate the introduction of class proceedings legislation in common law provinces (i.e. pre-1992). While this incongruous development might precipitate a sense of cautious optimism in Canada, nevertheless proponents and beneficiaries of multilayer access to justice should remain cognizant of the potential cross-border influence of such retrenchment policies.[259] As Catherine Piché has suggested, "it is difficult to argue in favour of a unified, truly *Canadian* or *American* legal culture."[260] A difficulty that is compounded by the observation that "social, political, economical and cultural developments in the United States

[255] Wendy Brown, *Undoing the Demos* (New York: Zone Books, 2015), 152.
[256] Ibid.
[257] Ibid.
[258] With the exception of Prince Edward Island, provincial legislatures in Canada have also opened the door to class actions by introducing respective class proceedings legislation during this period.
[259] Notably, there has thus far not been organized opposition to class action legislation by either business interests or provincial or federal governments in Canada. This might be a result of the relative absence of putative damages in the Canadian context. As the American experiences indicates, however, this general acquiescence in Canada should not be taken for granted.
[260] Catherine Piché, "The Cultural Analysis of Class Action Law," *Journal of Civil Law Studies* 2 (2009): 101.

reciprocally influence those of Canada."[261] Although American institutional arrangements—specifically the structure of separated powers—facilitate the creation and maintenance of private enforcement regimes, the reciprocal influence in legal cultures within the parliamentary institutions of the Canadian state has nevertheless been significant, particularly in the context of class actions, which originated in 1966 through reforms to Rule 23 of the Federal Rules of Civil Procedure. In this context, the two national regimes "are subject to a constant cross-fertilization of ideas."[262] Indeed, the individualization of collective harms, particularly environmental health-based harms—which strikes at the core of class actions to effectively neutralize their collectivist strength-in-numbers logic—can already be distinguished in Canadian jurisprudence. Ultimately, the similarities between these regimes is indicative of the potential of similar ideological objections being levied by organized interests seeking to constrict the range of access to justice vehicles and remedies available to harmed individuals and groups in Canada.

In point of fact, the most influential of these critiques has already materialized in the Canadian context; namely, the problematic imperatives of entrepreneurial litigation, which class action regimes often foster. This broadly refers to litigation that is primarily driven by attorneys rather than clients. That is, the plaintiff's attorney in class actions—economically incentivized by the potential for significant monetary returns—has increasingly been viewed as "a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney's own economic self-interest."[263] Law and economics scholarship has traditionally

[261] Ibid.
[262] Ibid.
[263] John C. Coffee Jr., "Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation," *Columbia Law Review* 100 (2000): 371.

characterized this major problem of entrepreneurial litigation through the theory of agency costs: whereas in ordinary litigation the client acts as the principal and the attorney as the client's agent, in class action litigation the client often does not possess sufficient incentive or capacity to monitor the attorney's conduct.[264] Simply put, the primary instigator of class action litigation is often the plaintiff's attorney, rather than the plaintiff. This is a fairly natural outgrowth of the pecuniary interests at stake in class action litigation: the primary (monetary) beneficiary of a successful action is often the plaintiff's attorney. In other words, the primary instigators and the primary beneficiaries of class action litigation are plaintiff's attorneys, rather than class members. It is hardly surprising, therefore, that law and economics scholars have repeatedly sought to correct this 'market failure' by realigning the interests of attorneys and clients through various proposals.[265] Nor is it surprising that libertarian critics have repeatedly focused on the 'agency problem' in broader curtailment strategies.[266] Notably, this conceptualization of the 'agency problem' does not sufficiently account for the pecuniary stake that attorneys have in any given class action, which is often significantly higher than any single class member. As John C. Coffee Jr. suggests, the "attorney thus behaves more like a principal than an agent," and it may be instructive to view plaintiff's attorneys less as agents than entrepreneurs, "with the class members serving largely as passive partners."[267] Although this reconceptualization may effectively circumvent the "agency problem" inherent in class actions, it merely serves to

[264] See, e.g., John C. Coffee Jr., "The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action," *The University of Chicago Law Review* 54, no. 3 (1987): 877-937.
[265] Coffee has been the foremost scholar in this regard.
[266] Notably, see Martin Redish, *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* (Stanford: Stanford University Press, 2009). Unlike the aforementioned tort reforms who tend toward polemical analysis, Redish's more sober critique of class actions identifies a number of important areas (i.e. settlement fairness; lack of representation; etc.) and ultimately argues that class actions should be abolished based on constitutional grounds in the United States.
[267] Coffee Jr., *Entrepreneurial Litigation,* 5.

reinforce the prevailing libertarian critique of tort reformers that the supposed public benefit of class actions is artificially manufactured in order to provide "a sorely needed moral basis for the sue-for-profit industry."[268] This is a pivotal facet of the ideological justification that informs the 'invisible fist' theory of law.

Yet the objection to this form of entrepreneurialism is theoretically inconsistent with the market logic of laissez-faire economics that such detractors concurrently endorse. Tort reformers have taken fervent exception to the profit-maximizing behaviour of entrepreneurial litigators, as though economic self-interest in the pursuit of public goals does not adhere to the logic of the invisible hand of the market (which, needless to say, holds that the pursuit of economic self-interest ultimately promotes the common good, even when this is not explicitly the objective of the profit-maximizing behaviour). It stands to reason that *if* profit-maximizing behaviour in the pursuit of economic self-interest promotes the common good, even where *this is not* an explicit objective, then surely this type of economic conduct promotes the common good when *it is* an explicit objective. Despite this theoretical inconsistency, the libertarian critique has given rise to the negative designation of class attorneys as 'bounty hunters'. Proponents of the class action as a pillar of private enforcement regimes have typically preferred to identify class attorneys by a more diplomatic moniker: Private Attorney General.

Finally, the ongoing debate over the identification of private actors exercising public authority as (1) an illegitimate co-optation of the coercive force of law (i.e. the libertarian position) or (2) a legitimate privatization of enforcement duties pursuant to the principles of economic efficiency (i.e. the neo-liberal position) largely foregoes the

[268] Olson, 53.

progressive critique of such privatization as removing regulatory duties beyond the control of democratic institutions, as posited by this analysis. In this light, the Private Attorney General as a gatekeeper of justice takes on the characteristics what A. Claire Cutler refers to as an entrepreneurial legal actor whose operative function contributes to "reconfigure[ing] state/society relations by legitimating private regulation [and] entrenching and deepening the paradoxical exercise of public authority by private agencies."[269] In other words, the dominant discursive parameters on private enforcement largely neglect the progressive critique of the neo-liberal position which problematizes private regulation as a viable governance strategy. According to Cutler:

> This alliance between public and private agents, between governmental and corporate elites, is working a reconfiguration of authority relations. It is blurring the distinction between the public and private realms and enhancing the legitimacy of the latter as a source of authority. The alliance is cemented by a commitment to the expansion of capitalism through the promotion of private regulatory authority. The disembedded law merchant provides the legal and ideological foundations for privatization.[270]

Ultimately, such critiques of privatization speak to the detrimental impacts of allowing strictly market ordering of enforcement priorities. However, the positive role of class actions as 'crucial instruments' of social protection in the *complementary* form as opposed to the *co-optative* form requires greater investigation. The remainder of this chapter clarifies these distinct categorizations of the Private Attorney General. As Bryant Garth et al have observed, the Private Attorney General can be perceived as a "mercenary law

[269] A. Claire Cutler, "Artifice, ideology and paradox: the public/private distinction in international law," *Review of International Political Economy* 4, no. 2 (1997): 264. See also, Robert Wai, "Transnational Private Law and Private Ordering in a Contested Global Society," *Harvard International Law Journal* 46, no. 2 (2005): 471-86.
[270] Ibid., 279.

enforcer"[271] whose entrepreneurial character drives case selection, while conversely being perceived in another form as a "social advocate"[272] who employs class actions as collective claims-making vehicles in cases where governments are recalcitrant to enforce regulations.

3. PRIVATE ATTORNEY GENERAL

As examined in Chapter 1, the second wave of reforms concerned with collective access to justice is most applicable in evaluating the role of class actions. This wave witnessed the emergence of the Private Attorney General as a figurative private actor who exercises public authority alternatively pursuant to the principles of social protection and economic efficiency in the form of a social advocate and a legal mercenary. During this period (roughly 1970s-1980s), Bryant Garth et al identified this figurative actor as an "accepted character" and a widely supported "legal institution."[273] As Owen Fiss observes, the figure of the Private Attorney General is the combination of "two different agencies: public officers and private citizens."[274] Although the authors are speaking in the American tradition, where class actions have a richer history, the Private Attorney General similarly obtains in Canada, where many commentators have observed its figurative presence.[275] But what does the term 'Private Attorney General' signify? And what are its implications for multilayer access to environmental justice?

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[271] Bryant Garth, Ilene H. Nagel, and S. Jay Plager, "The Institution of the Private Attorney General: Perspectives From An Empirical Study of Class Action Litigation," *Southern California Law Review* 61 (1988): 356.
[272] Ibid.
[273] Ibid., 352. See also, Carl Cheng, "Important Rights and the Private Attorney General Doctrine," *California Law Review* 73, no. 6 (1985): 1929-55.
[274] Owen Fiss, "The Political Theory of the Class Action," *Washington and Lee Law Review* 53, no. 1 (1996): 21.
[275] Notably, see the Hon. Frank Iacobucci, "What is Access to Justice in the Context of Class Actions?" in ed., Jasminka Kalajdzic, *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick, and Rumley,* (Toronto: LexisNexis, 2011), 17.

The earliest appearance of the concept of the Private Attorney General can be traced to an American federal appeals court ruling in 1943 involving New Deal regulatory enforcement. Despite this early invocation, the signifier of the 'Private Attorney General' remained largely neglected until the Rights Revolution of the 1960s and the emergence of the second wave of access to justice reforms in the 1970s. Thereafter, the signifier experienced a sudden surge in popularity in American jurisprudence. As William B. Rubenstein has pointed out, in the 1940s and 1950s, it appeared 7 and 11 times, respectively; followed by 70 appearances in the 1960s. Starting from the 1970s, the 'Private Attorney General' appeared 759 times, then 1,554 times in the 1980s and 2,523 times in the 1990s.[276] Given Canada's relatively nascent class action history—the trilogy of cases that opened the door to class actions arose in the early 2000s—the signifier has not experienced this heightened level of prevalence, although it has nevertheless been cited several times in Canadian jurisprudence from the mid-2000s to the present day.[277]

Comparatively speaking, the prevalence of the Private Attorney General in the United States as opposed to Canadian jurisprudence might be attributable to differences in the cost regimes of each state (and sub-state formations). Whereas Canada largely upholds the English Rule, otherwise known as the 'loser pays' principle, the American Rule holds

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[276] William B. Rubenstein, "On What A 'Private Attorney General' Is—And Why It Matters," *Vanderbilt Law Review* 57, no. 6 (2004): 2135. Interestingly, Rubenstein also offers a taxonomy of private enforcement through the figure of the Private Attorney General, although Rubenstein's taxonomy rigidly upholds the private/public distinction by holding that *simulation*—his third category—is a solely private endeavour. However, the basic premise of the present analysis holds that class actions involve *multilayered interests*—that is, individual, collective, and *public*—rendering the *simulation* category of Rubenstein's taxonomy theoretically incompatible with the present analysis.

[277] For example, we find a basic definition of the concept of being a private citizen as a "prosecutor or enforcement agency, what the Americans call a sort of private Attorney-General" in *Alberta (Child, Youth and Family Enhancement, Director) v. B.M., 2009 ABCA 270. 2009)* at 16. We can also find reservations of the concept: "The notion of private enforcers (or 'private Attorneys General'), particularly where they act for personal gain, is worrisome unless strictly controlled," in *(Whiten v. Pilot Insurance Co., [2002] 1 SCR 595, 2002 SCC 18. 2002)* at 44.

that each party is liable for their respective costs.[278] If understood through this analytical lens, the popularization of the concept in the 1970s was primarily a consequence of changing statutes relating to attorney's fees in the United States, which allowed for the recovery of legal expenses for successful Private Attorneys General on condition that the advancement of the public interest was demonstrated. "Once loosed as a matter of money," Rubenstein observes, "the Private Attorney General concept's diffusion was limited only by the imagination of lawyer's seeking attorney's fees."[279] As such, class counsel became economically incentivized to employ the signifier of the Private Attorney General. In Canada, on the other hand, where the English Rule has prevailed in most jurisdictions, this economic incentive was largely inexistent.[280] Indeed, the extent to which Canadian class counsel have been explicitly identified as Private Attorneys General is often limited to conceptualizations of their role as private actors exercising public authority in the pursuit of multilayer interests.[281] Importantly, however, the relative prevalence of a particular signifier is not necessarily indicative of the prevalence of the activity that it signifies: private enforcement.

Nevertheless, despite this widespread deployment, there remains considerable ambiguity over its precise meaning. As Jeremy Rabkin has remarked, "[i]t is revealing that

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[278] Notably, the Ontario Law Reform Commission report on class actions from 1982, which laid the groundwork for the *Class Proceedings Act, 1992*, explicitly advocated for changes in the provincial cost regime in favour of the American Rule. This endorsement was ultimately rejected. Although some Ontarian firms choose to indemnify representative clients for costs, this practice is not mandatory. This does not mean that paying costs is automatic; the court may use its discretionary judgment to relieve the representative plaintiff of this burden if the case in question raises a novel point of law, involves the public interest, or qualifies as a test case.

[279] Rubenstein, 2136.

[280] Although Ontario's influential class action regime upholds the English Rule, other provincial regimes, such as British Columbia, have opted in favour of the American Rule, given the potential disincentivization of the 'loser pays' principle in mass litigation.

[281] As opposed to plaintiff efforts to recover legal expenses (i.e. United States).

there is still no legal definition, nor any well-established pattern of usage, which precisely identifies a litigant as a 'Private Attorney General'."[282] This leads Rabkin to polemically state that the Private Attorney General "could be almost anyone—an ordinary citizen, perhaps, with just a bit more public spirit than his neighbours."[283] Even defenders of the Private Attorney General Model of regulatory enforcement have recognized that the signifier has been "surprisingly mercurial,"[284] since it has been used to refer to both plaintiffs and defendants, leading one commentator to pose the rhetorical question: "What other concept is so malleable that it can be deployed to signify either a plaintiff or a defendant, a lawyer or a client?"[285]

Even though the signifier does contain a lingering indeterminacy, it cannot be said that the Private Attorney General has not demonstrated a "well-established pattern of usage," notwithstanding Rabkin's libertarian critique of the concept (and class actions, more broadly).[286] While it is perfectly clear that various meanings have been attributed to the signifier since its earliest deployment in 1943, a customary understanding has developed around its key characteristic of private regulatory enforcement—a figurative private agent exercising public authority in pursuit of multilayer interests. Moreover, despite this notionally broad purview, the Private Attorney General has predominantly applied to plaintiff counsel in the context of class actions.[287] Although a single citizen's

[282] Jeremy A. Rabkin, "The Secret Life of the Private Attorney General," *Law and Contemporary Problems* 61 (1998): 194-95
[283] Ibid., 180.
[284] Rubenstein, 2129.
[285] Ibid.
[286] In fact, Rubenstein has pointed out that Rabkin's contention that the signifier of the Private Attorney General experienced diminished popularity in case reports after its eruption in the 1970s is an empirically false statement: the signifier continued to experience increased popularity in each successive decade. Rubenstein, 2135.
[287] Garth et al, 355.

individual suit may deter future misconduct by similarly situated parties, thereby promoting the public interest, a class action involving hundreds or thousands of claimants may exponentially serve the public interest, thereby yielding social benefits that are beyond the capacities of individual suits. As discussed below, the scale of class actions is directly related to their ability to obtain behaviour modification—deterring future misconduct is the most prominent intersection of private and public interests. In point of fact, established literature on the Private Attorney General corroborates these parameters, even as scholars vehemently disagree on its legitimacy and ideological character. However, the implicit spectrum involved in the private/public distinction as it pertains to the represented interests—that is, that achieving compensation for incurred wrongs being primarily a private interest whereas achieving deterrence for future misconduct being primarily a public interest—does not reflect the complexities involved in environmental harms. Indeed, the term 'multilayer interests' that this project employs is indicative of the tripartite interests represented in class actions: individual, collective, and public. The interrelations of these interests is perhaps most apparent in the context of environmental claims, as J.P.S. McLaren points out:

> In most instances the purpose of environmental litigation will be to seek an improvement in the environment in which the plaintiff and his [*sic*] neighbours live. The most satisfactory way of achieving this is to persuade the court to restrain the defendant from conducting his operations in such a way as to cause pollution. By grant of a perpetual prohibitory injunction direct pressure is brought upon the offender to seek ways of obviating the pollution which he is causing, and if he fails to comply his enterprise may be curtailed entirely. It may be argued that the same result can be achieved, albeit indirectly, through the award of damages. This assumes, however, that the damages awarded are high enough to cause the industrialist to consider changing his *modus operandi*. If the damages are

> modest he may look upon them as a licence to continue pollution. If this is allowed to happen then the environmental interest is effectively subverted.[288]

Notwithstanding the synthetic distinctions in the tripartite interests involved in environmental class actions, it should be noted that class action policy in Ontario has consistently prioritized 'access to justice' as the primary policy objective of the *Class Proceedings Act, 1992*—whereas behaviour modification is considered a secondary policy objective and judicial economy is logically inconsistent with class actions involving negative value claims (which environmental claims typically involve). This prioritization of access to justice over behaviour modification suggests that the primary objective of promoting remedies for harmed parties takes precedence over the secondary objective of promoting deterrence of future misconduct. Moreover, the tension between these policy objectives directly implicates the Private Attorney General Model given its tendency to diminish the role of class members through this reorientation towards punishment and deterrence—both of which can be achieved without any class members being remedied for their incurred harms through cy près awards. This fundamentally shifts the underlying compensatory framework of class actions into "either a bounty hunter or civil fine framework."[289] As an integral part of private enforcement regimes, the Private Attorney General Model may serve to reprioritize the policy objectives of class action regimes to the point where such actions can be viewed as successful with or without compensation for

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[288] J.P.S. McLaren, "The Common Law Nuisance Actions and the Environmental Battle – Well-Tempered Swords or Broken Reeds?" *Osgoode Hall Law Journal* 10 (1972): 547, as quoted by Heather McLeod-Kilmurray, *The Process of Judging the Environment: Civil Procedure, Environmental Ethics and their Effects on Environmental Law* (SJD, University of Toronto, 2007) [unpublished].
[289] Martin Redish, "Rethinking the Theory of the Class Action: The Risks and Rewards of Capitalistic Socialism in the Litigation Process," *Emory Law Journal* 64 (2014): 108.

class members.[290] Of course, the policy objectives of access to justice and behaviour modification are not necessarily mutually exclusive; that is to say, the compensatory objective of securing fair and equitable settlements may simultaneously serve to deter future misconduct simply by virtue of the settlement amount (and the concomitant risk posed to similarly situated wrongdoers). In other words, access to justice and behaviour modification are not unrelated objectives, despite the fact that each may manifest in distinct ways depending on any given case.

In light of the analyses of preceding sections of private enforcement regimes and the Private Attorney General more broadly, this chapter now turns to Ontario's *Class Proceedings Act* more specifically, in order to critically evaluate the origins of this provincial class action regime in light of the preceding framework.

4. ONTARIO'S *CLASS PROCEEDINGS ACT, 1992*

Although Ontario's groundbreaking class action regime was formally introduced by the New Democratic Party of Ontario with the *Class Proceedings Act, 1992*,[291] the legislative

[290] This leads Redish to reject the Private Attorney General Model as producing a "skewed perspective on the class action, which effectively alters the underlying substantive law being enforced in democratically and constitutionally impermissible ways." Of course, this is perhaps an unsurprising stance, given Redish's general critique of class actions *tout court* as undemocratic and unconstitutional. Pursuant to this logic of distorting the compensatory framework, Redish rejects cy près awards. It should be noted that rejection of cy près awards effectively provides wrongdoers with a strategy for freely engaging in misconduct: to disperse harms in such a way that the only feasible distribution of a potential settlement would be through a cy près award. In this light, a civil fine framework, despite its distortion of the compensatory function of civil litigation, does not appear too objectionable. Ibid., 107-8.

[291] Originating in the *Report on Class Actions*, which was produced by the Ontario Law Reform Commission in 1982 and eventually formalized in the *Class Proceedings Act, 1992*, Ontario's legislation identifies access to justice as one of the three guiding pillars of class actions (alongside the aforementioned judicial economy and behaviour modification). Interestingly, none of these principles are explicitly stated in the *Class Proceedings Act, 1992,* S.O. 1992. However, SCC decisions since then, notably *Dutton, Holick,* and *Rumley*, as well as the more recent *Fischer* decision, have read access to justice into their reasoning, lending credence to the claim that Ontario's class action regime (if not its legislative framework) shares these concerns.

history of this policy betrays a greater complexity. The origins of the *Class Proceedings Act* lay in the three-volume report of the Ontario Law Reform Commission ('OLRC Report') from 1982 which examined the inadequacies of individual remedies for collective harms and endorsed the creation of class proceedings legislation in common law jurisdictions.[292] The OLRC Report was commissioned during the tenure of the Progressive Conservative Party of Ontario, however, class proceedings legislation was not formally introduced until the NDP was elected in 1992. The legislation was drafted in the late 1980s by the Liberal Party of Ontario, but the electoral defeat of 1991 prevented the Liberals from tabling the legislation in Parliament. To examine the legislative origins of the *Class Proceedings Act*, therefore, we must look toward the governing term of Liberal Attorney General Ian Scott, under whom the legislation was drafted. Scott observed that the *Class Proceedings Act* was the most important reform of his political career:

> In large part, the availability of class proceedings is an access-to-justice issue. But there is more to the innovation than that. Representative plaintiffs, empowered to litigate on behalf of a class, serve in effect as some sort of private attorney general to attack what they consider to be shoddy workmanship, environmental banditry or corporate skullduggery. Through class actions, the government found a cost-effective way to promote private enforcement and thereby take some pressure off enforcement by the budget-restrained government ministries.[293]

This is a revealing statement that identifies the sweeping interconnectedness of the "cost-effective" principle of efficiency, private regulatory enforcement, and the financial pressures on "budget-restrained government ministries" that is ostensibly relieved by Private Attorneys General. This interconnectedness suggests that evaluating Ontario's

[292] Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982).
[293] Ian Scott (1934-2006) as quoted by Jasminka Kalajdzic, "Access to Justice for the Masses?" (LL.M. Thesis, University of Toronto, 2009), 53.

class action regime through the analytical frame of any of these causes in isolation would likely yield an incomplete picture.[294] For present purposes, perhaps the most consequential revelation is that class actions were not solely introduced to promote greater access to justice for collective claims-makers. According to Scott, class actions simultaneously promote private enforcement, thereby alleviating the financial pressures on insufficiently funded public agencies. The standpoint that increasing the budgets of such agencies to facilitate their proper functioning in regulatory enforcement is not advanced—this standpoint is often viewed as beyond the realm of possibility under neo-liberalism, or to borrow Richard Falk's terminology, beyond the "horizon of feasibility."[295] Scott's advocacy in favour of private enforcement is indicative of a pragmatic compromise reflective of the constraining economic conditions imposed by neo-liberal restructuring which has precipitated limitations in regulatory state capacities—that is, the capacity of states to implement and enforce regulations. In light of the immense growth in the quantity and complexity of law in developed states, regulation scholars such as John Braithwaite have suggested that delegating regulatory enforcement to private actors becomes "a coping strategy."[296] A normative distinction appears in this context between the *complementary* form of class actions as 'crucial instruments' of social protection intended to promote multilayer access to justice where governments are recalcitrant to enforce regulations and

[294] Excluding considerations of the economic restructuring of which civil justice reform was but a part will certainly produce questionable analyses of the origins of the Canadian class action.
[295] Richard Falk as quoted by Stephen Gill and A. Claire Cutler, "New Constitutionalism and World Order," 19.
[296] Braithwaite argues that such delegation should be publicly monitored. The argument is therefore in favour of metagovernance strategy. John Braithwaite, *Regulatory Capitalism* (Northampton: Edward Elgar, 2008), 160.

the *co-optative* form of class actions as intended to relieve budget-constrained public agencies of enforcement duties through privatization.

More to the point, the constraining 'fiscal space' that has precipitated the promotion of private enforcement regimes has also shaped the functioning of these regimes. This is especially pronounced in the context of class actions, which are primarily resolved through settlements. Clearly this settlement culture is aided by a general assumption of fairness by courts, whether justifiable or not, which perpetuates the belief that settlements advance the interests of class members and promote access to justice. Yet the reason offering the greatest explanatory power for this policy preference is not the inherent merits of the settlement process, but rather the preservation of scarce resources—a consequent of strict public budgeting and constraining 'fiscal space' for access to justice objectives. Indeed, the ubiquity of the phrase ("scarce resources") testifies to the unremitting financial pressure placed on the civil justice system by successive provincial and federal governments since the neo-liberal restructuring of the Canadian state in the 1980s. A basic search of case reports in the Canadian Legal Information Institute database reveals that the phrase has been invoked 1,740 times in Ontario alone.[297] This settlement culture also negatively affects the development of the common law, thereby facilitating the privatization of a significant aspect of parliamentary democracy (veritably a "democratic deficit").[298]

Naturally, it is alarming to discover that inadequate funding of the civil justice system is primarily responsible for strong judicial biases in favour of class action settlement—despite the adversarial void, the absence of a mandatory amicus curiae, and

[297]Accessed on 14 May 2015. Online: http://www.canlii.org/en/on/#search/jId=on&all=scarce%20resources&origJId=on.
[298] Trevor C. W. Farrow, *Civil Justice, Privatization and Democracy* (Toronto: University of Toronto Press, 2014).

the possibility of collusion between parties. One of the most consequential objections to entrepreneurial litigation has consistently been this possibility of collusion between plaintiff and defence attorneys—a possibility that is compounded by the adversarial void at the settlement stage. This gestures towards the fact that Private Attorneys General are generally not subject to the heightened levels of scrutiny and transparency as their public counterparts. As one commentator has observed, the "accountability problems associated with the Private Attorney General (and entrepreneurial litigation generally) grow with the case's scale: The greater the size of the class and liabilities at stake, the greater the prospect of fiduciary failure. The incentives for collusion become 'too big to decline.'"[299]

In light of these potentially conflicting interests, Catherine Piché has recently provided a set of reform-oriented principles designed to enhance the fairness of settlements in this "money-driven class action culture,"[300] however, the strong public policy preference in favour of settlements has largely progressed unimpeded. At root, the imperatives of case management and market-oriented efficiency have taken precedence over the development of the common law and substantive justice considerations. This is indicative of a neo-liberal displacement of democratic values with market principles and criteria. It is similarly axiomatic that Scott's standpoint is rooted in the market logic of neo-liberal governance. The broad ideological confluence on the Private Attorney General is the outcome of a political consensus between the classical liberal perspective that governments are sometimes recalcitrant to "aggressively enforce various regulatory laws"[301] and the market

[299] Coffee Jr., *Entrepreneurial Litigation*, 117.
[300] Catherine Piché, *Fairness in Class Action Settlements* (Toronto: Carswell, 2012), 286. Piché's instructive study of four target jurisdictions (Ontario, Quebec, British Columbia, and the United States Federal Courts) into the fairness of class action settlements yielded three reform-oriented principles aimed towards increasing transparency, information availability, evaluative standards, ethical representation, and interrogative rigour on the part of presiding judges. Ibid., 277-84.
[301] Garth et al, 353.

fundamentalist perspective that such regimes contribute to the privatization of "law enforcement pursuant to the ideals of economic efficiency."[302] From a progressive perspective, the pursuit of multilayer actions by private citizens is a social good insofar as active individuals have the capacity to hold private entities (typically corporations) and governments responsible for various types of misconduct.[303] However, the market rationality that informs such mobilization of entrepreneurialism through the privatization of law enforcement and the institution of private enforcement regimes operates to displace democratic values with market values. As Brown observes, neo-liberal rationality displaces basic democratic values with "market criteria of cost/benefit rations, efficiency, profitability, and efficacy" which serves to render "every human being and institution, including the constitutional state, on the model of the firm and hence supplants democratic principles with entrepreneurial ones in the political sphere."[304] Such displacement of neo-

[302] Ibid. The authors suggest that privatization pursuant to the ideals of economic efficiency is a libertarian standpoint, rather than a standpoint of contemporary neo-liberalism, which I contest. The authors go on to empirically analyze the various ways that the concept has shifted in meaning since its origins.

[303] Lorne Sossin has advocated for a balanced approach when the aim of a class action is governmental (mis)conduct, suggesting that by rejecting the two-step process in *Canada v. Grenier* (which required a successful judicial review as a precondition to such class actions), the Supreme Court of Canada, in *Canada (Attorney General) v. TeleZone Inc.*, may have opened the door to the privatization of oversight of Crown conduct. To this end, Sossin notes that an overreliance on "privately enforced administrative law accountability" potentially 'distorts' the commitments of a government to the public interest. Iacobucci has also raised concerns about the extent to which civil litigation ought to be used to address public wrongs, noting that such litigation "engages different principles and requires different tools from actions" that address "traditional disputes between private parties." At the same time, R. Douglas Elliot, skeptical of the view that class actions against the Crown "distort sound public policy," has argued that Binnie J's rejection of the *Grenier* framework was correct insofar as the two-step process "added an unjustifiable layer of delay and expense to potential claims against the Crown." See, Lorne Sossin, "Class Actions Against the Crown: A Substitution for Judicial Review on Administrative Law Grounds?" *University of New Brunswick Law Journal* 57, no. 9 (2007): 9. See also "Revisiting Class Actions against the Crown: Balancing Public and Private Legal Accountability for Government Action," in ed., Jasminka Kalajdzic, *Accessing Justice: Appraising Class Actions* (Toronto: LexisNexis, 2011), 31; Iacobucci, "What is Access to Justice in the Context of Class Actions?" 27; R. Douglas Elliott, "Fringe Benefits: Class Actions for Marginalized People in Canada," in ed., Jasminka Kalajdzic, *Accessing Justice: Appraising Class Actions* (Toronto: LexisNexis, 2011), 222.

[304] Wendy Brown, "We Are All Democrats Now...," in Amy Allen, ed., *Democracy in What State?* (New York: Columbia University Press, 2011), 73. This aspect of neo-liberal rationality can be construed as part of the de-democratization process of which juridical retrenchment and the assault of access to justice also figure.

liberal rationality can be construed as part of de-democratization processes of which juridical retrenchment and libertarian campaigns against access to justice (described above) also prefigure.[305]

Above all, the potential societal ramifications of this type of privatization, particularly when informed by a *co-optative* form of the Private Attorney General, effectively amounts to permitting market ordering of access to justice priorities. This type of market fundamentalism may result in detrimental outcomes for the processes of social reproduction of vulnerable communities who may not have the resources or wherewithal to attain vindication of their incurred environmental harms. Broadly speaking, the racial hierarchies and gender orders that produce and reproduce social injustices are compounded by the prioritization of profitability over social and democratic principles, with claims involving environmental health, exploitative labour conditions, discrimination, human rights, and similar causes of action that disproportionately affect women, racial and ethnic minorities, and other vulnerable people, generally failing to attract the interest of the gatekeepers of justice. While contingency fees are designed in part to ameliorate this problem, the prospects remain bleak for justiciable claims of vulnerable communities lacking sufficient economic incentives for representation—given the reversed recruiting paradigm of Ontario's class action regime.[306] The logic of contingency fees reorients the

[305] Brown identifies a set of late modern forces operating to 'dedemocratize' states, that is, hollow democracy of its substantive content, including corporate power, the commodification and marketization of elections, neo-liberal rationality, expansion of executive power, the juridification of politics, and increased securitization. Ibid., 71-77.

[306] Of course, the doctrinal rationale of the *Class Proceedings Act* suggests that adequate incentivization is present for entrepreneurial counsel to pursue litigation in the public interest. As Winkler C.J.O. has observed, "Sections 33(1) and (4) of the *CPA*, which provide for contingency fees and a multiplier effect on fees to reward risk and success, are intended to provide sufficient incentives for lawyers." The sufficiency of these incentives, from the perspective of poor and socially marginalized groups, is up for debate. Winkler C.J.O. goes on to state that "[t]his is the entrepreneurial aspect of class proceedings litigation that enhances access to justice." *(Fantl v. Transamerica Life Canada, 2009 ONCA 377. 2009)* at 67.

economic interests of gatekeepers towards prospective settlements (as opposed to the financial viability of clients); in cases in which these economic prospects are insufficient relative to the incurred costs and high risk exposures, the presence or absence of contingency fees is largely inapplicable to the capacity of vulnerable people to access justice. As it pertains to environmental harms that inequitably impair the social reproduction of low-income and racialized communities with strong gendered and age-related health-impairing effects, the prospects for multilayer access to justice are impaired by the prioritization of entrepreneurial criteria by the gatekeepers of justice, contributing to the exclusionary character of Ontario's class action regime.

5. EXCLUSIONARY LITIGATION

Notwithstanding the quality of substantive justice achieved via environmental class actions—accountability, monetary compensation, social recognition of loss, clean-up of contaminated regions, and so forth—which primarily affects claims-makers who have managed to proceed with their respective actions, there are two major conditions of entrepreneurial litigation that promote procedural inaccessibility: (1) the gatekeeping role of Private Attorneys General; (2) the inadequate protection of future claims-makers. These procedural barriers of class action regimes operate in exclusionary ways to prevent potential claims-makers from accessing justice in Ontario.

A. RECRUITMENT PARADIGM

John C. Coffee Jr. has offered a succinct description of the prevailing recruitment paradigm of class actions: "[T]he lawyer often appears to be hiring the client, rather than the client

hiring the lawyer."[307] The qualification criteria employed by class action lawyers demand greater analysis in order to determine which cases are structurally favoured or disfavoured over others. Given the onerous costs associated with mounting a class action, the immediate point at which Coffee's insight gestures towards is the palpable economic interests of entrepreneurial gatekeepers of justice. To phrase it plainly: justice-seekers are not determined based solely on the merit of their claims, but rather based on the profitability of their claims. This does not necessarily suggest that unmeritorious or frivolous claims are being pursued over unprofitable (or insufficiently profitable) yet meritorious claims. In Ontario's class action regime, Private Attorneys General are largely motivated by the dual factors of resource expenditure and risk exposure. Given the application of the English Rule of 'loser pays', Private Attorneys General are disinclined to pursue unmeritorious or frivolous claims given the high probability of adverse costs awards—unlike jurisdictions without cost-shifting rules. The point at stake is therefore not simply that cases are being selected based solely on profitability criteria irrespective of merits, but rather that meritorious cases are not being selected based on profitability criteria (as well as potential risk exposures, which are heightened in environmental claims, particularly those involving health-impairment). Ultimately, these dual factors of resource expenditures and risk exposures have contributed to a conservative class action regime in which Private Attorneys General are generally disinclined to pursue cases without adequate degrees of predictability. For some commentators, these recruitment characteristics have resulted in an "anemic class action regime, in which plaintiffs's counsel prefer the low-hanging fruit

[307] Coffee Jr, *Entrepreneurial Litigation,* 1.

and focus on fairly routine, more or less guaranteed claims."[308] In other words, the polar opposite of environmental class actions, which are typically highly complex and atypical claims with potential outcomes that are increasingly difficult to predict. Although it may be too early to definitely state that Ontario's class action regime is distinguished by a particular pattern of behaviour, given its relatively nascent history, it has become increasingly apparent that the "operating paradigm in class litigation is not the traditional series of events whereby clients seek legal advice and retain a lawyer to prosecute their interests."[309] It is rather the opposite: the gatekeepers of justice recruit potentially harmed members of the general public.

On one hand, to the extent that entrepreneurial Private Attorneys General are alerting potentially harmed individuals and collectives about their infringed rights and offering representation, particularly in cases where sufficient knowledge about the relevant misconduct may not be widely available, a mutually beneficial situation may develop in which Private Attorneys General provide an educative and promotive role in access to justice. However, the serious question remains concerning what types of cases are typically being selected. In other words, this hypothetical scenario does not address the structural aspects of the decision-making process (i.e. the qualification criteria employed by Private Attorneys General).

A recent quantitative survey in Ontario by Jasminka Kalajdzic addresses the empirical void concerning these case selection criteria by finding that the legal merits of

[308] It is perhaps not surprising, therefore, to discover that the legal merits of a claim is weighed alongside the quantum of damages as the most important criteria in case selection. Craig Jones, "Litigate or Regulate? The Elusiveness of an Effective Consumer Protection Regime," *Canadian Business Law Journal* 53 (2013): 370.
[309] Kalajdzic, "Access to Justice for the Masses?" 75.

the claim and the quantum of damages are the most important criteria for deciding to proceed with litigation.[310] These findings corroborate the qualitative interviews undertaken for this project in which risk-averse and resource-constrained Private Attorneys General described their activities as seeking to promote meritorious claims to the extent that these are sufficiently profitable and do not result in intolerable risk exposures. Generally speaking, the relative merits of a claim are indicative of the potential risk exposures. Moreover, it does not logically follow that simply because a given case was accepted for representation on the basis of a profit-motive that the case is not also meritorious with a public interest dimension (in the traditional sense). Instead, these findings suggest that the public interest is not the determining factor in the decision-making process; and more pressingly, there may be cases that are in the public interest but that do not meet the minimum qualification standards. As Kalajdzic observes, "[s]uch a minimum monetary threshold [one million dollars] would appear to favour certain kinds of class actions over others; human rights claims, or those on behalf of a small group of individuals, for example, would be less likely to involve damages exceeding a million dollars."[311] Although such a minimum monetary threshold varies between class action firms (some uphold a multiple million dollar threshold), the conservative estimate of a million dollars suggests that private enforcement through class actions is structurally failing "in what might be the majority of

[310] Ibid., 80.

[311] Ibid. See also, Michael Molavi, "Beyond the Courtroom: Access to Justice, Privatization, and the Future of Class Action Research," *Canadian Class Action Review* 10, no. 1-2 (2015): 8-31. Several prominent class action attorneys and firms have corroborated a similar finding, which appears to be increasing given increasing costs. For example, Ward Branch similarly suggests that the "global damages should be $1 million or more," which is largely premised on the costs associated with certification. See, Ward Branch, "The Wheat and the Chaff: Class Action Case Selection," accessed 9 July 2015. Online: http://static1.1.sqspcdn.com/static/f/299713/3665772/1248395358237/wheat.pdf?token=UGngmySBhHudWTI9z9OJUoj1yT0%3D.

cases," which speaks to the "necessity of public enforcement."[312] As litigation costs increase, such thresholds increase, which subsequently raises exclusionary barriers and broadens the range of unvindicated claims.

In a class action paradigm where lawyers recruit their clients, the conditions of recruitment acquire the characteristics of barriers. Whereas entrepreneurial lawyering might promote multilayer access to justice in certain ways, as Winkler C.J.O. suggests, it also serves to reinforce exclusionary tendencies based on economic calculations. As one of Canada's leading class action scholars, Garry Watson, has observed, the prevailing paradigm in Ontario is one wherein "the entrepreneurial, bounty hunter, plaintiff class action counsel funds the action and chases the pot of gold at the end of the rainbow; but the chase can be long, hard and very expensive,"[313] which is precisely why the pursued claim must satisfy the profitability qualification criteria of Private Attorneys General. More to the point, an economistic rationale does not sufficiently address the 'social mission' of class actions. This 'social mission' is under erosion in Ontario's class action regime which increasingly prioritizes securities class actions and investor rights given strong predictability factors and high potential returns—a type of action that primarily influences privileged social demographics as opposed to the vulnerable communities disproportionately affected by environmental injustices. While recruiting strategies based primarily on profit-motives may *incidentally* benefit those with negative value claims[314] who might otherwise suffer from inaccessibility, this only occurs insofar as the minimum

[312] Jones, "Litigate or Regulate? The Elusiveness of an Effective Consumer Protection Regime," 365-66.
[313] Garry Watson, "The Canadian Experience with Class Actions: Access to Justice or Just a New Moneymaking Product Line for Lawyers?" *Amicus Curiae* 45 (2003): 30.
[314] The term "negative value claims" broadly refers to those claims that are individually non-viable, i.e. claims in which potential costs outweigh potential damages.

qualifying criteria for representation is met. What happens to those vulnerable people whose harmed interests are not deemed sufficiently profitable?

B. FUTURE CLAIMS-MAKERS

The exclusionary outcomes of reversed recruiting apply universally across Ontario's class action regime, however, the distinct problem of future claims-makers applies specifically to environmental class actions. The problem of future claims-makers broadly refers to the exclusion of certain claims-makers from *present* actions and the prevention of these claims-makers from commencing *future* actions to vindicate their claims. More specifically, Geoffrey C. Hazard Jr. coined the term 'futures problem' in 2000 to describe claims "where a claimant cannot presently prove a causal connection between an injury and a supposed source of injury, but nevertheless suspects or fears that he or she is suffering injury that has its origins in the suspect source."[315] This definition has been expanded in several directions, most notably in cases where potential claims-makers are not aware that they have been exposed to toxic contamination and other causes of injury that do not manifest symptoms for years or decades. In the years since Hazard introduced the term, scholarship on the 'futures problem' has proliferated[316]—moreover, the problem of future claims-makers has been most prominent in the context of chemical consumption given that certain toxic exposures have extended latency periods and adverse health effects may not manifest for

[315] Geoffrey C. Hazard Jr., "The Futures Problem," *Yale Law School Legal Scholarship Repository* 1, no. 1 (2000): 1903.

[316] Notable interventions in this literature include (but are not limited to): Linda S. Mullenix, "Back to the Futures: Privatizing Future Claims Resolution," *University of Pennsylvania Law Review* 148, no. 6 (2000): 1919-32; Howard M. Erichson, "Uncertainty and the Advantage of Collective Settlement," *DePaul Law Review* 60, no. 2 (2011): 627-46; Geoffrey P. Miller, "Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard," *University of Chicago Law Forum* 1 (2003): 581-630; Deborah R. Hensler, "Bringing *Shutts* into the Future: Rethinking Protection of Future Claimants in Mass Tort Class Actions," *University of Missouri-Kansas City Law Review* 74, no. 3 (2006): 585-612.

several years after exposure. Broadly speaking, 'future claims-makers' refers to those who have been exposed to a particular toxic substance, but who have not yet manifested symptoms of disease or injury to warrant pursuing their claims. For Samuel Issacharoff, the problem of future claims-makers is "the secular equivalent to a plenary indulgence,"[317] a reference to the Catholic doctrine of total remission of punishment for sins (re: wrongful conduct). The classic example of the problem of future claims-makers is the 1984 Agent Orange case in the United States in which exposed persons who developed symptoms (notably cancerous growths) at a later stage could not access compensation (the settlement fund was depleted); moreover, the conditions of the settlement precluded the provision of payment to affected persons who suffered harm post-1994.[318]

The problem of future claims-makers is particularly pronounced in the context of environmental class actions for several reasons. Firstly, future claims-makers often posses 'rationally apathetic' stances towards ongoing actions, whether out of cautious optimism concerning the probabilities of developing adverse health effects or psychological repression over the gravity of this probability.[319] Future claims-makers may additionally have been exposed to toxicants without their present knowledge; that is, future claims-makers may be presently unaware of any incurred harms, even as they might gain awareness of such harms at some future date. Secondly, defendants in environmental class actions invariably recognize the potential threat of future claims-makers and thereby insist on the resolution of their total liability.[320] By settling cases 'for cheap' with Private

[317] Samuel Issacharoff, "Governance and Legitimacy in the Law of Class Actions," *The Supreme Court Review* 1999 (1999): 345.
[318] James Grimmelmann, "Future Conduct and the Limits of Class-Action Settlements," *North Carolina Law Review* 91 (2012): 391.
[319] Coffee Jr., *Entrepreneurial Litigation*, 97.
[320] As Rhonda Wasserman points out, the "starting assumption in negotiations, in judicial opinions, and in the scholarly literature, is that defendants negotiating settlements of mass torts insist upon global peace;

Attorneys General motivated by economic self-interest, defending corporations and governments can effectively limit their total expenditures with legal finality. Although Private Attorneys General ostensibly serve to protect multilayer interests, their primary objective in their representative capacities is the protection of their present clients.[321] This demand for global peace (i.e. resolution of outstanding liability) and the representative priorities of Private Attorneys General has resulted in structural disadvantages for future claims-makers whose chronic undercompensation has manifested in various ways:

> (1) underestimating the number of likely future claims against the settlement fund (which is easily done given the long latency periods—up to forty years—associated with asbestos and other products);
> (2) ignoring the impact of inflation, which trivializes any fixed recovery to be paid a decade or more later; or
> (3) allowing early claimants to "raid" the settlement fund by filing extravagant claims, thereby depleting the funds available for future claimants.[322]

Given these structural disadvantages of entrepreneurial private enforcement as it relates to future claims-makers,[323] it may paradoxically be the case that class actions can sometimes be "less the plaintiff's sword and more the defendant's shield."[324] A relatively modest

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they do not want piecemeal settlements that fail to resolve their total liability." See Wasserman, "Future Claimants and the Quest for Global Peace," *Emory Law Journal* 64, no. 2 (2014): 536.

[321] This leads to a situation in which "[n]either the trial bar, which is focused on the present clients, nor the class action bar [having] a strong interest in protecting future claimants." Coffee Jr, *Entrepreneurial Litigation*, 97.

[322] Ibid., 98.

[323] For an overview of some of these disadvantages, see, for example, Deborah R. Hensler, "Bringing Shutts into the Future: Rethinking Protection of Future Claimants in Mass Tort Class Actions," *University of Missouri-Kansas City Law Review* 74 (2006): 585-612; Daniel M. Weddle, "Settlement Class Actions and Mere-Exposure Future Claimants: Problems in Mass Toxic Tort Liability," *Drake Law Review* 47, no. 1 (1998): 113-40; Yair Listokin and Kenneth Ayotte, "Protecting Future Claimants in Mass Tort Bankruptcies," *Northwestern University Law Review* 98, no. 4 (2004): 1435-504; Alex Raskolnikov, "Is There a Future for Future Claimants after Amchem Products, Inc. v. Windsor," *Yale Law Journal* 107, no. 8 (1998): 2545-82.

[324] Coffee Jr., "The Mass Tort Class Action," 118.

settlement may serve to placate the short-term economic interests of entrepreneurial Private Attorneys General and a limited number of present claims-makers to the detriment of future claims-makers.

To conclude, it has become abundantly clear that the profit-oriented and risk-averse criteria employed in case selection (manifesting as a consequent of a reversal in the traditional recruiting paradigm) and the structural disadvantages against passive future claims-makers serve to reinforce the exclusionary dynamics of Ontario's class action regime. Although sufficient economic incentives may serve to effectively mobilize Private Attorneys General to prosecute multilayer environmental claims—thereby promoting greater access to justice in a minimally procedural sense—the limitations of entrepreneurialism in private enforcement are nevertheless incontrovertible to even proponents of class actions. First and foremost, the approach of economic incentivization raises serious concerns regarding claims that are insufficiently profitable and/or claims with intolerable risk exposures. By the same token, the profit-maximizing behaviour endemic to entrepreneurial private enforcement raises concerns about the potential misalignment of economic interests (i.e. the classic agency problem), which underscores the inadequacy of a strictly procedural conception of multilayer access to justice. These concerns are addressed in greater detail in Chapter 5.

Finally, the exclusionary dynamics pertaining to future claims-makers in environmental class actions almost universally involve the extended latency periods of certain toxic exposures (and the absence of any manifested symptoms of health-impairment). This problem arises in cases where reasonable causation has been established; that is, where toxicants have been scientifically linked to adverse health effects in a target

population. However, a major barrier to multilayer access to environmental justice stemming from chemical consumption has been the privileging of private property over human health. The myriad problems of establishing toxic causation have contributed to Ontario's exclusionary class action regime in which the destruction of private property arising from toxic exposures is privileged over potential adverse health effects.[325] To clarify: it is easier to establish causation as it pertains to harmed private property (i.e. diminution of property value; physical destruction; loss of use and enjoyment of private property; and so forth) than causation in human health given the uncertainties inherent in establishing scientific health-related facts. Such private property environmental claims are more attractive for risk-averse entrepreneurial Private Attorneys General given their heightened levels of predictability. Ultimately, the socio-economic barriers that this stricter conception of causation[326] and restricted view of commonality constitute demand further analysis, not merely from a proceduralistic perspective, but also from a critical political economy perspective which recognizes the uneven distribution of toxic exposures and chemical consumption across social locations (see Chapter 4). As the following chapters explicate, this involves the production and reproduction of social inequities through the privileging of private property in Ontario's emerging private enforcement regime. The neo-liberal governance shift from a *complementary* conception of class actions towards a *co-optative* conception compounds these exclusionary tendencies and intensifies the transformation of the market economy into a market society.

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[325] See, e.g., Steve C. Gold, "When Certainty Dissolves into Probability: A Legal Vision of Toxic Causation for the Post-Genomic Era," *Washington and Lee Law Review* 70, no. 1 (2013): 237-339; Per Laleng, "Causal Responsibility for Uncertainty and Risk in Toxic Torts," *Tort Law Review* 18 (2010): 102; Margaret A. Berger, "Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts," *Columbia Law Review* 97 (1997): 2117-52.

[326] As opposed to a probabilistic conception in mass torts involving human health.

CONCLUSION

These discernible limitations of entrepreneurial litigation serve to structurally disadvantage future claimants and unprofitable (or insufficiently profitable) claimants alike. For these claimants, Ontario's class action regime operates in an exclusionary manner, even as its primary policy objective is promoting access to justice. More to the point, these are not limitations that are resolvable through behavioural remedies aimed at compelling private actors to facilitate access to justice for a broader range of claimants; for example, ad hoc solutions such as (voluntary or mandatory) pro bono services are largely incongruous with class actions, given the associated onerous costs and high risks. To borrow the language of law and economics research, it would be tantamount to 'economic irrationality' for Private Attorneys General to engage in private enforcement irrespective of profitability.[327] Although critics of class actions often focus on the profit-maximizing behaviour of entrepreneurial attorneys and the general disinclination to pursue low value claims, this agent-oriented critique ultimately neglects the systemic nature of the problem of inaccessible justice. The 'economic irrationality' of pursuing claims irrespective of profitability simply reinforces the structural inadequacies of an overreliance on market logic in policy implementation.

[327] This is indicative of the possessive individualism and profit-maximizing behaviour of *homo economicus*. See Wendy Brown, *supra* note 247.

Insofar as the class action is conceived as a "safety valve"[328] or "failsafe"[329] type of policy instrument of private enforcement regimes, it has displayed an exceptional capacity to promote access to justice (at least in a minimally proceduralist sense), particularly for negative value claims. This function assumes heightened significance in actions involving governmental parties. Moreover, the compensatory facet of access to justice features prominently in this context: remedies awarded in a successful action are generally provided to the victims as compensation (when *cy près* awards are not pursued), whereas statutory fines are provided to governments. This crucial policy instrument most effectively strengthens associations of citizens when its mobilization is underscored by a *complementary* conception of the Private Attorney General; in these cases, private actors engage in regulatory enforcement concurrently with public agencies.[330] Interestingly, the availability of alternate routes to environmental justice in Ontario's legislative framework—including the *Environmental Bill of Rights* and the *Environmental Protection Act*—has been cited by defendants at the preferability stage of certification; in other words, as a strategy to restrict multilayer access to environmental justice for class members, defendants have proposed that other preferable vehicles are available for polluter accountability.[331]

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[328] Ibid.

[329] Coffee Jr., "Public Enforcement and the Private Attorney General," in *Entrepreneurial Litigation* (Massachusetts: Harvard University Press, 2015): 175.

[330] A *coordinative* conception would similarly strengthen such associations of citizens as an additional instrument in social protection. A prime example of such *coordination* is the 'relator' action, that is, a public nuisance claim (i.e. pollution) by private parties that can only be advanced with explicit permission of the Attorney General. In the environmental context, public interest standing in public nuisance (and the requirement of explicit permission by the Attorney General) has been addressed in s.103 of the *Environmental Bill of Rights, 1993* which holds that no person who has suffered or may suffer environmental harm "shall be barred from bringing an action without the consent of the Attorney General."[330] According to the Environmental Commissioner of Ontario, this provision was intended to operate in a supplementary manner with the *Class Proceedings Act, 1992*. *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, online: https://www.ontario.ca/laws/statute/ 93e28; Lynda Collins and Heather McLeod-Kilmurray, *The Canadian Law of Toxic Torts* (Toronto: Thomson Reuters, 2014), 55-6.

Where private litigation as a policy instrument becomes problematic is largely when Private Attorneys General are considered as being interchangeable with their public counterparts pursuant to the principles of economic efficiency.[332] In other words, where the *co-optative* conception of the Private Attorney General animates governance strategies. This effectively amounts to allowing market imperatives to dictate priorities of regulatory enforcement. By prioritizing efficiency and profitability over considerations of social justice, fairness, and equality, the *co-optative* conception facilitates a limited form of accessibility—for those harmed interests that are deemed sufficiently profitable by entrepreneurial gatekeepers of justice. Simply put, the same market principles and criteria that serve to facilitate multilayer access to justice in certain (sufficiently profitable) cases, concomitantly serves to deny multilayer access to justice in other (insufficiently profitable/unprofitable) cases. Although both *complementary* and *co-optative* conceptions conform to market logic, the former operates alongside public enforcement whereas the latter is postulated as independently sufficient.

It goes without saying that the underlying stance of this project is that access to justice as a social good should not be overdetermined by market forces. As Mauro Cappelletti observed nearly forty years ago, an overreliance on private enforcement would

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[331] See, e.g., *Hollick v. Toronto (City),* 2001 SCC 68 [2001] 3 SCR 158; *Environmental Bill of Rights, 1993*, S.O. 1993, c.28, s. 61(1) and s. 74 (1); *Environmental Protection Act*, R.S.O. 1990, c.19, s. 14(1), s. 172(1), and s. 186(1).

[332] The efficiency of private enforcement in the class action context is not negligible, given that Private Attorneys General often possess extensive litigation experience that often significantly exceeds those of public regulators. This private expertise, as well as privileged forms of information available to private actors, lends credence to multienforcer regimes in which public agencies can direct and mobilize private actors. As Engstrom points out, in "regulatory regimes where information about wrongdoing remains hidden—and so is prohibitively costly for public enforcers to discover and dislodge—there will be little or no enforcement at all unless private parties can be induced to surface information about wrongdoing." David Freeman Engstrom, "Agencies as Litigation Gatekeepers," *The Yale Law Journal* 123, no. 3 (2013): 632; see also, John Braithwaite, "Privatized Enforcement and the Promise of Regulatory Capitalism," in *Regulatory Capitalism*, 64-86.

be "foolish," given that "too many gaps would remain if the whole task were left to the haphazard existence, and to the will and whims, of spontaneous 'champions' of the common good."[333] Janine Brodie has similarly pointed out that social liberalism in the twentieth century recognized that certain social goods "should not be entrusted to capitalist markets because they were incapable of ensuring fair distribution or achieving collective goals."[334] This sharply contrasts with contemporary neo-liberalism, which involves the extension of market logics into political institutions and agencies, including the provisioning of social goods and services, such as access to justice. In short, there are palpable limits to private enforcement regimes from the perspective of multilayer access to environmental justice. Even its ardent defenders readily acknowledge that private enforcement acts as a "form of auto-pilot enforcement, *with market incentives*."[335] Where such incentives are absent, private enforcement is similarly absent. This *enforcement gap* indicates that public regulatory enforcement remains an indispensible feature in the early twenty-first century. At root, proponents of the privatization of regulatory enforcement typically cite the 'scientific' character of economics, that is to say, the supposedly neutral and value-free dictates of markets as a chief good to the extent that any particular interest is not directly served. As this project posits, however, allowing market forces to determine enforcement priorities privileges certain types of actors and interests over others. In class actions, for instance, securities actions are prioritized over environmental health-based claims—this prioritization has strong socio-demographic characteristics to the extent that

[333] Mauro Cappelletti, "Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study," in eds., Mauro Cappelletti and John Weisner, *Access to Justice: Promising Institutions* (Alphen aan den Rijn: Sijthoff and Noordhoff, 1979), 865.
[334] Janine Brodie, "Neo-liberalism and Social Policy," in eds., Stephen Gill and Claire A. Cutler, *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2015), 256.
[335] Farhang, 5. [emphasis added]

relatively privileged actors are affected by securities disputes, whereas largely low-income and racialized people are affected by environmental health-impairment with strong gendered outcomes. The alleged neutrality of this type of privatization exhibits a "strategic silence"[336] about the racial hierarchies and gender orders constituted by the marketization of regulatory enforcement.

This critical outlook should not detract from the relative merits of class actions in promoting multilayer access to environmental justice, which speaks to their continuing relevance in contemporary multi-enforcer regimes. One of their chief characteristics leading to their description as 'crucial instruments' of social protection has been their ability to circumvent the 'political capture' of regulatory agencies by the polluter-industrial complex (or any regulated industry, in fact) and thereby enforce regulations that would otherwise remain negligibly enforced (or unenforced).[337] Class actions are uniquely situated to pursue claims against states, particularly when public agencies are recalcitrant to address outstanding issues of concern. As it pertains to broader enforcement priorities in the political economy, as Stephen Gill and A. Claire Cutler have pointed out, the emergence of the "new informality" in regulatory enforcement whereby corporate rights are articulated through "formal, hard, legal disciplines," and corporate duties in "soft,

[336] Isabella Bakker, *The Strategic Silence: Gender and Economic Policy* (New York: Zed Books, 1994).
[337] Pamela Bucy suggests that this "capture theory" has been largely substantiated in the environmental context in which states "compete with each other for economic development by offering lax environmental enforcement," with "some states routinely collud[ing] with polluters." Pamela Bucy, "Private Justice," *Southern California Law Review* 76 (2002): 33. At the same time, this "capture theory" is likely incongruous with Engstrom's synthetic institutional design for the greater investment of decision-making authority to public agencies over the direction of private litigation. See, *supra* note 324; David Freeman Engstrom, "Harnessing the Private Attorney General," *Columbia Law Review* 112, no. 3 (2012): 1244-325; John Coffee Jr. has referred to this capacity to evade political capture as the 'failsafe function' of private enforcement. John Coffee Jr., "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working," *Maryland Law Review* 42, no. 2 (1983): 215-88; John Coffee Jr., "Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions," *Columbia Law Review* 86, no. 4 (1986): 669-727.

unenforceable terms" suggests that the "formalization of corporate social responsibilities" remains imperative from the perspective of environmental justice, even in jurisdictions with robust class action regimes.[338]

As the following chapters explicate, the multifaceted barriers to access to environmental justice in Ontario can only begin to be overcome through the interdependent coordination of progressive litigative and public regulatory enforcement mechanisms in a broader multi-enforcer regime. Although private actors can play an important complementary role in social protection and the pursuit of environmental justice,[339] the primary instrument of policy enforcement and toxicant regulation must be a public regime that is "comprehensive, systematic, and proactive," given the "vast universe of useful and potentially harmful chemical substances"[340] in Canada. Before exploring this vast universe of toxic substances in greater detail (in Chapter 4), the next chapter continues the economic analysis of class actions by examining the emergence of litigation finance in Ontario and the financialization of justice.

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[338] A. Claire Cutler, "Legal Pluralism as the 'Common Sense' of Transnational Capitalism," *Onati Socio-Legal Series* 3 (2013): 730; Stephen Gill and A. Claire Cutler, "New Constitutionalism and World Order: General Introduction," in eds., Gill and Cutler, *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2015): 1-22.

[339] See, e.g., Keith N. Hylton, "When Should We Prefer Tort Law to Environmental Regulation?" *Washburn Law Journal* 41 (2002): 515.

[340] Lynda Collins and Heather McLeod-Kilmurray, "Material Contribution to Justice: Toxic Causation after *Resurfice Corp. v. Hanke*," *Osgoode Hall Law Journal* 48 (2010): 456.

FINANCIALIZING JUSTICE:

LITIGATION FINANCE IN ONTARIO'S CLASS ACTION REGIME

INTRODUCTION

A "revolution"[341] is occurring in Ontario that has received scant academic and mainstream attention. The emergence of a third party litigation finance industry is revolutionizing Ontario's class action regime through the financialization of litigation. In light of the enormous costs and risks associated with modern class actions, private litigation financing has been advocated as a market-based solution for the abysmal state of multilayer access to justice in Ontario. This effectively reconceptualizes class actions as 'investment opportunities' for financial capital. Such financing has been described as "a hot new investment commodity with high levels of reward not available in traditional investment vehicles."[342] The theoretical insularity of courtrooms from the instabilities and fluctuations of the global political economy has been cited as a major source of this growing appeal—a perceived insularity that may have contributed to the growth of litigation finance in the aftermath of the 2008 Global Financial Crisis in common-law jurisdictions around the world where such investment practices are permissible.[343] As the CEO of LexShares, a former mergers and acquisitions investment banker at Deutsche Bank, observes: class actions are "completely uncorrelated, zero-beta assets that are not influenced by broader

[341] Sandra Rubin, "Enter the Silent Partner," in *Lexpert* 1 July 2011, online: <http://www.lexpert.ca/article/enter-the-silent-partner/?p=&sitecode=>.
[342] Camille Cameron and Jasminka Kalajdzic, "Commercial Litigation Funding: Ethical, Regulatory and Comparative Perspectives," *The Canadian Business Law Journal* 55, no. 1 (2014): 3.
[343] In addition to the relative insularity of such investments from the instabilities and fluctuations of the political economy, Kalajdzic and Cameron have pointed out that "tough economic times decrease traditional finance options and litigants' risk tolerance." See "Commercial Litigation Funding: Ethical, Regulatory and Comparative Perspectives," 3.

economic factors," which is to say, "it doesn't matter what the stock market does – commodity prices, interest rates, none of that is having a direct impact on investment in litigation, which is really operating inside a courtroom vacuum."[344] Needless to say, such investments are portrayed to potential investors as a strategic form of portfolio diversification while simultaneously being portrayed to lawmakers and the general public as promoting access to justice.

Given the nascent history of the industry in Ontario, the extent to which litigation financing has allowed collective claims-makers to overcome economic barriers in its provincial class action regime largely remains a matter of conjecture. However, the problematics of allowing market forces to further penetrate civil justice has sparked a contentious debate on the legitimacy of the developing industry within the meager ranks of those who have examined the ongoing revolution. Through a critical policy analysis, this chapter extends the analysis of the neo-liberalization of civil justice from Chapter 2 by focusing on the emergence of this industry in Ontario's class action regime.

Litigation financing applies in a variety of consumer and commercial contexts that span the breadth of Canadian law, however, the nascent industry in Ontario has been dominated by class actions in recent years.[345] Ontario's class action regime is distinguished by high costs and risks which act as economic barriers to multilayer access to justice. The demand for litigation financing is therefore prompted by the dual factors of (1) risk aversion and (2) budget constraints on the part of Private Attorneys General. Firstly, the

[344] "Lexshares: Diversification and Access to Justice," 10 August 2016, online: http://www.pymnts.com/news/investment-tracker/2016/lexshares-litigation-crowdfunding/.
[345] Litigation financing in various forms has existed for much of the twentieth century (i.e. the provision of legal financing by family members, etc.), however, litigation financing as a business enterprise has only recently emerged in Ontario. It is in this context that class actions have dominated the emerging litigation financing industry. Anthony Sebok, "Litigation Investment and Legal Ethics: What Are the Real Issues?" *Canadian Business Law Journal* 55, no. 1 (2014): 127.

continuing application of the English Rule whereby the losing party is liable for the winning party's legal costs has created a demand for indemnification agreements with third parties which effectively operate as insurance measures in case of adverse costs awards. Secondly, as a "sport of kings,"[346] the modern class action is a capital-intensive legal vehicle that requires Private Attorneys General to invest significant resources over a period of years (the average class action in Ontario takes approximately 3 years). The involvement of a litigation financier may offset these burdens by (1) indemnifying claimants and (2) providing the necessary financing to maintain the claim, thereby promoting a type of multilayer access to justice.

Although resource disparities between disputing parties are causes for concern across the legal spectrum, such concerns are particularly compounded in the class action context which often situates plaintiff classes against multinational corporations and governments with "vastly superior resources."[347] Despite the significant 'war chests' that Private Attorneys General in Ontario have amassed since the 1990s (which may be viewed as moderating this *David vs. Goliath* narrative), such resource disparities nevertheless remain prevalent in Ontario's class action regime. Under these conditions, Private Attorneys General have become economically incentivized to limit their resource expenditures to their projected share of any recovery, whereas powerful defendants "have the resources and incentive to spend more than the amount at stake to build a reputation for 'scorched earth' litigation."[348] The availability of third party litigation financing may serve

[346] *Kerr v Danier Leather Inc.*, 2007 SCC 44 [2007] at 63.
[347] Jeff Gray, "The Risky Business of Investing in Lawsuits," *The Globe & Mail* 26 June 2012. See also, Maya Steinitz, "Whose Claim is this Anyway? Third Party Litigation Funding," *Minnesota Law Review* 95, no. 4 (2011): 1268-338.
[348] Michael Trebilcock and Elizabeth Kagedan, "An Economic Assessment of Third-Party Litigation Funding," *Canadian Business Law Journal* 55, no. 1 (2014): 64. As the authors point out, such financing

to mitigate the unequal impact of such incentives by strengthening the resource capacities (and limiting the risk exposures) of Private Attorneys General. To the extent that class actions are 'crucial instruments' of social protection for vulnerable groups, this strengthening can be viewed as a positive development against powerful adversaries.

Nevertheless, the emergence of litigation finance in Ontario has given rise to a series of objections that warrant further consideration. The litigation finance industry is primarily designed for the purposes of capital accumulation rather than access to justice promotion.[349] Although access to justice may be a secondary objective that is achieved in a procedural and (monetary) compensatory sense in the process of attaining the former objective, the typically percentage-based returns on litigation investments are withdrawn from the portion of the recovery that would otherwise have been distributed to class members, which gives rise to the concern that litigation financing is a form of *buying access at the expense of justice*; that is to say, promoting procedural access through the diminishment of substantive justice. Needless to say, the converse side of this concern is that a percentage of a diminished recovery is preferable to a percentage of nothing; in other words, that insofar as litigation finance facilitates claims that otherwise would not be pursued, it promote access to justice. A critical perspective on this industry might nonetheless consider the extent to which 'access to justice' has been appropriated as a public-spirited value in furtherance of capital accumulation and posit the question: to what extent do financial entities such as Deutsche Bank or Bridgepoint Financial Services Inc.

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could "enhance the accuracy of the settlement by eliminating factors unrelated to legal merit: that is, relaxing the risk aversion and budget constraints which unbalance bargaining power between plaintiff and defendant."

[349] Whereas litigation financing may plausibly promote deterrence by strengthening meritorious claims against corporate or governmental defendants, the *CPA* policy objective of behaviour modification remains secondary to the primary objectives of increasing access to justice and promoting judicial economy.

consider access to justice an investment priority? Ultimately, critics have inquired about the extent to which litigation finance "transforms courtrooms into a stock exchange and litigation into a commodity"[350] under the auspices of promoting access to justice.

This revolutionary development has gone largely unexplored in extant political economy research on the financialization phenomenon that has spread globally since the mid-1970s. Similarly, legal scholarship has generally not situated litigation finance within this broader financialization phenomenon, which has been characterized as a transformative historical development of capitalist economies and democratic societies.[351] Although several conceptions of 'financialization' have been posited by various scholars, this analysis upholds Gerald A. Epstein's definition that financialization describes the "increasing role of financial motives, financial markets, financial actors and financial institutions in the operation of the domestic and international economies."[352] The increasing role of financial capital in mediating everyday life has been insightfully examined by feminist political economists, including Adrienne Roberts who expresses the relationship between household capacities and global finance as the "financialization of social reproduction."[353] This focus on households can be expanded to include the environmental foundations upon which all reproduction rests, in light of Cindi Katz's seminal theorization of social reproduction which explicitly identifies the importance of political ecology.

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[350] W. Bradley Wendel, "Alternative Litigation Finance and Anti-Commodification Norms," *DePaul Law Review* 63, no. 2 (2014): 657.
[351] Costas Lapavitsas, *Profiting Without Producing: How Finance Exploits Us All* (New York: Verso, 2013).
[352] Gerald A. Epstein, "Introduction: Financialization and the World Economy," in ed., Gerald A. Epstein, *Financialization and the World Economy* (Northampton: Edward Elgar Publishing, 2005), 3.
[353] Adrienne Roberts, "Household Debt and the Financialization of Social Reproduction: Theorizing the UK Housing and Hunger Crises," in ed., Susanne Soederberg, *Risking Capitalism (Research in Political Economy, Vol. 31)* (Bingley: Emerald Group Publishing, 2016), 135-64. See also, Brigitte Young, Isabella Bakker, and Diane Elson, eds., *Questioning Financial Governance From a Feminist Perspective* (New York: Routledge, 2011).

Moreover, the financialization of litigation and the impacts of this financialization on multilayer access to environmental justice as a key facet of social reproduction has gone entirely unexplored in extant research. Although it is beyond the scope of this chapter to comprehensively develop this further, the analysis offered provides a foundation for deeper integration of the financialization of litigation in political economy analyses on the global financialization phenomenon in the early twenty-first century.

Given the multiple ways in which access to justice—as a fundamental human right and policy objective of the *Class Proceedings Act*—has been appropriated and mobilized by competing factions, it may be beneficial to distinguish between the critics and the critiques of third party litigation finance. Critiques of third party litigation finance have generally advanced either consequentialist or jurisprudential objections to the emerging industry. The consequentialist objections have typically raised concerns over the potential negative implications of litigation finance, including the adverse effects of introducing third parties into the civil justice system (i.e. increases in frivolous litigation, etc.). At the same time, jurisprudential objections are primarily concerned with the ethical challenges posed by litigation finance for the legal profession (i.e. conflicts of interest, potential collusion, etc.).

Lending credence to the conceptualization of *access to justice as a field of contestation*, corporate interests that have historically raised objections to the modern class action are among the most vociferous critics of litigation finance. Such critics (i.e. U.S. Chamber of Commerce) have adopted the popular right-wing anti-litigation stance that any increase in litigation is socially undesirable on the normative grounds that "a lawsuit is an

evil in itself"[354] and on the politico-economic grounds that litigation finance is "antithetical to all notions of free enterprise,"[355] which conceptually extends the theory of the 'invisible fist of law' discussed in Chapter 2 to the present discussion. In other words, the capacities of litigation finance to overcome the economic barriers to multilayer access to justice by promoting class actions against largely corporate defendants is viewed by such critics as a problematic development. Given these promotive capacities, it remains difficult to ultimately ignore the strategic subtext of such critiques (notwithstanding their potential validity) as motivated by ideological imperatives rather than the preservation of the democratic integrity of civil justice systems. Conversely, proponents of litigation finance have generally sought to dismiss or assuage consequentialist and jurisprudential concerns through various proposals, such as praising the merits of the prevailing self-regulatory model for the industry.

The objective of this chapter is to develop and expand the political-economic analysis of Chapter 2 in the context of the litigation finance industry in Ontario through a contextual analysis of key dynamics of the monetizing, liberalizing, and privatizing imperatives of this emerging industry.

1. THE COMMODIFICATION CRITIQUE

The contentious debate over litigation finance has developed within the parameters of the prevailing market rationality; which is to say, any consequentialist or jurisprudential objections have largely been advanced without concomitant axiological or deontological

[354] Ibid., 655.
[355] John H. Beisner and Gary A. Rubin, U.S. Chamber of Commerce Institute for Legal Reform, "Stopping the Sale of Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation," (2012): 15.

critiques over the illegitimacy of commodifying litigation.[356] As one commentator has observed, the "perceived repugnancy"[357] of litigation finance in Ontario "appears to be related to the potential abuses rather than a moral statement"[358] that litigation "should not be subject to market forces."[359] As a matter of conceptual clarity, it may be worthwhile to observe that legal services can already be viewed as being commodified to the extent that the behaviour of private attorneys in a legal market is typically animated by economic interests and objectives and private lawyers already have a stake in litigation perceived as a capital generating activity; which is to say, that litigation is already subject to market forces and therefore describing litigation finance as 'commodifying litigation' may be conceptually untenable since an object (or process) that is already a commodity cannot be said to be commodified. Although the present analysis makes references to the 'commodification of litigation' as a way to establish continuity with established literature, it may be more accurate to rather speak of the 'financialization of litigation'. Insofar as the formal spectrum of perspectives on commodification ranges from the 'universal commodification' stance emblematic of laissez-faire economics to the 'universal non-commodification' stance of heterodox economics,[360] the limited range of perspectives on

[356] The anti-commodification critique has not featured prominently in the growing literature. References to commodification are typically brief. For example, in his defence of litigation finance, Anthony Sebok critiques a number of objections to the emerging industry, however, on the question of the anti-commodification critique, Sebok draws an analogy with the marketization of legal judgments (i.e. buying a judge's decision) and proceeds to critique this latter practice and differentiate it from litigation financing (without responding to the anti-commodification critique). See *supra* note 338.
[357] Poonam Puri ,"Financing of Litigation by Third-Party Investors: A Share of Justice?" *Osgoode Hall Law Journal* 36, no. 3 (1998): 564. Notably, in her defence of third party litigation funding, Puri does not provide a counterargument for why lawsuits should be subject to market forces, but rather restricts her argument to the potential abuses that may arise out of third party litigation funding.
[358] Ibid.
[359] Ibid.
[360] Margaret Radin, "Market-Inalienability," *Harvard Law Review* 100, no. 8 (1987): 1849-937.

litigation finance in Ontario may be indicative of a neo-liberal consensus on the legitimacy of market forces within the civil justice system.

Although it is beyond the scope of this chapter to provide a comprehensive overview of the relevant literature on commodification, it may suffice to observe that critical perspectives on commodification are primarily rooted in either radical political economics, such as the classic analysis offered by Georg Lukács who suggested that commodification should not be "regarded as the central problem in economics, but as the central, structural problem of capitalist society in all its aspects,"[361] and may extend to the pragmatic approaches of critical pluralists such as Margaret Radin who has raised concerns in legal scholarship for decades over commodification and the encroachment of market rationality into non-market areas of human life.[362] To the extent that proponents of litigation finance in Ontario have engaged with such critical perspectives, this has typically been limited to dismissive references to Michael Sandel's recent moral objections to market encroachments.[363] Ultimately, anti-commodification critiques have almost universally been rejected as contrary to the "market-liberal theory of value."[364] The absence of such critiques indicates a widespread consensus on the notional legitimacy of the penetration of market forces into non-market areas of democratic life and the associated commodification of social goods. In other words, the debate over litigation finance has largely involved consequentialist or jurisprudential objections rather than politico-economic critiques over

[361] Georg Lukács, *History and Class Consciousness*, trans. Rodney Livingstone (Cambridge: The MIT Press, 1972), 83.
[362] Margaret Radin, *Contested Commodities: The Trouble With Trade in Sex, Children, Body Parts, and Other Things* (Cambridge: Harvard University Press, 2001). See also, Margaret Radin, "Market-Inalienability," *Harvard Law Review* 100, no. 8 (1987): 1849-937.
[363] Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets* (New York: Farrar, Straus and Giroux, 2013).
[364] W. Bradley Wendel, "Alternative Litigation Finance and Anti-Commodification Norms," 675.

the commodification of litigation (and the political rationalities that legitimate such commodification) as a feature of the neo-liberalization of civil justice.

To exemplify this observation in practical terms, the CEO of Burford Capital (a major litigation finance firm) has recently suggested that litigation finance "really is just corporate finance. It just happens that the underlying asset is a litigation claim instead of an airplane or a photocopier."[365] In this light, a consequentialist or jurisprudential analysis would examine the implications and dynamics of this 'underlying asset' in the context of the civil justice system, whereas an anti-commodification stance rejects the notion that an incurred harm is ontologically the same as a photocopier and that an incurred harm should normatively be treated the same as a photocopier; in short, that an incurred harm is a commodity and whether an incurred harm should be commodified and treated as such.[366] The economic basis of the anti-commodification critique presupposes that this 'underlying asset' or object of commodification is not ontologically produced for sale; to invoke the Polanyian distinction, such potential assets are "fictitious commodities."[367] Simply put, this stance is that the infringed right of a human being (or any part thereof) is not a product created for purchase and exchange on a marketplace.

To clarify, W. Bradley Wendel has outlined the parameters of the commodification critique in the context of litigation finance as follows:

> Someone who believes that free markets are a good thing because they permit autonomous individuals to enter into value-enhancing exchanges should naturally be supportive of a mechanism by which causes of action and their proceeds are freely alienable to anyone willing to pay the price set by the market. On the other hand, someone who objects to [third

[365] "Strings Attached," *Lexpert* 1 July 2012.
[366] To answer the ontological question: the process of commodification implies that the object of commodification was not originally a commodity.
[367] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 2001), 71-81.

> party litigation financing] as having a commodifying tendency in the domain of civil litigation would be expected to object to the hegemonic tendencies of market rationality in general, and to favor restrictions on the alienation of many forms of property.[368]

Whereas Wendel adopts the former viewpoint in support of the commodification of litigation (and the concomitant alienability of litigable claims) with the neo-liberal belief in the goodness of "free markets," the latter viewpoint has been largely absent from analyses of litigation finance. As Peter S. Spiro has pointed out, however, the "free market" often produces innovations such as litigation finance "in response to problems such as [access to justice], but they are not always *socially beneficial* innovations."[369] Spiro polemically compares financiers who "invest" in litigation as being "very much like vulture funds that buy distressed debt."[370]

Since consequentialist and jurisprudential analyses are conceptually distinct from one another (and from axiological or deontological analyses) yet raise interrelated and complementary concerns over litigation financing, this chapter will integrate various reservations raised by these respective standpoints.[371] This serves as an extension of the analysis developed in Chapter 2 that a *co-optative* conception of class actions promotes the privatization of regulatory enforcement which further allows market forces to largely determine which collective claims-makers are able to access justice. The emergence of

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[368] W. Bradley Wendel, "Alternative Litigation Finance and Anti-Commodification Norms," 659.
[369] Peter S. Spiro, "The Problem of Cost Awards and Third Party Funding in Class Proceedings," 6 October 2014. Online: <http://canliiconnects.org/en/commentaries/30012>. [emphasis added]
[370] Ibid.
[371] The conceptual distinction between consequentialist, jurisprudential, and axiological (or deontological) critiques of litigation finance does not imply that the concerns raised by such critiques are not interrelated. To artificially separate and categorize these objections might ultimately prove detrimental to achieving a comprehensive understanding of litigation finance and its critiques. More to the point, such conceptual distinctions may ultimately be synthetic; for example, although the anti-commodification critique is rooted in axiological or deontological reasoning, the social impacts of marketization are fundamentally the causes of concern (i.e. turning a market economy into a market society) and it may therefore not be theoretically sound to classify such arguments as wholly non-consequentialist.

litigation finance in Ontario compounds this market fundamentalism by allowing the penetration of market forces into civil justice with various impacts for class members, including the monetization of substantive justice.

2. THIRD PARTY LITIGATION FINANCE

Third party litigation finance refers to the provision of monetary assistance by parties who do not have any direct interest in the litigation for which the financing is provided (apart from the financing itself). Strictly speaking, third party litigation finance does not *necessarily* imply that the third party will share in the profits of the financed litigation. For example, charitable donations through legal fundraising activities do not commonly involve a pecuniary interest on the part of third parties. However, in the class action context, third party litigation financiers universally provide monetary assistance in exchange for a percentage of any recovery. In jurisdictions where the English Rule remains in effect, such as Ontario, third party litigation financiers often provide indemnification against adverse costs awards (in exchange for a percentage of any recovery). In other words, whether such financiers address the resource constraints or risk exposures inherent in class actions (or a combination of the two), the interest of such financiers is primarily pecuniary, although such financiers typically invoke secondary concerns such as promoting access to justice.

A. THE ORIGIN OF THIRD PARTY LITIGATION FINANCE IN CANADA

Third party litigation finance in Canada is a relatively recent development. The first cases in which Canadian courts were motioned to approve third party financing agreements

occurred in 2009 and 2010 (in Alberta[372] and Nova Scotia[373]). However, in both *Hobsbawn v. Atco Gas and Pipelines Ltd.* and *MacQueen v. Sydney Steel Corporation*, the courts did not offer any reasons and any relevant materials were placed under seal. In Ontario, the first case in which court approval for a third party financing agreement was sought occurred in 2009 with *Metzler Investment GMBH v. Gildan Activewear Inc.*[374]

B. *METZLER INVESTMENT GMBH V. GILDAN ACTIVEWEAR INC.*

The plaintiff (Metzler Investment GMBH) sought approval of a financing agreement (Costs Indemnification Agreement) into which it had entered with Claims Funding International, a third party litigation financier based in Ireland. The proposed financing agreement was fairly straightforward: in exchange for indemnifying the plaintiff in the event of any adverse costs award, Claims Funding International would receive a 7 percent commission on any "Resolution Sum"[375] (i.e. settlement or monetary judgment). Although Justice Leitch held that it was not possible to conclude that the agreement would "not amount to over-compensation to the extent that it is unreasonable and unfair to those who will bear its expense,"[376] namely, the class members, out of whose share the third party commission would have been drawn, the case nevertheless tentatively opened the door to third party financing in Ontario with the affirmation that such agreements are not "*per se*

[372] *Hobsbawn v. Atco Gas and Pipelines Ltd.*, A.S.C.J. (May 14, 2009) Calgary (QB).
[373] MacQueen v. Sydney Steel Corporation, N.S.S.C. (October 19, 2010) Halifax (SC).
[374] *Metzler Investment GMBH v. Gildan Activewear Inc.*, [2009] O.J. No. 3315 (SCJ) [*Metzler Investment*]. In contrast to the previous two cases, *Metzler Investment* did not proceed on an *ex parte* basis. The defendants maintained that they were affected by the motion to approve the fee arrangement and the plaintiffs concurred (as did the court).
[375] *Metzler Investment GMBH v. Gildan Activewear Inc.*, at 12. This "Resolution Sum" would not include disbursements, legal fees, and administrative expenses, which would be deducted from the "Resolution Sum" before Claims Funding International's 7 percent commission would be calculated.
[376] Ibid., at 69.

champertous."[377] This applied the expansive conception of maintenance and champerty of *McIntyre Estate v Ontario* (see below) to third party financing agreements in the class action context.[378] To clarify, champerty is a form of maintenance in which the litigation financier possesses a pecuniary interest in the financed litigation. However, Justice Leitch reserved judgment on whether or not the proposed financing agreement was champertous in nature (given the absence of a monetary cap) and the proceeding was eventually settled out of court.

Interestingly, the stance that third party financing agreements are not *per se* champertous was subsequently contradicted by Justice Little who observed that such agreements "may very well be *per se* champertous."[379] Although Justice Little's position contradicts the growing consensus on the legitimacy of litigation financing, it nevertheless provides a critical counterpoint to the liberalization of maintenance and champerty laws in Ontario.

C. *DUGAL V. MANULIFE FINANCIAL CORPORATION*

Whereas *Metzler Investment* tentatively introduced third party litigation financing into Ontario's class action regime with the application of the reasoning of *McIntyre Estate* to the class action context, *Dugal v. Manulife Financial Corporation*[380] established its legitimacy with the approval of the proposed financing agreement. This approval was based

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[377] Ibid.
[378] "Expansive" in contradistinction to the formerly restrictive conception of champerty which would likely have considered third party financing agreements as champertous.
[379] *Metzler Investment GMBH v. Gildan Activewear Inc.*, at 6. See also Steve Tenai and Nicholas Saint-Martin, "Third Party Funding of Class Actions," online: <http://www.nortonrosefulbright.com/files/third-party-funding-of-class-actions-pdf-199kb-52204.pdf>.
[380] *Dugal v. Manulife Financial Corporation,* [2011] ONSC 1785.

on the judgment that the financing agreement was not champertous given that the third party financier (Claims Funding International) did not "incite or provoke"[381] the litigation and did not possess an "improper motive."[382] The propriety of the third party motive was determined according to the reasoning offered in *Metzler Investment* that "the nature and amount of the fees to be paid are critical in determining whether the motivation was improper."[383] According to Justice Strathy, "exacting an unfair price for the funding agreement, with the resultant unfairness to the litigant, would be an improper motive."[384] In other words, the concern appears to be that an "unfair price" would unjustly deprive class members of their fair share of any recovery. Ultimately this criterion was employed in determining that the financing agreement was reasonable in its proposed commission rate and caps.[385] The reasonableness of the proposed commission rate (7 percent) was also favourably determined in comparison to the levy imposed by the Class Proceedings Fund (10 percent).[386]

In addition to the quantitative concerns over commission rates and caps, the landmark *Dugal v. Manulife* decision also considered qualitative factors pertaining to the legitimacy of third party litigation financing, such as control over litigation strategy, which have prefigured in legal debates wherever third party litigation financing has been

[381] Ibid., at 19.
[382] Ibid.
[383] Ibid.
[384] Ibid., at 20.
[385] Although the third party financing was the same in both cases (Claims Funding International), the financing agreement in *Dugal v. Manulife* most notably differed from the agreement in *Metzler Investment* in that it contained commission caps and was therefore not prone to the overcompensation that Justice Leitch identified in the latter case; the commission rate of the agreement was the same 7 percent as the prior proposed agreement, however, a commission cap was introduced at "$5 million if the resolution occur[ed] at any time prior to the filing of the plaintiffs' pre-trial conference brief and $10 million if the resolution occur[ed] at any time thereafter." *Dugal v. Manulife* at 6.
[386] Ibid., at 33.

introduced. Moreover, given that Claims Funding International is a third party litigation financier based in Ireland without any material assets in Canada, Justice Strathy maintained that adequate security should be provided to ensure that Claims Funding International possessed the capacity to satisfy any potential costs award (as per the indemnification agreement).[387]

D. *CAMPBELL'S CASH AND CARRY PTY LTD. V. FOSTIF PTY LTD.*

The development of litigation finance has not occurred in a "national vacuum."[388] As Christopher Hodges et al have pointed out in a recent overview of litigation finance in England and Wales, the emerging industry has developed in an international context "in which arrangements, rules and developments in one jurisdiction can have a major impact on others"[389] and in which litigation finance firms are "investing in cases outside their home jurisdictions."[390] The dominant presence in Canada of the Ireland-based financier Claims Funding International (a firm founded by Australian lawyers and financiers) testifies to this internationality. In the context of this interconnectedness of national jurisdictional developments and the increasing role of global capital flows in the financialization of litigation, the "principal constraint" on such developments has been "traditional public policy"[391] against maintenance and champerty—the laws of which have experienced liberalization to permit greater financialization. Although developments have not been uniform across national jurisdictions, this liberalization is an indicator of the globalization

[387] Ibid., at 35.
[388] Christopher Hodges, John Peysner, and Angus Nurse, "Litigation Funding: Status and Issues," Centre for Socio-Legal Studies, University of Oxford (January 2012): 37.
[389] Ibid.
[390] Ibid.
[391] Ibid.

of litigation finance, which has permitted global capital inflows and foreign financing into domestic civil justice systems, transforming these institutions into capital markets of global finance. The prospective securitization of litigation finance—a critical enabler of financialization—reinforces this development. At present, various types of litigation finance have developed globally, including in the United Kingdom, Canada, United States, South Africa, Ecuador, and several continental European jurisdictions (such as Belgium, Germany, and Austria), however, the most robust litigation finance industry has developed in Australia to the point of granting financiers the power to determine litigation strategies.[392]

To the extent that contingency fees operate as an economic alternative to third party litigation financing, it should not be particularly surprising that Australia has been at the forefront of the litigation finance industry, given its regulatory prohibition on contingency fees. Conversely, the legalization of contingency fees in provincial class action legislative frameworks effectively reduced the demand for litigation financing in Canada. In a majority decision, the Australian High Court found in its landmark 2006 decision in *Campbell's Cash and Carry Pty Ltd. v. Fostif Pty Ltd*[393] that it was not contrary to public policy for a financier to provide monetary assistance and control the financed litigation with a pecuniary interest. However, the dissenting opinion provides an instructive window into the objection to litigation finance:

> The purpose of court proceedings is not to provide a means for third parties to make money by creating, multiplying and stirring up disputes in which those third parties are not involved and which would not otherwise have flared into active controversy but for the efforts of the third parties, by instituting proceedings purportedly to resolve those disputes, by assuming near total control of their conduct, and by manipulating the procedures and

[392] Hodges et al., 37-61.
[393] [2006] HCA 41 (Aus. H.C.).

> orders of the court with the motive, not of resolving the disputes justly, but of making very large profits.
>
> Courts are designed to resolve a controversy between two parties who are before the court, dealing directly with each other and with the court: the resolution of a controversy between a party and a non-party is alien to this role. Further, public confidence in, and public perceptions of, the integrity of the legal system are damaged by litigation in which causes of action are treated merely as items to be dealt with commercially.[394]

Notably, the extent to which the *Fostif* decision endorses third party litigation financing—to the point of allowing financiers to directly control the litigation rather than operating as passive third parties—has not been reflected in Canadian jurisdictions.[395] This is similarly evident in England and Wales where financiers have not been granted the power to directly control litigation, which suggests that the cautious approach taken in Canada has greater similarity to the latter jurisdictions than Australia. From the perspective of such financiers, the investment of significant resources and the exposure to high risks of adverse costs awards without concomitant control (and the expectation of total passivity) may ultimately prove unsustainable. As the industry has developed, litigation financiers, which are often comprised of experienced legal actors, have increasingly offered legal analysis and advice, which can take the form of 'influencing' as opposed to 'controlling' litigation.

F. THE GRIM REALITY OF MULTILAYER ACCESS TO JUSTICE

From an access to justice perspective, Justice Strathy observed that the "grim reality"[396] of class actions in Ontario's regime (with its English Rule) makes it 'economically irrational'

[394] Ibid., at 226.
[395] The possibility that control over the litigation may be relinquished (formally or effectively) to third party financiers in Canada in the foreseeable future remains a cause for concern.
[396] Ibid., at 29.

for any representative plaintiff to pursue a class proceeding without indemnification. "No person in their right mind," Justice Strathy stated, "would accept the role of representative plaintiff if he or she were at risk of losing everything they own. No one, no matter how altruistic, would risk such a loss over a modest claim. Indeed, no rational person would risk an adverse costs award of several million dollars to recover several thousand dollars or even several tens of thousand dollars."[397] The widespread response to this "grim reality" has been the indemnification of representative plaintiffs by Private Attorneys General—or by the Class Proceedings Fund, in cases where applications have been submitted and approved. Without such indemnification, the prospects of multilayer access to justice ostensibly rest upon the 'economic irrationality' of potential representative plaintiffs. Furthermore, given that indemnification provided by Private Attorneys General "impose[s] onerous financial burdens"[398] and "risk[s] compromising the independence of counsel,"[399] and that the Class Proceedings Fund is selective with its provision of indemnification, Justice Strathy maintained that the proposed financing agreement in *Dugal v. Manulife* ultimately promotes access to justice, a policy objective that would otherwise be "illusory if access to justice were deterred by the prospect of a crushing costs award borne by the representative plaintiff or counsel."[400]

As a landmark case, *Dugal v. Manulife* provides an instructive overview of the role of third party litigation financing in promoting access to justice, although primarily in the limited sense of providing indemnification. To reiterate, Justice Strathy's position holds that the potential for adverse costs awards may impede access to justice by discouraging

[397] Ibid.
[398] Ibid.
[399] Ibid.
[400] Ibid., at 33.

meritorious litigation, therefore agreements that provide indemnification may be complementary to the policy objective of increasing access to justice insofar as such agreements are fair and reasonable in their material terms and conditions. Needless to say, this widely-held position is premised on the continuance of the English Rule in Ontario's class action regime; that is, a legislative intervention that abolishes the "loser pays" principle would effectively obviate the need for indemnification by any party to the proceeding. In fact, Justice Strathy's comments may be interpreted as implicitly endorsing such a legislative reform, given the emphasis on the undesirability of the prevailing 'grim reality' of class actions in Ontario. As examined in previous chapters, the Ontario Law Reform Commission strongly recommended for the abolishment of the English Rule in 1984 in its *Report on Class Actions*; a reform proposal that was not adopted in the *Class Proceedings Act*. It remains to be seen whether such a legislative reform will manifest in the foreseeable future. In fact, Justice Edward Belobaba recently noted:

> Most members of the class action bar, whether acting for plaintiffs or defendants, agree that a "no costs" rule would be much more sensible. Like them, I also wish that the recommendation on costs as set out in the Ontario Law Reform Commission's Report on Class Actions had been accepted. Instead, the provincial legislature decided to adopt the views of the Attorney General's Advisory Committee and continue the "costs follow the event" convention for the very different world of class actions as well. I was a member of that Advisory Committee. I now realize that I was wrong and that the OLRC was right. I understand that the provincial Law Commission is undertaking a review of the *Class Proceedings Act*, including the costs provisions. Hopefully, our mistake will be corrected.[401]

Nevertheless, the extent to which the burgeoning industry of third party litigation financing in Ontario may be affected by such a legislative reform remains an open question,

[401] *Rosen v. BMO Nesbitt Burns Inc.,* 2012 ONSC 6356, at 2.

not least since the statutory prohibition on maintenance and champerty has been progressively liberalized (see below). In other words, a legislative reform which abolishes the English Rule may effectively obviate the need for the provision of indemnification by third party litigation financiers (or any party to the litigation). Such a development would not be inconsequential given that the primary motive for the pursuit of third party litigation financing by Private Attorneys General in Ontario has been indemnificatory.[402] However, such a legislative reform does not actually address the financing of litigation by third parties (as opposed to the provisioning of indemnification). In practical terms, the elimination of the English Rule would obviate the need for adverse costs indemnity, thereby assuaging the exposure concerns of risk-averse Private Attorneys General, but would not substantively affect the pursuit of third party financing by budget-constrained Private Attorneys General.

3. MAINTENANCE & CHAMPERTY

The strongest doctrinal objection to the emergence of third party litigation financing is rooted in the interrelated doctrines of maintenance and champerty.[403] As these pertain to modern class actions, however, the doctrines of maintenance and champerty have historically been invoked in the debate over the legitimacy of contingency fees. This should not be particularly surprising given that third party litigation financing is a relatively recent

[402] Jasminka Kalajdzic, Peter Cashman, and Alana Longmoore, "Justice for Profit: A Comparative Analysis of Australian, Canadian, and U.S. Third Party Litigation Funding," *American Journal of Comparative Law* 61, no. 93 (2012): 118.

[403] It should perhaps come as no surprise that most of the insightful commentaries on the doctrines of maintenance and champerty were published in the late nineteenth and early twentieth century. See, for example, AH Dennis, "The Law of Maintenance and Champerty" *Law Quarterly Review* 6, no. 2 (1890): 169-88; Max Radin, "Maintenance by Champerty," *California Law Review* 24, no. 1 (1935): 48-78; Percy H Winfield, "The History of Maintenance and Champerty" *Law Quarterly Review* 50, no. 35 (1919): 50-72; EH Bodkins, *The Law of Maintenance and Champerty* (London: Steven and Sons, 1935).

development. Nonetheless, it stands to reason that the descriptions of maintenance and champerty offered in this section are appropriate for definitional purposes and applicable to the present discussion.

There is a discernible continuity in the objections raised to contingency fees and those that may be raised to the emergence of third party litigation financing as it pertains to the potential distorting effects of financialization in the promotion of greater access to justice. For example, the OLRC Report observed that with the introduction of contingency fees the "lawyer acquires an interest in the lawsuit that might come between him and his client [sic], not only concerning the amount of the fee but also over the control of the suit on such questions as whether to accept an offer of settlement,"[404] which is similarly true for third party litigation financing insofar as third parties may possess interests that are competing (or complementary, in optimal cases) to those of class members.[405]

A. OVERVIEW

In its monumental *Report on Class Actions*, the Law Commission defined maintenance as the "officious intermedd[ling] in a suit"[406] in which the maintainer does not possess a proper or legitimate interest. The Law Commission also recognized that champerty "refers to a

[404] Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982): 726.
[405] This is similarly true as it pertains to the introduction of additional interests that may come between class lawyers and class members, such as those of the third party litigation financier, who may prefer strategies concerning settlements (for example) that may not be aligned with the best interests of class members. It should be noted, however, that when the interests of the third party litigation financier aligns with those of the class members and serves to promote access to justice (in that limited sense), this is a consequence of the profit motive of the third party litigation financier serving a complementary role in the proceedings and not a consequence of public-spiritedness on the part of the third party litigation financier. As this chapter maintains, the motives of the third party litigation financier is universally the profit motive. The introduction of such additional interests might require class lawyers to engage in a balancing act to satisfy interests that may not be entirely complementary or outright competing.
[406] Ontario Law Reform Commission, *Report on Class Actions*, 716-17.

species of maintenance in which a person unlawfully maintains an action for a share of the proceeds that may be realized as a consequence of the suit."[407] More recently, the Ontario Court of Appeal provided a benchmark definition of both doctrines in *McIntyre Estate v. Ontario (Attorney General)*:

> Maintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever and where the assistance he or she renders to one or the other parties is without justification or excuse. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation.[408]

Maintenance does not necessarily involve champerty, whereas champerty necessarily involves maintenance; in other words, "without maintenance there can be no champerty."[409] As it pertains to litigation finance in Ontario's class action regime, the concerns raised primarily revolve around potential champertous behaviour given the universality of pecuniary interests.

B. LEGISLATIVE HISTORY OF CHAMPERTY

The legislative roots of Ontario's prohibition on champerty originate in the medieval English statute *Statutum de Conspiratoribus* (*Statute Concerning Conspirators*) from 1305.[410] The medieval language of this statutory prohibition on champerty was eventually modernized in 1763 when the *Statute Concerning Conspirators* was updated and

[407] Ibid., 717.
[408] *McIntyre Estate v. Ontario (Attorney General) (2002)*, 61 O.R. (3d) 257 (C.A.) at 26.
[409] Ibid.
[410] Ibid., at 18.

republished.[411] This English prohibition was introduced in 1792 into the former Province of Upper Canada,[412] followed by the recently established Province of Ontario's enactment of *An Act Respecting Champerty* (*Champerty Act*) in 1897, which holds (in its entirety) as follows:

> 1. Champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains.
> 2. All champertous agreements are forbidden and invalid.[413]

This statute is based on the prior English prohibition. The language of s.1 of the *Champerty Act* is identical to the modern language of the English prohibition from 1763—the unambiguous prohibition of all champertous agreements of s.2 was a new addition that was formulated by the Ontario legislature in 1897.[414] Although the abuses[415] that the original medieval English statute sought to prohibit are no longer practiced, the prohibition on champerty has evolved to include other abusive practices that are broadly within the purview of the *Champerty Act*. These abusive practices include the prevailing understanding of champertous conduct as the improper profiting by a third party to litigation in which the "champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses."[416]

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[411] Ibid.
[412] Report on Class Actions, 721.
[413] An Act Respecting Champerty, R.S.O. 1897, c. 327.
[414] *McIntyre Estate v. Ontario*, at 20.
[415] These abusive practices were unique to medieval English society: "In those times, there existed a practice of assigning doubtful or fraudulent claims to Royal officials, nobles and other persons of wealth and influence who would be expected to receive a more favourable hearing in court than the assignors. Typically, these arrangements provided that the assignee maintain the action and that the proceeds of success would be shared between the assignor and assignee. Over time, as conditions in the administration of justice improved with the emergence of an impartial and independent judiciary, the circumstances that gave rise to the enactment of what is now s. 1 of the Champerty Act no longer existed." *McIntyre Estate v. Ontario,* at 19.
[416] Report on Class Actions, 719.

Notably, maintenance and champerty are no longer common law criminal offences in Canada (given the inclusion of s.9 into the *Criminal Code of Canada* which abolished common law offences in 1953). Unlike similar jurisdictions (i.e. England, Australia), however, the *Champerty Act* has not been repealed in Ontario, although the purview of maintenance and champerty has been progressively liberalized since the late nineteenth century.

C. POLICY OBJECTIVES OF MAINTENANCE & CHAMPERTY

The primary policy objective of the modern doctrines of maintenance and champerty[417] is the prevention of litigation (not merely frivolous litigation); that is, the prevention of litigation that would not otherwise have been initiated. At the outset of its modern incarnation, this prohibition sought to restrict the facilitation of litigation irrespective of its merits. Legal historians have suggested that this normative stance "reflected a deeply entrenched English attitude that litigation itself was a socially disruptive evil."[418] In other words, the prohibition on maintenance and champerty cannot be reduced to administrative concerns over the clogging of courts through an increase in frivolous litigation, but rather encompasses a broader societal perspective on the undesirability of litigiousness.

As the OLRC Report observed, the objection to the introduction of contingency fees through recourse to the modern doctrines of maintenance and champerty holds that contingency fees motivate the stirring up of lawsuits that are both "supportable but would

[417] I am using the term "modern" (in the phrase "modern doctrines of maintenance and champerty") in order to distinguish this doctrinal usage from its medieval roots. Although the doctrines are nominally identical, the abusive practices which each usage sought to prohibit are sufficiently different to warrant the distinction.
[418] Report on Class Actions, 717.

not be brought on the client's initiative and those that are groundless but have nuisance value"[419] which compounds the "already overcrowded courts and contribut[es] to an undesirable litigious attitude in the community."[420] This is the normative stance underlying the doctrines, which similarly extends to third party litigation financing. In short, the modern policy objective of discouraging litigation is rooted in concerns over the administration of justice, as well as broader societal concerns over increased litigiousness.[421]

D. ACCESS TO JUSTICE AS A POLICY OBJECTIVE

The restricted conception of maintenance and champerty outlined thus far has been progressively liberalized since the late nineteenth century by courts to allow for several exceptions in the provision of financial assistance by third parties. This expansion has primarily occurred as a consequent of balancing the countervailing policy objectives of discouraging litigation and increasing access to justice.[422] Courts have recognized that the policy objective of increasing access to justice has been unduly restrained under the stricter

[419] Ibid.
[420] Ibid.
[421] Although doctrinal restrictions remain in effect on the acceptability of such financing agreements, the extent to which these restrictions operate on a meaningful basis rather than operating as formalities that may be circumvented in a fairly straightforward fashion remains an open question. For example, litigation financiers cannot be viewed as stirring up litigation that would not otherwise have been pursued; however, the extent to which class action firms can initiate proceedings (for which they may not possess adequate resources) with the intention of pursuing a third party financing agreement may effectively circumvent this restriction. In other words, a proceeding that is pursued with the prospects of a financing agreement at some future date does not formally violate the doctrinal restrictions on maintenance and champerty, but can reasonably be interpreted as facilitating a claim that may not otherwise have been pursued.
[422] The countervailing policy objectives in this formulation are largely grounded in a restrictive conception of "access to justice" as meaning "access to courts." This should not be particularly surprising given that the expansion of the concept of "access to justice" beyond the strictly court-based conception has primarily occurred in later discursive waves as policies have developed to combat the multifaceted nature of inaccessibility.

conception of maintenance and champerty given its reluctance to differentiate between meritorious and frivolous litigation.

These exceptions in the provision of third party litigation financing have been distinguished by the motives attributable to third parties; where exceptions have been granted, these motives are adjudged as proper or legitimate by courts. For example, litigation funds obtained from family members have been recognized as proper or legitimate. Notably, although such funds have been identified as exceptions to maintenance for third parties, these exceptions do not extend to champertous agreements; which is to say, in cases where a third party (family member) were to possess a pecuniary interest in the litigation for which financing has been provided, such a champertous agreement would not be recognized by the courts (although practical enforcement of such familial agreements is predictably difficult).[423] Additionally, charitable donations and altruistic legal fundraising activities are typically treated as exceptions to maintenance, however, rather like exceptions pertaining to family members, these do not commonly feature in the class action context.

The enormous costs and high risk exposures associated with mounting a class action in Ontario has tended to restrict the possibilities of available financing opportunities, thereby contributing to the economic barriers associated with multilayer access to justice. Legislative initiatives have sought to overcome these economic barriers through various measures, such as the legalization of contingency fees which promotes access to justice through the economic incentivization of attorneys. In Ontario, this legalization first

[423] Poonam Puri, "Financing of Litigation by Third-Party Investors: A Share of Justice?" 529.

occurred in the context of class actions with the enactment of the *Class Proceedings Act*.[424] In this context, all fee arrangements must obtain court approval. Moreover, as the Court of Appeal pointed out in *McIntyre Estate v. Ontario*, which remains the leading case on maintenance and champerty, it is not the case that "contingency fee agreements can never be champertous,"[425] but rather that contingency fee arrangements "should no longer be considered *per se* champertous,"[426] and that courts should consider the "circumstances of each case"[427] before determining whether or not the "requirements for champerty are present."[428]

Given the direct applicability, proponents of third party litigation finance have sought to liberalize or abolish the laws of maintenance and champerty, with one critic positing that the "exceptions are fairly incoherent"[429] and the "justifications are ancient and anachronistic and hold little force in contemporary society."[430] At the same time, proponents have expressed the view that without such financing any given class proceeding may never move past the certification stage. Against the critique that third party litigation financing is "morally questionable because it will allow third parties to profit from other people's injuries,"[431] some critics have argued that "it would seem perverse to maintain the status quo and thereby allow wrongdoers to profit from the plaintiff's inability to pursue a

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[424] S. 33 (1) of the *Class Proceedings Act* holds: "Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceedings."
[425] *McIntyre Estate v. Ontario* at 75.
[426] Ibid.
[427] Ibid.
[428] Ibid.
[429] Puri, "Financing of Litigation by Third-Party Investors: A Share of Justice?" 565.
[430] Ibid.
[431] Ibid., 563.

legal claim."[432] This latter point is plainly accurate, however, such a view may ultimately overvalue the role of private litigation financiers as facilitators of access to justice and undervalue to role of public funding models such as Ontario's Class Proceedings Fund.

E. JUDICIAL ECONOMY & ACCESS TO JUSTICE

In Ontario, the consequentialist objection that third party finance encourages frivolous litigation assumes greater significance in the context of class actions since it evokes a primary policy objective of the *Class Proceedings Act*: judicial economy, that is, the preservation of scarce judicial resources. According to this objection, to the extent that class actions serve as procedural vehicles in the preservation of scarce judicial resources, litigation finance is a contradictory feature of Ontario's class action regime insofar as such financing may encourage frivolous litigation, thereby placing additional (and unnecessary) strain on judicial resources. However, there is no empirical evidence in the Canadian context that third parties have provided litigation financing for unmeritorious or frivolous claims. In point of fact, the economic interests of litigation financiers is rooted in pursuing meritorious claims, which is to say, 'winnable cases'. This is a major reason why litigation finance has taken hold globally in jurisdictions with strong reputations for judicial excellence and independence, which is to say, in civil justice systems in which meritorious cases possess greater degrees of predictability for success.

From a critical policy perspective, the primary objective of judicial economy (alongside access to justice) of the *Class Proceedings Act* has occupied a tenuous position in Ontario's class action regime. The formal logic underlying this policy objective holds

[432] Ibid.

that class actions preserve scarce judicial resources by allowing for the aggregation of individual claims that would otherwise clog the courts into a single procedural vehicle, thereby allowing for a mass resolution of the aggregated claims and preventing the expenditure of judicial resources on duplicative individual claims. By the same token, the formal logic underlying the policy objective of access to justice holds that individual claims would not be pursued without a vehicle for collective claims-making such as a class action. The formal contradiction is abundantly clear: if such claims are individually non-viable, then they would not otherwise clog the courts in absence of an aggregative vehicle; if such claims would otherwise clog the courts, then they are not individually non-viable.

However, this distinction is a consequent of a difference in the character of the respective claims; that is, negative value claims are those that would likely not be pursued without a class action by 'rational actors', whereas positive value claims are those that would likely be pursued with or without a class action by 'rational actors'. In the former case, the class action promotes access to justice, whereas in the latter case, the class action promotes judicial economy. In fact, the class action may also be construed as promoting access to justice in the latter case insofar as collective claims-making produces a strength-in-numbers dynamic against powerful adversaries. Nevertheless, to the extent that class actions promote meritorious negative value or individually non-viable claims that would not otherwise have been pursued, this promotion contradicts the policy objective of judicial economy. From a strictly economical perspective, any increase in litigation contradicts the objective of preserving scarce judicial resources, irrespective of the merits or frivolity of the claim.

F. MOTIVE REQUIREMENT

Although substantive differences in the exceptions are significant – a mother lending money to a daughter is substantively different from a charitable donation for a worthy cause – a common denominator among these exceptions is the determination of the proper or legitimate motive by the courts. Whereas courts previously held that any form of third party litigation financing "without lawful excuse"[433] amounted to maintenance irrespective of the motives of the third party financier, the range of permissible funding sources has since progressively expanded through closer scrutiny of such motives.[434] As the Court of Appeal discerned in *McIntyre v Ontario*, the second general principle (out of four)[435] on maintenance and champerty elucidates the criterion of proper or legitimate motive as follows:

> For there to be maintenance, the person allegedly maintaining an action or proceeding must have an improper motive, which motive may include, but is not limited to, officious intermeddling or stirring up strife. There can be no maintenance if the alleged maintainer has a justifying motive or excuse.[436]

Clearly courts have affirmed the primacy of the motive of the financier in the constitution of maintenance. Similarly the Privy Council affirmed the primacy of motive in 1860 by holding that maintenance and champerty "must be something against good policy, something tending to promote unnecessary litigation, something that in a legal sense is

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[433] Report on Class Actions, 718.
[434] Ibid.
[435] The general principles outlined in McIntyre v. Ontario are as follows: (1) "Champerty is a subspecies of maintenance. Without maintenance, there can be no champerty." (2) "For there to be maintenance, the person allegedly maintaining an action or proceeding must have an improper motive, which motive may include, but is not limited to, officious intermeddling or stirring up strife." (3) "The type of conduct that has been found to constitute champerty and maintenance has evolved over time so as to keep in step with the fundamental aim of protecting the administration of justice from abuse." (4) "When the courts have had regard to statutes such as the Champerty Act and the Statute Concerning Conspirators, they have not interpreted those statutes as cutting down or restricting the elements that were otherwise considered necessary to establish champerty and maintenance at common law." *McIntyre v. Ontario*, at 34.
[436] Ibid.

immoral and to the constitution of which a bad motive in the same sense is necessary."[437] This recalls the public policy objective of discouraging litigation over concerns about the administration of justice and societal litigiousness. In the case of a charitable donation, legal fundraiser, or a family member offering to donate the necessary funds, the determination of the motive is fairly unproblematic. However, the prospect of litigation financing in the class action context raises a number of concerns that are not necessarily applicable in the aforementioned exceptions, not least of which is the universality of third party profiting.

G. THE PROFIT MOTIVE: BUYING ACCESS AT THE EXPENSE OF JUSTICE

It is important to note that whether and to what extent the motives of financiers are discernible from the material terms and conditions of financing agreements has thus far been largely neglected in the relevant jurisprudence. Plainly speaking, it is not self-evident that third party motive is discernible from such material terms and conditions. Although courts have largely considered the matter incontrovertible, it is not immediately clear why the 'fairness of the price'[438] is indicative of the propriety of the motive, particularly since financiers are private enterprises who are motivated by profit maximization; that is, irrespective of commission rates or monetary caps, the primary motive of financiers is the profit motive. Of course, this does not foreclose the possibility that such financiers have

[437] *Fischer v. Kamala Naicher* (1860), 8 Moo. Ind. App. 170 at 187 (P.C.) as quoted by Poonam Puri, "Financing of Litigation by Third-Party Investors," 527. According to Puri, in addition to the aforementioned "bad motive" and the provision of litigation financing, the third party litigation financier also "must cause the action to be commenced, aggravated, or enlarged in some way," in order to constitute maintenance.

[438] As maintained in *Dugal v. Manulife*, a landmark case in the determination of maintenance and champerty in the class action context.

secondary motives of increasing access to justice. Nevertheless, the point at stake is the objective observation that such financiers are not altruistic actors such as legal charities nor are the motives strictly discernible from the material terms and conditions of financing agreements.

Such terms and conditions are perhaps less indicative of the propriety of their motives and more indicative of their respective business strategies. It is safe to assume that a hypothetical financier does not charge a commission rate of 7 percent (as opposed to 20 percent) out of public-spirited concern for greater access to justice for class members, but rather as a consequent of in-house economic calculations and strategic considerations on optimal commission rates (and monetary caps). It is an observation bordering on a truism that such private enterprises would charge higher rates if these were acceptable by courts (and Private Attorneys General); for example, Australian litigation financiers generally charge commission rates in the range of 25-40%, at times as high as 60-70%.[439] The discernable tendency of approving financing agreements without usurious or unconscionable commission rates and caps is likely more indicative of the access to justice concerns of *courts* rather than those of *third party financiers*.

In short, the 'fairness of the price' is not indicative of third party motive as much as it is indicative of meticulous internal (in-house) deliberations and external (Private Attorney General) negotiations that occur in advance of a tentative agreement. The material terms and conditions of such agreements are reflections of the profit-maximizing priorities of third party financiers. Given that the overriding objective of this process is approval by the courts, negotiations that occur in advance of a tentative agreement often consider the

[439] Kalajdzic, Cashman, and Longmoore, "Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding," 100.

boundaries provided by courts on the acceptability of commission rates and caps. The immanent criticism herein is not that third party financiers do not sufficiently prioritize access to justice—these are profit-driven private enterprises, not state institutions motivated by the public interest or altruistic actors such as legal charities—but rather to observe that it does not stand to reason that their motivations are proper or legitimate by virtue of the material terms and conditions of their proposed agreements. As much as third party financiers may gesture towards the public benefits of their financing practices, these notional benefits are ultimately secondary to profit maximization.

Substantively speaking, such profits are generally withdrawn directly out of any recovery of the financed litigation—every dollar in profits is a dollar that is not distributed to class members.[440] The potential for collusion between Private Attorneys General and third parties may compound this problem insofar as financing agreements (privately negotiated by Private Attorneys General and litigation financiers) with unreasonable terms may be pursued against the interests of class members. As Michael Trebilcock and Elizabeth Kagedan have pointed out, this type of collusion serves to "stifle or misrepresent the value of the claim to the class representative, who is insufficiently informed or incentivized to carry out his [*sic*] role as agent and monitor of these arrangements,"[441] which would ultimately result in "all class members receiving a lower share of the award than the risks justify."[442] Such a strong incentive to exploit the informational advantages that Private Attorneys General and litigation financiers possess has serious negative

[440] Defenders of third party litigation financing may posit that there would be no recovery to be distributed to class members without third party litigation financing; in other words, that a smaller percentage of any given recovery for class members is preferable to a larger percentage of no recovery whatsoever. As explained below, such a view overvalues the role of third party litigation financiers as facilitators of access to justice.
[441] Trebilcock and Kagedan, "An Economic Assessment of Third-Party Litigation Funding," 65.
[442] Ibid.

implications for the access to justice benefits of this type of financing; that is to say, informational exploitation and the capitalization of imbalanced power relationships would "yield an unreasonably low class-member pay-out, compromising access to justice objectives."[443]

As a matter of policy, litigation finance may accentuate the deterrence function of class actions irrespective of the extent to which funds distributable to class members are diminished. This effectively elevates behaviour modification as a secondary policy objective to the status of a primary objective (on par with access to justice and judicial economy). From an access to justice perspective, the issue becomes whether and to what extent litigation finance serves to increase access at the expense of justice; in other words, whether and to what extent procedural access (i.e. a day in court) takes precedence over substantive justice (i.e. a fair and equitable recovery).

To recall the analysis of Chapter 2, the neo-liberalization of civil justice in the class action context was underway with the legalization of contingency fees in the *Class Proceedings Act* which introduced economic incentivization (via statute) as a cornerstone of the promotion of the policy objective of increasing access to justice—that is, as a form of harnessing market forces for the purposes of private regulatory enforcement and public policy implementation. The present analysis over the motives of litigation financiers may be viewed as a continuation of the previous analysis of the motives of entrepreneurial Private Attorneys General. "The motivations driving lawyers and investors are one and the

[443] Ibid., 67. As the authors point out, "the most pressing informational concern is that the representative plaintiff will accept an inefficient funding agreement that does not reflect the class claim's actual value and probability of success." Moreover, given that the conception of justice that animates civil litigation primarily (though not exclusively: injunctive relief) assumes a monetary form, such reductions in the distributable recovery for class members concomitantly amounts to reductions in remunerative justice.

same,"[444] as one proponent of third party litigation financing has observed, which lends credence to the view that "[b]ecause the courts and legislatures have condoned the profit-motive of entrepreneurial class counsel, it is hard to see how the motives of third-party funders could be viewed as obnoxious by comparison."[445] By the same token, a critique of the structural limitations of the profit motive of entrepreneurial Private Attorneys General naturally extends to third party litigation financiers (who are further unrestrained by the absence of professional obligations to class members which Private Attorneys General otherwise possess). Fundamentally, however, the political-economic dynamics that have facilitated the penetration of market forces into the civil justice system (and broader regulatory enforcement mechanisms) by courts and legislatures suggests that the financialization of litigation is not so much an anomaly as a continuation of neo-liberal governance in contemporary Canada.

4. THE MARKETIZATION OF CIVIL JUSTICE

Despite its nascent stage of development, it has become possible to discern several features of the marketization of civil justice in Ontario. The investment imperative of limiting exposures to economic instabilities and the desirability of ensuring liquidity in such investments contribute to the prospective securitization of litigation investments. Moreover, the financialization of litigation ultimately promotes the monetization of substantive justice over other types of reparations—this is particularly problematic in the context of environmental justice since such collective harms often involve demands for

[444] Peter Senkpiel, "Three's a Crowd: Third-Party Litigation Funding of Class Actions in Canada," *Canadian Class Action Review* 5, no. 2 (2009): 301.
[445] Ibid.

non-monetary outcomes, including clean-up of contaminated sites, de-toxification, public apologies, medical programmes, educational initiatives, and so forth. Finally, the non-existence of a state regulatory regime in Ontario and the continuation of the self-regulatory model for litigation finance for the foreseeable future has effectively permitted market forces to determine the parameters of the emerging industry.

A. LIMITED EXPOSURE TO ECONOMIC INSTABILITIES

As an 'investment opportunity', the modern class action offers the potential for significant returns for third party litigation financiers. In Ontario's class action regime, litigation financing has been described as "a hot new investment commodity with high levels of reward not available in traditional investment vehicles."[446] The desirability of such "high levels of reward" is reinforced by the established settlement culture of class action litigation in Ontario, wherein an adversarial void (and the absence of a mandatory amicus curiae) and the inefficacies of class objectors have contributed to produce conditions which are conducive to favourable settlements for Private Attorneys General (and by extension, third party litigation financiers).[447]

Although the prospect of a healthy percentage from a class action settlement (or judgment) is axiomatically a major attraction for potential investors, the most attractive feature of third party litigation finance may be the extent to which such investments are sheltered from the instabilities and fluctuations of financial markets. That is to say, the cyclical crises of capitalism have served to promote litigation as an investment opportunity

[446] Cameron and Kalajdzic, 3.
[447] This is explored in greater detail in Chapter 5. Moreover, the problematic class action settlement culture is not unique to Ontario and applies fairly evenly across Canadian jurisdictions. For an overview, see Catherine Piché, *Fairness in Class Action Settlements* (Toronto: Carswell, 2011).

with limited market exposure. As one commentator has observed, class action litigation is particularly attractive to potential investors as a way to "diversify their investment portfolios and achieve gains in bad markets"[448] given that such investments "are potentially independent of economic conditions, since the prospects of winning a case depend on its merits, not the economy."[449] Such investments are portrayed to investors as a strategic form of portfolio diversification while simultaneously portrayed to lawmakers and the general public as promoting access to justice.

Clearly the independence of such investments (or their perceived insularity from financial markets) originates in the stability and proper functioning of the civil justice system. However, the formal logic of this view does not account for the myriad ways in which political-economic conditions may influence the behaviour of legal actors who may otherwise be integrated in unstable or fluctuating markets; for example, an economically faltering class action firm may be compelled to accept a settlement that may otherwise have been deemed unacceptable in a more favourable political-economic climate, thereby compromising substantive justice for class members.[450] The perceived insularity of such investments may inadequately account for the broader political economy in which class actions are situated. Nevertheless, this perceived insularity likely contributed to the growth of the third party litigation financing industry in the aftermath of the 2008 Global Financial Crisis in common-law jurisdictions where such investment practices are permissible.[451] It

[448] Senkpiel, "Three's a Crowd: Third-Party Litigation Funding of Class Actions in Canada," 311. See also, Sara Randazzo, "Litigation Financing Attracts New Set of Investors," *The Wall Street Journal* 15 May 2016, online: http://www.wsj.com/articles/litigation-financing-attracts-new-set-of-investors-1463348262.
[449] Ibid.
[450] This is similarly applicable to both corporate and governmental defendants who may be influenced in a variety of ways by shifting political-economic conditions.
[451] In addition to the relative insularity of such investments from the instabilities and fluctuations of the political economy, Kalajdzic and Cameron have pointed out that "tough economic times decrease traditional finance options and litigants' risk tolerance." See *supra* note 336.

is perhaps ironic (and almost tautological) that this type of financialization is viewed as an advantageous development by prospective investors given the insularity of such investments from the instabilities generated by financial capital.

B. THE SECURITIZATION OF LITIGATION INVESTMENTS

Since third party litigation financing can be accurately identified as an investment, Poonam Puri has suggested that such investments should be subject to the *Ontario Securities Act*.[452] According to Puri, such an application of the *OSA* is legitimate given that a security is by definition "any investment contract"[453] and an investment contract is subjected to a four-pronged test which third party litigation financing agreements typically meet:

(1) money has to be invested;

(2) in a common enterprise;

(3) with the expectation of profit;

(4) to be derived primarily from the efforts of others.[454]

Such a prospective designation aims to constitute a securities market in litigation, thereby promoting third party litigation financing insofar as such investments would no longer lack liquidity, which has been a major undesirable feature of the current industry for investors. At present, the absence of a secondary market on which to trade litigation investments *qua* securities generally obliges third party financiers to commit to the duration of the financed proceeding (assuming the material conditions of any given financing agreement have not been violated by Private Attorneys General, which may permit third party financiers to

[452] For an overview of the securitization of litigation finance in the United States, see, e.g., Maya Steinitz, "Whose Claim is this Anyway? Third Party Litigation Funding," *Minnesota Law Review* 95, no. 4 (2011): 1268-338.
[453] Puri, "Financing of Litigation by Third-Party Investors: A Share of Justice?" 545.
[454] Ibid.

withdraw).[455] Although the prospect may appear remote—given the nascent stage of third party litigation finance in Ontario—there appears to be a growing consensus that the creation of a securities market is an inevitability. Even proponents of third party litigation finance have conceded that such an inevitable development would effectively "turn litigation into a stock market."[456] The implications of securitization for Ontario's class action regime are remarkable: in a regime dominated by investor rights, class actions are being transformed into investments; securities class actions are transformed into securities. Ultimately, as a critical enabler of financialization, this securitization of litigation investments into tradable assets reinforces the power of financial capital in democratic states and societies.

C. MARKET RATIONALITY & MONETIZATION

From both a theoretical and empirical standpoint, a major concern in turning courts into stock markets is the deeper penetration of market rationalities into civil justice. For instance, the dominant preferences of financial investors for short-term gains may have negative impacts in the context of third party litigation financing. Such financiers do not possess fiduciary duties towards class members, but rather owe such duties to their shareholders, whose investment preferences may contradict litigation strategies that are beneficial to class members. This is a particularly striking concern in jurisdictions where litigation finance is self-regulated and does not involve adherence to codes of conduct. As

[455] Courts have expressed caution regarding financing agreements that include voluntary withdrawal options for third party litigation financiers given the potential for undue influence or control that such an option may manifest.

[456] Senkpiel, "Three's a Crowd: Third-Party Litigation Funding of Class Actions in Canada", 314. In other words, the polemical critique of third party litigation financing as the legalization of buying and selling litigation may become a practical reality.

Elizabeth Chamblee Burch has observed, litigation financiers may be incentivized to "pressure plaintiffs to settle early, so that they can report higher quarterly profits"[457] for their shareholders. Such incentivization may extend to Private Attorneys General and compound the collusive tendencies of Ontario's class action regime. In cases where these incentives align, Private Attorneys General and litigation financiers are incentivized to "collude with the defendant if the deal financially benefits them, pressure plaintiffs to accept an offer through questionable means, and misallocate settlement funds if it is necessary for achieving the deal's required consensus."[458] Moreover, the marketization of civil justice would effectively prioritize the monetization of multilayer access to justice given that litigation financiers are principally motivated by profit maximization rather than access to justice concerns. This motivation may incentivize financiers and Private Attorneys General to compel representative plaintiffs to pursue a "simple monetary award instead of a socially desirable remedy such as injunction or clean-up."[459] Such a prioritization of monetary recoveries over other forms of substantive justice is particularly worrisome in the environmental context, which often involves non-monetary interests and social calls for restoration of polluted land, air, and water, as well as myriad other forms of redress, including medical programs and public apologies. In short, the penetration of market rationalities and monetization priorities is largely incongruent with environmental claims, which often favour preventative measures and deterrence over (or in addition to) compensatory damages. Even proponents of litigation finance, such as Maya Steinitz, have recognized that "a socially undesirable element to the commodification of legal claims is

[457] Elizabeth Chamblee Burch, "Financiers as Monitors in Aggregate Litigation," *New York University Law Review* 87, no. 5 (2012): 1319.
[458] Ibid.
[459] Trebilcock and Kagedan, 73.

to purely monetize all legal recovery, thereby dramatically affecting choice of remedies."[460] The reinforcement of such monetizing imperatives may effectively reduce the multifaceted remedies sought by environmental classes into strictly compensatory forms favoured by litigation financiers—a reduction that would largely occur with the active or passive participation of Private Attorneys General working on a contingency fee basis who similarly prefer such compensation over other forms of remedies.

D. REGULATORY GAP IN ONTARIO'S LITIGATION FINANCE INDUSTRY

There is no statutory framework for regulating third party litigation financing in Ontario. The Law Society of Upper Canada has adopted a 'wait and watch' approach for the regulation of the litigation finance industry, which has effectively permitted the industry to remain self-regulated apart from the case-by-case interventions of class action judges.[461] In its forthcoming review of Ontario's class action regime, the Law Commission of Ontario will consider the emerging third party litigation financing industry, although the recommendations to the Ministry of the Attorney General that may emerge from its Class Action Project are not presently ascertainable.[462] In other words, the emergence of the third party litigation finance industry has occurred largely as a self-regulated enterprise without governmental oversight—a state of affairs that will likely continue for the foreseeable future.

Insofar as the modern class action operates as a policy instrument for private regulatory enforcement and the emergence of this industry has reinforced the dominance

[460] Steinitz, "Whose Claim is this Anyway? Third Party Litigation Funding," 1321.
[461] Cameron and Kalajdzic, 10.
[462] Whether the Law Commission of Ontario's recommendations will differ from the 'wait and watch' approach of the Law Society of Upper Canada is a matter of speculation at present.

of market forces in civil justice by financializing litigation, the absence of any state regulatory regime warrants greater reflection. The restructuring in neo-liberal governance towards the harnessing of market forces in the pursuit of policy objectives becomes especially problematic in the context of litigation finance given the absence of any so-called 'harnessing' by regulatory bodies. The absence of a state regulatory regime has effectively permitted market forces to dictate the parameters of the emerging industry with scant judicial oversight. In practical terms, the current case-by-case model of subjecting proposed financing agreements to judicial review (to ensure doctrinal compliance) creates a fragmentary regulatory regime that lacks the comprehensiveness and sustainability of a principle-based statutory framework.

This self-regulatory model has been endorsed by some proponents of third party litigation financing who view state interventions as cumbersome and constraining to the operation of market forces. Trebilcock and Kagedan have argued that the maintenance of the prevailing self-regulatory model is preferable on the basis that a robust regulatory regime "would be heavy-handed and inefficient"[463] and may ultimately stifle litigation financing, although the authors consider the possibility of an amendment to the *Class Proceedings Act* to provide guidance on the acceptability of financing agreements.[464] In a recent intervention, Puri has proposed a principle-based legislative framework that promotes transparency and fairness through the mitigation of "potential power imbalance[s] and information asymmetries"[465] and outlines the expectations of all parties

[463] Trebilcock and Kagedan, 81-2. Such an amendment would endorse a Kaplowian conception of standards (as opposed to rules) given the divergences in class actions, which may at times be fairly straightforward with minimal risks and at other times engage novel interpretations of law with high risks.
[464] Ibid.
[465] Poonam Puri, "Profitable Justice: Aligning Third-Party Financing of Litigation with the Normative Functions of the Canadian Judicial System," *Canadian Business Law Journal* 55, no. 1 (2014): 53. Puri reviews other methods for regulating third party litigation financing, including an approach based on the

"with the judiciary interpreting, applying and enforcing the legislation"[466] in cases where disputes arise. This legislative model is an improvement from the "incremental, case-by-case approach that is currently the norm [which] lacks the capacity to provide timely and comprehensive regulatory reform."[467] To reiterate, however, the prospects of implementing a state regulatory regime for litigation finance remain remote at present in Ontario.

E. STRANGE BEDFELLOWS: REGULATION PROMOTION BY CAPITAL GROUPS

Somewhat ironically, vociferous proponents of robust statutory frameworks for the regulation of the litigation finance industry have largely come from 'free enterprise' interests that generally advocate in favour of self-regulatory models. The most prominent example has been the U.S. Chamber of Commerce's Institute for Legal Reform, which has released a series of publications and increased lobbying efforts against the emerging litigation finance industry in the United States. According to the Chamber of Commerce, litigation finance "represents a clear and present danger to the impartial and efficient administration of civil justice"[468] based on four public policy implications:

1. The potential for an increase in frivolous litigation;[469]
2. The potential for financiers to wrest control over the litigation from plaintiffs and counsel;[470]
3. The potential for the prolongation of litigation and the deterrence of settlement;[471]

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fiduciary duty of the attorney-client relationship and the maintenance of the prevailing case-by-case approach, while ultimately endorsing a new principle-based legislative framework.

[466] Ibid., 49.

[467] Ibid.

[468] John H. Beisner and Gary A. Rubin, U.S. Chamber of Commerce Institute for Legal Reform, "Stopping the Sale of Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation," (2012): 1.

[469] Ibid., 4.

[470] Ibid., 4-5.

[471] Ibid., 5-6.

4. The potential ethical compromises in attorney-client relationships with the inclusion of a third party.[472]

In light of these potentialities, the Institute for Legal Reform advocates for the establishment of a "robust oversight regime"[473] which includes the creation of a federal agency "empowered to make rules and regulations in pursuit of its mandate and to enforce any laws, rules, or regulations governing [third party litigation finance]."[474] According to this view, the potential risks of litigation finance "are simply too acute to be left to industry self-regulation."[475] Presumably the Institute for Legal Reform considers the acuteness of these risks to be significantly worse than those posed in other areas for which deregulatory campaigns have been waged, including against environmental, financial, health, employment, and consumer regulatory protections. More to the point, the Institute for Legal Reform has reinforced these consequentialist and jurisprudential objections with quasi-moral objections to the effect that litigation finance is "antithetical to the free enterprise system because it allows private parties to subject businesses involuntarily to the coercive effects of our litigation system, all for the purpose of profit."[476] This selective protestation of the profit-motive recalls the earlier critique of class actions as discussed in Chapter 2. Needless to say, the Institute for Legal Reform has focused its efforts on preventing the use of litigation finance in the class action context, which gestures towards

[472] Ibid., 6.
[473] Ibid., 2.
[474] Ibid.
[475] The US Chamber of Commerce's Institute for Legal Reform contends that "the risks posed by [third party litigation financing] investments are so serious, and the incentives for misconduct by [third party litigation financing] investment companies are so great, that industry self-regulation is not a viable option to protect the administration of civil justice." Ibid., 7.
[476] Ibid., 15.

an implicit recognition that litigation finance bolsters the capacities of entrepreneurial Private Attorneys General to pursue class actions against corporate actors.[477]

Despite the at-times salient observations that inform such objections—such as the criticism advanced in the 2009 report, *Selling Lawsuits, Buying Trouble*, that a litigation financier seeks to "protect its investment, and its interest lies in maximizing its return on that investment, not in vindicating a plaintiff's rights,"[478] which raises valid access to justice concerns—it is not particularly difficult to interpret the critiques and proposals of corporate interests in a strategic light; which is to say, as stemming from self-interested concerns over the potential adverse consequences for corporate behaviour (rather than concerns over the administration of justice or access to justice for collective claims-makers). As one commentator has observed, an "objection to the commodification of civil justice by [litigation finance] is likely to be *purely strategic* unless it is part of a broader theoretical agenda that seeks to displace economic modes of valuation from areas of life in which they do not belong."[479] The stance of this project has been precisely such a displacement of 'economic modes of valuation' from social and democratic life, whereas the objections of capital groups such as the Chamber of Commerce transparently evinces such strategic maneuvering. Interestingly, this strategic objection has created a peculiar situation in which socially progressive critics of self-regulation are provisionally (and for disparate reasons) aligned with their conventional adversaries in advocating for robust regulatory regimes in litigation finance.

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[477] Ibid., 13.
[478] John H. Beisner, U.S. Chamber of Commerce Institute for Legal Reform, "Buying Lawsuits, Selling Trouble: Third-Party Litigation Funding in the United States," (2009): 2.
[479] Wendel, "Alternative Litigation Finance and Anti-Commodification Norms," 659. [emphasis added]

5. THE PUBLIC MODEL: CLASS PROCEEDINGS FUND

Although the OLRC Report's recommendation that Ontario should discontinue the English Rule for its then-forthcoming class action regime was ultimately rejected by the Ministry of the Attorney General's Advisory Committee on Class Action Reform in 1990, the Advisory Committee nevertheless recommended that the preservation of the English Rule should be accompanied by the creation of a sustainable public fund to promote the public interest and mitigate any disincentives of adverse costs awards.[480] As the comprehensive review of the Class Proceedings Fund observed in 2013: "access to justice is the most fundamental objective of class proceedings, and as the Attorney General's Advisory Committee recognized, it risked being undermined without the existence of a costs-assistance fund."[481] According to the amendment of the *Law Society Act, 1990,* section 59.1 holds the dual purposes of the Class Proceedings Fund as follows:

> 1. Financial support for plaintiffs to class proceedings and to proceedings commenced under the *Class Proceedings Act, 1992*, in respect of disbursements related to the proceeding.
> 2. Payments to defendants in respect of costs awards made in their favour against plaintiffs who have received financial support from the Fund.[482]

The Law Foundation of Ontario provided an endowment of $500,000 to the Class Proceedings Fund with the objective that the public fund should operate on a financially self-sustaining model: a 10% levy is charged for all class actions that have been granted financing (i.e. disbursements and/or indemnification), thereby ensuring its continued operation. As of June 2015, the Class Proceedings Fund had expanded to $9,495,618, a

[480] Ontario, *Report of the Attorney General's Advisory Committee on Class Action Reform* (Toronto: The Committee, 1990): 56-73.
[481] Class Proceedings Fund: 20 Years in Review (2013): 4.
[482] *Law Society Act,* R.S.O. 1990, c. L.8.

1,900% increase in its funding capacities.[483] Despite criticisms that the Class Proceedings Fund is too restrictive in its case selection methods—applications are evaluated according to the criteria provided by the *Law Society Act* (i.e. merits, public interest, reasonable proposal for funding usage, etc.)—out of 106 applications (excluding deferred and withdrawn/cancelled applications), it has approved 82 applications for an effective approval rate above 75%.[484] Ultimately, the continued existence of the Class Proceedings Fund as a public option for litigation financing suggests that class actions in Ontario have a viable option for financing (for disbursements and indemnification).

A. PRIVATE AND PUBLIC LITIGATION FINANCING

Nevertheless, the emergence of this growing industry has renewed criticisms of the purported obsolescence of public financing of class actions in favour of the preferability of a market-based solution. Yet the case selection preferences for private litigation financiers and the Class Proceedings Fund are distinguished by the motives of profit maximization—whereas the Class Proceedings Fund prioritizes access to justice and the public interest in case selection, private litigation financiers prioritize profit maximization in case selection. These priorities are reflected in the selected cases. Among these cases, private litigation financiers have preferred "high-stakes, large securities cases,"[485] whereas the Class Proceedings Fund has financed public interest cases of various sizes in different areas of the law, including employment, environmental, pensions, residential schools, and

[483] Gina Papageorgiou, "Ontario's Class Proceedings Fund: Separating Fact From Fiction," *Canadian Class Action Review* 10, no. 1-2 (2015): 84.
[484] Class Proceedings Fund: 20 Years in Review (2013): 14. The total number of applications (including deferred and withdrawn/cancelled applications) is 131, resulting in a modified approval rate of 63%.
[485] Papageorgiou, "Ontario's Class Proceedings Fund: Separating Fact From Fiction," 92.

consumer protection.[486] The social ordering imposed by such market discipline with the proliferation of litigation finance is self-evident. As the current counsel to the Class Proceedings Committee, Gina Papageorgiou, observes:

> [T]here are fewer concerns about conflicts of interest in CPF-funded cases, and disbursement funding has been more generous than any provided by third party funders. Because it is not driven by profit and operates in the public interest, the CPF has historically funded a variety of different types of cases and many important public interest and novel cases, which likely would not have proceeded without it, and which have not attracted third party funders.[487]

Indeed, the numerous consequentialist and jurisprudential objections that have been levied against the litigation financing industry are largely inapplicable to the Class Proceedings Fund. More to the point, its non-profit status as a public option effectively obviates any anti-commodification objections.

B. RESTRUCTURING THE FUND

Notwithstanding its empirically substantiated strong condition as a public option for litigation financing, a potential legislative reform that has been proposed is to modify its fixed 10% levy to encourage greater flexibility and promote applications that might otherwise have been disincentivized. For example, some cases might possess more reasonable prospects of success and may therefore warrant lower levies. Jean-Marc Leclerc has raised concerns about a number of features of the Class Proceedings Fund, including its inflexible 10 percent levy and the fact that its financing coverage is limited to disbursements and adverse costs awards (it does not cover fees).[488] In contrast, Quebec

[486] Ibid.
[487] Ibid., 99.
[488] Jean-Marc Leclerc, "'The Sport of Kings': Financing Class Actions in Ontario," *Canadian Class Action Review* 8, no. 1 (2013): 128.

offers financing for legal fees in addition to disbursements. The selectivity of its financing as well as its rigid (perhaps exorbitant) levy has resulted in the Class Proceeding Fund's lower usage rates (10-20% of all class actions in Ontario). Garry Watson has suggested that the objective of the Class Proceedings Fund may be more successfully achieved if its levy were lowered and subsequently imposed on "all class action recoveries, whether or not these are covered by the Fund."[489] Similarly, Ward Branch has contrasted Ontario's public financing program with Quebec's *Fonds d'aide aux recours collectifs* which imposes a mandatory (and variegated) levy on all class action recoveries; a financing model that has logically contributed to higher usage rates.[490]

Evaluating the merits of adopting the Quebec model, Jon Bricker has pointed out that the *Fonds* "continues to rely on public funding"[491] and "[i]f tried in Ontario, public funding would almost certainly be resisted on both *ideological grounds* and on grounds that it is far less reliable than the current, self-sustaining funding model" [emphasis added].[492] Although it is not axiomatic that a self-sustaining funding model is any more (or less) reliable than a public funding model, the more significant question may be the ideological opposition that would inevitably arise from such a proposal, which gestures toward the various socio-political forces acting upon Ontario's (and other provincial) class action regime(s). The ideological preferences in Ontario's class action regime for market-based solutions to litigation financing are rooted in the neo-liberal belief in the goodness

[489] Garry Watson, "Class Actions: The Canadian Experience" *Duke Journal of Comparative and International Law* 11 (2001): 277.
[490] W.A. Bogart, Jasminka Kalajdzic, and Ian Matthews, "Class Actions in Canada: A National Procedure in a Multi-Jurisdictional Society?" Report presented at The Globalization of Class Actions Conference, Oxford University, December 2007: 30.
[491] Jon Bricker, "Ontario's Class Proceeding Fund: A Good (If Less Than Perfect) Class Action Costs Model," *Canadian Class Action Review* 4, no. 2 (2008): 428.
[492] Ibid.

of free markets. In an analysis of the role of political ideology in the introduction of class action regimes in Canada, Jacob Ziegel has suggested that class actions originated in Quebec in 1978 (the first province in Canada) given the "anti-capitalistic"[493] tendencies of Rene Levesque's government. This contrasts with the dominant proceduralism through which class actions in Ontario have historically been conceptualized. Notably, Quebec's class action regime is distinguished by the primacy of access to justice considerations in judicial decision-making (at the certification stage), whereas Ontario's class action regime exhibits a greater emphasis on judicial economy (at the certification stage).[494] Such differences in legal cultures are not inconsequential given that the major battleground for class actions is the certification stage (once certified, class actions typically result in settlements). Moreover, the originary distinction between the 'anti-capitalism' of Quebec's regime and the proceduralism of Ontario's regime may help explain why Quebec has adopted a more collectivist or social democratic form of public financing which is uniformly imposed on all class actions in the province, whereas Ontario has adopted a more liberal form of public financing which promotes freedom of choice in financing options. It should be noted, however, that the public financing model has not only proven to be a viable policy option in Ontario, but that it may be further strengthened by following the example provided by Quebec's *Fonds* model of litigation financing. In short, the notion that private litigation financing provides a service that public models are incapable of providing is neither persuasive nor empirically substantiated in the established literature.[495]

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[493] Jacob Ziegel, "Political Ideology and Class Action Legislation," in Janet Walker and Garry Watson, eds., *Class Actions in Canada: Cases, Notes, and Materials* (Toronto: Emond Montgomery, 2014): 43.
[494] Patrick Hayes, "Exploring the Viability of Class Actions Arising from Environmental Toxic Torts: Overcoming Barriers to Certification," *Journal of Environmental Law & Practice* 19 (2009): 189.
[495] If variegated levies are introduced in public financing, the merits of private financing (as these pertain to providing lower commission rates) may be effectively obviated.

CONCLUSION

At root, third party litigation financing is a market-based solution for the high costs and risks associated with civil litigation, which are compounded in the context of the modern class action. Notwithstanding the continuing application of the English Rule in Ontario's class action regime—which encourages the pursuit of indemnification by third parties as an insurance measure against adverse costs awards—the emerging litigation finance industry operates on the acceptance of economic barriers to multilayer access to justice as established facts. In other words, third party litigation financing provides Private Attorneys General with the capacities to overcome certain economic barriers to multilayer access to justice (i.e. high costs and risks) without eliminating these economic barriers. The position that such litigation financing may promote multilayer access to justice by overcoming economic barriers to the civil justice system and facilitating the pursuit of meritorious claims presupposes that these economic barriers remain for those meritorious claimants who are not able to secure adequate litigation financing. If Ontario's class action regime is the "sport of kings"[496] given that "only kings or equivalent can afford it,"[497] as the Supreme Court observed in *Kerr v. Daniel Leather*, then third party litigation financing serves to intensify this capital-intensive sport by coronating select claimants.[498] The underlying economic barriers to multilayer access to justice ultimately remain in place for every claimant who cannot ascend to the throne. It may be instructive to observe that in

[496] *Kerr v Danier Leather Inc.*, 2007 SCC 44 at 63.
[497] Ibid.
[498] John Walker similarly observes in the Australian context that "[c]osts, delays and inequality of arms in our adversarial system are at the centre of relevant policy considerations. The high cost demand for funding is a symptom of the problem, not the cause." Walker, "Policy and Regulatory Issues in Litigation Funding Revisited," *Canadian Business Law Journal* 55, no. 1 (2014): 87.

Australia—the leading jurisdiction for litigation finance in the world—a court recently observed:

> It is a very good system [Western Australian justice system], the envy of many countries in the world. Every conceivable process is available to ensure that no stone is left unturned in the search for a just resolution. It is the Rolls Royce of justice systems in the sense that it is the best that money, a lot of money, can buy.
>
> But there isn't much point in owning a Rolls Royce if you can't afford the fuel to drive it where you want to go. You can polish it, admire it and take pride of ownership from it but it doesn't perform its basic function sitting in the garage...
>
> The community owns the justice system of this State but very few of its citizens can afford to engage in its processes. It might be time to consider trading our Rolls Royce for a lighter, more contemporary and more fuel efficient vehicle which we can actually afford to drive and which will get us where we need to go just as effectively and perhaps more quickly.[499]

The inaccessibility problem for which litigation finance is a market-based solution remains the unaffordability of civil justice, particularly in the class action context with its enormous costs and associated risks. Although litigation finance may promote procedural access to justice in select cases, the underlying economic barriers remain in place.

Furthermore, the gatekeeping role played by Private Attorneys General may be compounded by the inclusion of a third party financier with its own motivations and qualification criteria for case selection. Although litigation financiers proclaim the access to justice benefits of these 'investment opportunities,' such financiers determine whether a claim meets the qualification criteria for financing based on "a risk-adjusted valuation of the case, using traditional financial metrics, to come up with an estimation of value and return."[500] In short, the imperatives of profitability are determinative of case selection; the

[499] Ibid.
[500] Margaret McCaffery, "Litigation as an Asset Class" *National Post* (26 March 2008).

potential access to justice benefits of such financing are dependent on the profitability of any given case. This raises the inevitable question of previous chapters: what happens to those claims that are not deemed sufficiently profitable? In this light, the emerging litigation finance industry in Ontario (and jurisdictions globally) can be conceptualized a novel facet of financialization of disciplinary neo-liberalism in the twenty-first century.

Thus far, litigation financiers have primarily focused on high-value securities actions, which is to say, actions that possess high potential rates of return and a modicum of predictability. More to the point, securities class actions are dominant in Ontario's class action regime (in the broad sense) and in Ontario's litigation finance industry (in the limited sense). The primacy of investor rights as opposed to other types of harmed interests (i.e. human rights claims, labour exploitation, environmental degradation, etc.) should be a cause for concern for those who appreciate the capacities of class actions as 'crucial instruments' of social protection. Whether these potential capacities are actualized by the penetration of market forces into civil justice remains a questionable proposition. As several commentators have observed, the "commodification of litigation [...] does nothing to increase access to justice for litigants with human rights, civil rights or other public law based claims."[501]

To conclude, this critical analysis has served as an extension of the politico-economic critique offered in Chapter 2 that a *co-optative* conception of class actions promotes the privatization of regulatory enforcement which contributes to allowing market forces to largely determine which collective claimants are able to access justice. The emergence this type of financialization in Ontario has reinforced this market

[501] Kalajdzic, Cashman, and Longmoore, "Justice for Profit: A Comparative Analysis of Australian, Canadian, and U.S. Third Party Litigation Funding," 142.

fundamentalism by allowing the penetration of market forces into civil justice through various measures, including the liberalization of maintenance and champerty laws which have traditionally prohibited such financial activities. Moreover, the prospective securitization of litigation, the regulatory gap, and ideological resistances to collectivist models of public financing must be conceptualized within the broader social, political, and economic context. Finally, through the justificatory logic of increasing access to justice, the financialization of litigation through third party financing has further promoted the penetration of market rationality into civil justice. The gendered and racial biases inherent in commodification and the unequal distribution of accessibility remain outstanding issues of concern in a class action regime such as Ontario's that prioritizes the protection of investor rights over other socially beneficial claims.

ENVIRONMENTAL JUSTICE:
THE PRIVILEGING OF PRIVATE PROPERTY IN ONTARIO'S CLASS ACTION REGIME

INTRODUCTION

For nearly five decades, it has been axiomatic that environmental claims are especially well-suited for class actions. The globalization of class actions since American legislators ushered in the modern class action in 1966 has been distinguished by this widespread belief. In Canada, the introduction of class action legislation by the socially progressive Parti Québécois of René Lévesque in 1978 and the Ontario New Democratic Party of Bob Rae in 1992—the latter opening the floodgates for common law provinces in Canada to adopt similar legislation—was similarly distinguished by the notion that environmental claims are paradigmatic class actions. The reasoning that informs this popular belief is rooted in the multilayer interests (individual; collective; public) served in the pursuit of environmental class actions in light of the negligible enforcement (or non-enforcement) of environmental rules and regulations in Canada. Moreover, environmental class actions generally involve negative value claims that would not otherwise be individually brought by 'economically rational' actors (i.e. the cost of individually pursuing such claims outweighs the benefits; the risk of adverse costs awards similarly prefigures into such economic calculations). This widespread belief is reasonable given the combination of negative value claims and negligible regulatory enforcement in light of access to justice being a primary policy objective of class actions. However, the capacity of environmental class actions to promote access to justice has been restricted in several jurisdictions, foreign

and domestic, including Ontario. The empirical reality of environmental class actions is not reflective of the theoretical promise of their promotive capacities.

As explored in previous chapters, class actions serve as integral pillars of a private enforcement regime in Ontario that permits market forces to largely dictate access to justice priorities (Chapter 2). The social and political impacts of privatizing enforcement are compounded by litigation financialization in Ontario (Chapter 3) which intensifies the marketization of civil justice. Although these politico-economic developments apply to class actions on a general level, the material effects of this wide applicability are not evenly distributed across Ontario's regime. For example, securities class actions involving investor rights are the primary beneficiaries of the neo-liberalization of civil justice, as opposed to actions involving environmental justice, human rights, discrimination, exploitative labour conditions, and other areas that disproportionately involve low-income, racialized, and gendered claimants. The supposedly neutral and value-free 'scientific' character of market criteria and imperatives effectively prioritizes the interests of certain socio-demographic sectors over others, exhibiting a "strategic silence"[502] about this inequitable distribution and social ordering. Considering the policy justifications of such politico-economic developments as promoting access to justice in conjunction with the general consensus of the paradigmatic character of environmental class actions, we might reasonably expect that environmental class actions have been major beneficiaries of such developments. It may be surprising to discover, however, that such promotive benefits have failed to materialize in the environmental context. That no environmental class action has

[502] Isabella Bakker, *The Strategic Silence: Gender and Economic Policy* (New York: Zed Books, 1994).

been successful at trial in Canadian common law provinces reinforces this systemic failure of environmental claims to fulfill their original promise.[503]

This state of affairs extends to the pre-trial certification stage. A recent quantitative study of certification decisions in Ontario between 2010-2015 found that 143 decisions were rendered during this period with 112 proceedings certified at first instance across the categories of class actions.[504] Environmental claims ranked last across this range, which included securities, consumer protection, employment, competition, Crown liability, franchise, investment fraud, pension, intellectual property, and privacy claims. Only a single environmental claim was advanced among the 143 applications for certification.[505] It goes without saying that securities actions dominated as the most prevalent category.[506] These statistical findings provide quantitative support for the standpoint that Ontario's class action regime has shifted at the level of the decision-making of Private Attorneys General against environmental claims. It is not solely that environmental claims are advanced and denied certification, but rather that they have largely ceased to be advanced altogether.

This chapter examines the great chasm between the widespread view of environmental class actions as paradigmatic claims and the abysmal reality of their floundering in Ontario's regime. A critical analysis of the ways in which the political

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[503] This is tempered by the phenomenon of the 'vanishing trial' and the strong judicial and public policy preference for settlements, as examined in Chapter 5. Also, several environmental class actions have settled post-certification with varying results. Only a single environmental class action has ever even proceeded to trial on its merits (unsuccessfully): *Smith v. Inco*, 2011 ONCA 628, 107 OR (3d) 321.
[504] Daniel EH Bach and Ronald Podolny, "When Numbers Tell a Story: A Quantitative Look at Certification Decisions in Ontario," in *Canadian Class Action Review* 11, no. 2 (2016): 311-320.
[505] At first sight, the discovery that 100% of environmental proceedings attained certification as class actions might be a promising sign, however, upon closer inspection, this inflated statistic is a result of the minuscule number of environmental claims that sought certification in the first place: 1. Ibid., 314.
[506] No human rights claims were granted certification out of two applications.

economy of pollution constructs barriers to multilayer access to environmental justice is developed by exploring the paradigm of scientific uncertainty that structures environmental claims, including the complexities of health-based harms associated with toxic consumption, the lack of empirical data to substantiate claims of health-impairment, and the discursive misalignment of scientific inquiry and legal reasoning. The chapter proceeds by (1) critically exploring scientific uncertainty in toxic consumption and (2) identifying the problematics of establishing toxic causation in environmental health-impairment claims. These two sections comprise the parameters of the argument that Ontario's class action regime systematically *privileges private property over human health* in environmental justice. A series of representative case studies are subsequently provided that substantiate the central contention of this privileging of private property. Throughout this chapter, the exclusionary dynamics of environmental class actions are addressed through an analysis of vulnerable groups whose social reproduction is disproportionately harmed by environmental injustices, thereby revealing the 'strategic silence' of permitting market forces to largely determine social priorities.

1. THE PARADIGM OF SCIENTIFIC UNCERTAINTY

One of the greatest substantive barriers to multilayer access to environmental justice is the prevalence of scientific uncertainty, particularly in claims involving human health-impairment. This prevalence operates in a mutually constitutive manner with economic barriers; for example, scientific uncertainty contributes to the exclusionary dynamics of Ontario's class action regime by disincentivizing entrepreneurial Private Attorneys General from pursuing otherwise meritorious claims. Given the reversed recruiting

paradigm in Ontario's regime, the gatekeeping role played by Private Attorneys General is influenced by the prospects of success for potential claims—such prospects are significantly diminished in health-impairing claims involving high degrees of scientific uncertainty. As this section explicates, scientific uncertainty manifests in various ways throughout Ontario's class action regime. These manifestations have the cumulative effect of disincentivizing the pursuit of multilayer environmental justice in Ontario's regime by diminishing the prospects of success for such claims at trial (or more commonly, the pre-trial certification stage). Notably, the lack of empirical data, the complexities of evidence and toxic harms, and the incongruities of scientific inquiry and legal reasoning produce mutually constitutive barriers to access to environmental justice.

A. TOXIC KNOWLEDGE PRODUCTION

The difficulties associated with mounting an environmental class action originate in substantive form with the myriad fields of scientific inquiry that are implicated in evidence production. From an economic perspective, the procurement of expert testimony and evidential research is a capital-intensive process that operates as a major disincentive for risk-averse and budget-constrained Private Attorneys General, particularly when governmental research into the health-impairing effects of relevant toxicants is either inexistent or negligible. Without state-sanctioned research (or insufficient research), the prospects of multilayer access to environmental justice are exceedingly remote; several factors may contribute to such insufficiencies, including political recalcitrance and budgetary restrictions as a result of broader economic restructuring and the squeezing of fiscal space. Neo-liberal fiscal policy and regressive tax regimes have precipitated

declining state expenditures on research initiatives affecting the social reproduction of Canadians in general and vulnerable people in particular.[507]

The most common domains of knowledge production relevant to environmental class actions include pharmacology, toxicology, and epidemiology.[508] In cases involving public health considerations, the primary scientific field of inquiry is generally epidemiology, which is traditionally conceived as "the science of the distribution of diseases and other health-related features in human populations and of the factors that influence this distribution."[509] The standard feature of such studies is the linkages between a target human population and the distribution of health-impairing events as distinguished by exposures to specific variables. From the perspective of collective claims-makers, epidemiological studies provide suggestions on potential causalities between health-impairment and toxic exposures (these do not attain the certainty of strict causation, although such studies are beneficial when conjoined with other forms of scientific evidence). Although epidemiological studies possess a wide spectrum of potential faults, including the underestimation of the prevalence of health-impairment, the most consequential limitation for public health in Canada is the lack of such studies given their resource-intensive character (i.e. time and funding). Without strong epidemiological evidence, many potential environmental health claims flounder at the case selection stage for Private Attorneys General; in other words, as gatekeepers to justice, Private Attorneys General typically evaluate the availability of necessary empirical data (of which

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[507] Isabella Bakker, "Social reproduction, fiscal space and remaking the real constitution," 219-232.
[508] For a more detailed overview of these and other health-related fields, see Collins and McLeod-Kilmurray, *The Canadian Law of Toxic Torts* (Toronto: Thomson Reuters, 2014), 9-17. Parts 1 and 2 of this Chapter are gratefully indebted to this pioneering volume, as well as other texts by the authors, who are leading environmental law researchers in Canada.
[509] Klaus Krickeberg, Van Trong Pham, and Thi My Hanh Pham, *Epidemiology: Key to Prevention* (New York: Springer, 2012), 5.

epidemiological studies figure prominently). Given the significant investment of time and funding sources, the probability of Private Attorneys General independently undertaking epidemiological studies are exceedingly remote. In qualitative interviews undertaken for this project, not a single participant would consider an environmental health-impairment claim without significant extant empirical research—the potential of independently undertaking such research was viewed as practically inconceivable.

In similar fashion, toxicological studies that examine the "adverse effects of chemicals on living organisms"[510] with a primary focus on "substances that can cause [poisonous] adverse effects after exposure to relatively small quantities"[511] are often necessary evidentiary studies in environmental class actions. Such studies are similarly time-consuming and capital-intensive processes that are beyond the resource capacities of Private Attorneys General. Moreover, toxicological studies are premised on the extrapolation of evidence-formation in animal testing to human beings (a process that is often problematized by defendants in the class action context despite the wealth of corroborating evidence that such extrapolations possess a high degree of veracity).[512] The extensive investments of time and resources necessary for toxicological studies produce situations wherein toxicants that are socio-culturally recognized as poisonous remain open to questionable counter-claims for extended periods of time. For example, despite widespread recognition in developed societies throughout the twentieth century that asbestos, benzene, radiation, arsenic, and other poisonous substances were harmful to human health and the environment, scientific consensus based on toxicological data

[510] Karen E. Stine and Thomas M. Brown, *Principles of Toxicology* (Baton Rouge: CRC Press, 2015), 1.
[511] Ibid.
[512] Ibid., 2; see also, Collins and McLeod-Kilmurray, *The Canadian Law of Toxic Torts*, 13.

required several decades before such socio-culturally held views were scientifically validated.[513]

In contrast to both epidemiology and toxicology, pharmacological studies are prevalent given regulatory mandated clinical trials for the introduction of new substances into Canada. Pharmacology as the "study of drugs and their effects of life processes,"[514] particularly in the treatment of human diseases, benefits from the pervasiveness of human testing (as opposed to animal testing) which permits comparative analyses and strong conclusive evidence-formation in class actions involving pharmaceuticals.[515] Given these strengths, it should not be particularly surprising to discover that pharmaceutical claims are more frequently prosecuted and certified as class actions (compared to other health-based claims) in states and sub-state formations with class action regimes.[516] This privileging of pharmaceutical claims suggests that the relative scarcity of other environmental health-based claims (relative to their pervasiveness) is largely a consequent of insufficient empirical data and suboptimal evidence formation rather than ideological opposition or political disinclination by Private Attorneys General.

B. *CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999*

A number of overlapping federal and provincial statutes comprise Canada's environmental regulatory framework, including (at the federal level) the *Canadian Environmental Assessment Act, 2012, Hazardous Products Act, Species at Risk Act, Transportation of*

[513] Ibid., 14. See also, Frank Ackerman and Lisa Heinzerling, *Priceless: On Knowing The Price of Everything and The Value of Nothing* (New York: The New Press, 2004), 119.
[514] George M. Brenner and Craig Stevens, *Pharmacology* (Philadelphia: Saunders Press, 2013), 2.
[515] Collins and McLeod-Kilmurray, 16.
[516] Ibid.

Dangerous Goods Act, 1992, Pest Control Products Act, Fisheries Act, and the *Canada Shipping Act, 2001*.[517] In Ontario, the relevant provincial statutes include the *Ontario Water Resources Act, Clean Water Act, Environmental Bill of Rights, Pesticides Act, Safe Drinking Water Act, Environmental Assessment Act, Toxics Reduction Act, Green Energy Act,* and the *Nutrient Management Act*.[518] Although federal statutes take precedence over provincial statutes, these are generally more complementary than contradictory.

Of particular relevance to the present analysis is the *Canadian Environmental Protection Act* ('CEPA'), which was originally drafted in 1988 as a systematic assessment and management framework for chemical substances that posed a threat to human health and the environment—it was comprehensively revised and replaced in 1999.[519] Although promising in purpose, CEPA was limited in scope, given its major foundational shortcoming: the assessment and evaluation of potentially harmful chemicals was limited to the testing of new chemicals that were introduced post-1988 into Canada (approximately 2,000 chemicals per year) without simultaneously testing the estimated 23,000 chemicals already in circulation. In 2006, the federal government introduced its Chemical Management Plan ('CMP') to address a subset of 1,550 high-priority chemicals, with a proposed deadline of 2020 for the completion of these assessments. Although the CMP includes environmental monitoring and human biomonitoring of select priority chemicals,

[517] Canadian Environmental Assessment Act, 2012 (S.C. 2012, c. 19, s. 52); Hazardous Products Act (R.S.C., 1985, c. H-3); Species at Risk Act (S.C. 2002, c. 29); Transportation of Dangerous Goods Act, 1992 (1992, c. 34); Pest Control Products Act (S.C. 2002, c. 28); Fisheries Act (R.S.C., 1985, c. F-14); Canada Shipping Act, 2001 (2001, c. 26).
[518] Ontario Water Resources Act, R.S.O. 1990, c. O.40; Clean Water Act, 2006, S.O. 2006, c. 22; Environmental Bill of Rights, 1993, S.O. 1993, c. 28; Pesticides Act, R.S.O. 1990, c. P.11; Safe Drinking Water Act, 2002, S.O. 2002, c. 32; Environmental Assessment Act, R.S.O. 1990, c. E.18; Toxics Reduction Act, 2009, S.O. 2009, c. 19; Green Energy Act, 2009, S.O. 2009, c. 12; Nutrient Management Act, 2002, S.O. 2002, c. 4.
[519] Canadian Environmental Protection Act, 1999 (S.C. 1999, c. 33).

the budgetary constraints of regulatory bodies and associated research institutes has precluded comprehensive assessments of roughly 20,000 chemicals currently in use in Canada. Such budgetary constraints are produced by neo-liberal fiscal policies with adverse impacts on social reproduction with gendered, racialized, and class-based dimensions.[520]

As Isabella Bakker points out, the mobility of capital in the new constitutionalism of disciplinary neo-liberalism promotes the constraining of state tax revenue and expenditures with inequitable effects on the social reproduction of vulnerable people.[521] The systematic lack of empirical data as a result of declining tax revenues and state expenditures implicates processes associated with neo-liberal governance that promote the mobility of capital and tax avoidance/evasion by transnational corporations (a recent report by the Tax Justice Network estimated that Canada loses over $80 billion annually in tax evasion).[522] By declining to adequately research substances to which communities are exposed, the Canadian state effectively (re)privatizes social reproduction[523] activities by downloading the responsibilities for chemical consumption and toxic exposures to households largely through the promotion of 'precautionary consumption', a gendered practice operating as a form of "self-protection in response to insufficient regulatory

[520] The rich body of scholarship on environmental justice in general and environmental racism in particular (as a subfield of the former) testifies to such inequitable impacts.
[521] Bakker, "Social reproduction, fiscal space and remaking the real constitution," 219-232. To critique micro-level effects of sub-state and state policies without linking these to macro-economic developments yields an incomplete picture of the politico-economic forces impacting access to environmental justice.
[522] Ibid.
[523] Bakker pioneered the thesis of the "reprivatization of social reproduction." See, e.g., Isabella Bakker, "Neo-liberal Governance and the Reprivatization of Social Reproduction: Social Provisioning and Shifting Gender Orders," in eds., Bakker and Stephen Gill, *Power, Production and Social Reproduction* (New York: Palgrave Macmillan, 2003), 66-82.

precaution"[524] that disproportionately burdens women and domestic workers.[525] As Bakker observes, this governance shift "reflect[s] the increasingly privatized and marketized forms of social provisioning and risk that characterize the neo-liberal moment where everyday activities of maintaining life and reproducing the next generation are increasingly being realized through the unpaid and paid resources of (largely) women."[526]

The systemic lack of empirical data is compounded by a series of gendered and racial shortcomings of testing standards and evaluative frameworks for those priority chemicals that qualify for formal state assessments. According to CEPA methodologies, chemical substances must be assessed for the 'endpoints' of reproductive and developmental toxicity, carcinogenicity, and mutagenicity—an endpoint refers to a "biological event used to determine when a change in the normal function of the human body occurs as a result of toxic exposure."[527] Across these endpoints, however, state assessments have overwhelmingly focused on carcinogenicity.[528] The gendered dynamics of this research focus are straightforward: the social reproductive vulnerabilities implicated in reproductive and developmental toxicity and mutagenicity have been inequitably neglected. For example, chemical substances with endocrine-disrupting properties are chronically understudied in CMP risk assessments, leading critical scholars to advocate in favour of alternative toxicity endpoints that address neglected health-impairing events that disproportionally affect women.[529] Furthermore, the largely gender-neutral risk

[524] Scott et al, "The Production of Pollution and Consumption of Chemicals in Canada," 18.
[525] Norah MacKendrick, "Protecting Ourselves from Chemicals: A Study of Gender and Precautionary Consumption," in ed., Dayna Nadine Scott, *Our Chemical Selves: Gender, Toxics, and Environmental Health* (Vancouver: University of British Columbia Press, 2015), 58-77.
[526] Bakker, "Social reproduction, fiscal space and remaking the real constitution," 221.
[527] Dayna Nadine Scott and Sarah Lewis, "Sex and Gender in Canada's Chemical Management Plan," 85.
[528] Ibid.
[529] Ibid., 87.

assessments of the CMP often deviate toward gender blindness to the extent that autonomous abstract individuals are conceptualized as human subjects rather than allowing for gender-specific evaluations (re: data is aggregated into average individual intake of chemical substances which does not distinguish between biological and gendered differences). To the extent that gender-specific evaluations are conducted, these focus almost exclusively on biological reproduction (i.e. pregnancy) rather than encompassing the myriad aspects of the daily lives of women and girls, and research focused on health-impairing events that disproportionately affect women continues to be undertaken with male laboratory animals during testing.[530] Such essentialist and androcentric tendencies remain outstanding issues of concern for the CMP, in addition to broader shortcomings, such as the absence of mandatory assessments of the cumulative effects of chemical substances and their interactions with environmental factors, as well as the absence of occupational exposure testing, particularly precarious labour in which toxicity exposures tend to be higher than workforce averages.[531]

Above all, the CMP operates on the problematic logic of the management of risk as opposed to the prevention of contamination; that is, the management of chemical substances and hazardous toxicants is prioritized over precautionary approaches. For example, toxicity designations under the CEPA framework necessitate both "a potential for exposure and a potential for harm," which is to say, a chemical "substance demonstrating a *high probability of harm at any exposure level will not be listed as toxic*

[530] Ibid., 88. See also, Robert N. Hughes, "Sex Does Matter: Comments on the Prevalence of Male-Only Investigations of Drug Effects on Rodent Behaviour," *Behavioural Pharmacology* 18, no. 7: 583-89; Donna Mergler, "Neurotoxic Exposures and Effects: Sex and Gender Matter! Hänninen Lecture 2011," *Neurotoxicology* 33, no. 4: 644-51.
[531] Scott and Lewis, 89-92.

if estimates of exposure are currently considered low" [emphasis added].[532] This preference for managing rather than preventing toxic contamination and exposures directly contradicts the imperatives of the Precautionary Principle. If preliminary signals from the negotiations of the forthcoming Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic and Trade Agreement (CETA) are any indication, the Precautionary Principle will continue its gradual delegitimization in favour of such risk management practices. The meso and micro level impacts of such macro-economic developments can be directly observed in the impaired capacities of vulnerable communities to socially reproduce. At root, such shortcomings favour the polluter-industrial complex and generate inequitable racial and gendered impacts with the ensuing corollary of creating disincentivizing conditions for the pursuit of multilayer access to environmental justice.

In point of fact, the lack of empirical data is a recurring barrier at every turn in the pursuit of environmental justice in Ontario's class action regime. It remains incumbent upon plaintiffs to provide the relevant data to substantiate their claims, despite the reality that defendants in environmental health-based actions are best positioned for data collection. As the leading scholars in the field in Canada, Lynda Collins and Heather McLeod-Kilmurray, observe:

> In the case of toxic products, defendants manufacture, market, and disseminate the substances at issue; they have the resources, the opportunity, and the duty to investigate their products both before and after release. In contrast, plaintiffs in such cases are unable to assess the product before or after release, and are frequently unaware of its toxicity and therefore incapable of avoiding a toxic exposure. In the case of contaminant emissions, polluting defendants have the opportunity and the statutory duty to monitor and report their discharges, and are far better equipped to research and determine the human health effects

[532] Ibid., 95.

> of the substances emitted. Again, plaintiffs typically have neither the resources to investigate the risk nor the opportunity to avoid it.[533]

This imbalanced situation recalls a central pillar of Parker's notion of 'speaking justice to power' discussed in Chapter 1: the meta-regulatory strategy of regulated self-regulation.[534] That is, Parker recognizes that corporations are ideally situated to gather information about their own products and practices—a recognition that leads Parker to advocate in favour of corporations engaging in data collection on behalf of state regulatory bodies. Although meta-regulatory strategies identify such informational asymmetries and power imbalances, the proposal that relevant corporations would actively engage in data collection and investigation, despite the potential of civil liability, remains an improbable prospect. The abyss separating current agnotological strategies with such meta-regulatory proposals does not inspire confidence in the probability of transformational change in prevailing corporate governance strategies.

C. THE PRODUCTION OF IGNORANCE

It is becoming increasingly apparent that scientific uncertainties are not reducible to the limitations of contemporary research, but rather extend to policy failures and the pursuit of agnotological strategies. Wendy Wagner has proposed a clarifying distinction between "trans-scientific uncertainties"[535] which chiefly exist as consequences of the limitations of scientific inquiry at any given point in history and "preventable scientific uncertainties"[536]

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[533] Collins and McLeod-Kilmurray, 140-41.
[534] Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford: Oxford University Press, 1999), 174-205.
[535] Wendy Wagner, "Choosing Ignorance in the Manufacture of Toxic Products," *Cornell Law Review* 82 no. 4: 774-80; see also, Collins and McLeod-Kilmurray, 23-6.
[536] Ibid., 780-84.

which refer to failures of investigative programmes. The former category poses a host of difficulties in the context of establishing causation, particularly since health-impairing events in contemporary societies are often compounded by multiple contributing factors. This multi-factorial tendency permits defendants to espouse alternative theories and causes of harm for relevant health-impairing events.

The latter category—'preventable scientific uncertainties'—entails the passive production of ignorance through inequitable redirection of resource capacities, as well as the active production of ignorance through the suppression of critical knowledge and concomitant refusals to investigate the potential harms of toxic commodities. This similarly creates unfavourable conditions for multilayer access to environmental justice insofar as toxic manufacturers are incentivized to manufacture ignorance of product toxicity. In other words, as a legal tactic to avoid civil liability, toxic manufacturers engage in agnotological strategies (i.e. refraining from conducting research on their own processes and commodities). Given the common law requirement for plaintiffs to produce scientific research in support of their claims against defendants, as well as the resource-intensive character of such research in the context of environmental health and toxic exposures, the production of ignorance on the part of such manufacturers serves the purpose of minimizing available research on their toxic commodities. As Wagner explains, a manufacturer that 'chooses ignorance' in this respect is behaving rationally since a "manufacturer that conducts no research can generally avoid liability because plaintiffs and government research programs are unlikely to conduct scientific research on their own."[537] As others have pointed out, "chemical manufacturers and polluting industries are profit-

[537] Ibid., 775.

driven enterprises, with clear economic disincentives to investigate the potential harmful effects of the substances they release into the environment."[538] The extent to which agnotological strategies have been pursued by chemical manufacturers has been extensively documented by critical scholars[539] and remains a significant barrier in the pursuit of multilayer access to environmental justice not merely through formal legal channels, but also within the socio-political domain wherein such strategies (i.e. misinformation, etc.) produce uncertainties and doubts about the veracity of scientific claims. For example, a trove of newly discovered documents by the Center for International Environmental Law substantiates the longstanding belief that tobacco and oil industries collaborated as early as the 1940s in their agnotological strategies by sharing public relations firms, research institutes, scientists, marketing, and advertising strategies with the objective of "shaping science to shape public opinion"[540] as it pertains to the environmental harms posed by their respective practices and products. To speak of a polluter-industrial complex necessarily involves such agnotological pursuits in the production of ignorance.

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[538] Collins and McLeod-Kilmurray, 141.

[539] See, e.g., David Michaels, *Doubt is Their Product: How Industry's Assault on Science Threatens Your Health* (Oxford: Oxford University Press, 2008); Shannon Sullivan and Nancy Tuana, eds., *Race and Epistemologies of Ignorance* (New York: State University of New York Press, 2007); David Michaels, "Manufactured Uncertainty: Protecting Public Health in the Age of Contested Science and Product Defense," *Annals of the New York Academy of Science* 1076 (2006): 149-62; Robert Proctor and Londa Schiebinger, eds., *Agnotology: The Making and Unmaking of Ignorance* (Stanford: Stanford University Press, 2008). For the manufacturing of social ignorance in the Canadian context, see, for example, Janine Brodie, "Social Literacy and Social Justice in Times of Crisis," Trudeau Lecture, 30 May 2012, Wilfred Laurier University/University of Waterloo, online:http://www.trudeaufoundation.ca/en/activities/events/trudeau-lecture-janine-brodie-2010-trudeau-fellow.

[540] Center for International Environmental Law, 20 July 2016, online: https://www.smokeandfumes.org. See also, Naomi Oreskes and Erik M. Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* (New York: Bloomsbury Press, 2010).

D. SCIENTIFIC INQUIRY & LEGAL REASONING

The primary discursive barrier for claimants in environmental class actions at the evidentiary level remains the incongruity between scientific inquiry and legal reasoning; that is, the standards and criteria of scientific uncertainty often misalign with evidentiary standards of civil justice.[541] This is similarly evident in broader socio-political discourses in which events are disputed by competing factions that can mobilize scientific experts in defense of their respective positions (i.e. global warming). Such incongruities have greater susceptibility for the 'manufacturing of doubt' and the postulation of alternative theories and causes of harm, particularly in multi-factorial health-impairing events.

Whereas scientific inquiry aspires to objective truths that are empirically substantiated through a conservative process of data collection and laboratory testing, legal inquiry necessitates the adjudication of a dispute in a timely manner. The methodological discrepancies and normative disparities in purpose operate to create a tenuous relationship between scientific evidence and legal argumentation whereby strong evidentiary claims are disputed through the application of legal standards of proof to the standards of scientific consensus-formation. As described above, numerous toxicants that were socially perceived as harmful substances (i.e. benzene, asbestos, arsenic, etc.) did not attain scientific consensus for several decades, given the pace of discovery and conservative preferences of scientific inquiry (in addition to agnotological production and other mobilization efforts by industry). The repercussions of such delays in the legal setting cannot be solely discovered in the failures of pursued civil actions, but extend to claims that were never pursued in the first place as a consequence of inadequate evidentiary grounding, as

[541] Many environmental scholars have raised this pivotal point, including, Collins and McLeod-Kilmurray, 26-31.

indicated at the outset of this chapter with the pre-trial certification statistics. Carl F. Cranor aptly describes this "slow knowledge accumulation" as "science delayed means justice denied."[542] This incongruity does not suggest that scientific advancement and methodologies should adjust to the demands of adjudicatory bodies, but rather that adjudicators should recognize the limitations of consensus-formation and adjust their evaluative frameworks in order to have "a more realistic view of the availability of evidence [and to] change what they expect of it and modify how they treat the evidence before them."[543] Although such incongruities apply in various legal settings, they pose particular difficulties for class actions involving environmental health-impairment given the heavy dependence on scientific evidence required to prove causation. This difficulty is compounded in multi-factorial cases in which "a signature disease"[544] is not evident; that is, a case in which a direct cause-and-effect relationship between the chemical substance and the incurred harm is unproblematically establishable (such as mesothelioma and asbestosis claims).[545]

A possible strategy to ameliorate the adverse effects of such incongruities is the adoption of a 'weight of evidence' approach.[546] Given the recognition of injustices that may result from the application of conservative scientific standards to legal contexts, several regulatory and scientific bodies have endorsed this approach as an optimal strategy to avoid false negatives in chemical testing, including Health Canada and Environment Canada.

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[542] Carl F. Cranor, *Toxic Torts: Science, Law and the Possibility of Justice* (Cambridge: Cambridge University Press, 2008), 203. Many environmental justice scholars, including Collins and McLeod-Killmurray, also highlight this pivotal point.
[543] Ibid.
[544] Joseph Sanders, "From Science to Evidence: The Testimony on Causation in the Bendectin Cases," *Stanford Law Review* 46 (1993): 13.
[545] Ibid.
[546] Collins and McLeod-Kilmurray, 30-1.

According to s.76.1 of CEPA, the "weight of evidence approach and the precautionary principle" must be applied by relevant ministers to high-priority (identified) chemical substances, although the extent to which the approach and the principle have been meaningfully applied remains questionable. This multi-step approach involves the following steps:

> The scientist must:
> (1) identify an association between an exposure and a disease;
> (2) consider a range of plausible explanations for the association;
> (3) rank the rival explanations according to their plausibility;
> (4) seek additional evidence to separate the more plausible from the less plausible explanations;
> (5) consider all of the relevant available evidence;
> (6) integrate the evidence using professional judgment to come to a conclusion about the best explanation.[547]

The advantage of the 'weight of evidence' approach to scientific uncertainty is to permit expert witnesses to introduce subjective explanatory features to otherwise descriptive testimonies, thereby allowing for judgment-formation based on the availability of existing data using an 'inference to the best explanation' criterion.[548] In other words, the conservative standards of scientific certainty are moderated to allow for "a finding of causation even if some individual pieces of evidence are weak, or some forms of evidence are missing."[549] This approach strengthens the evidentiary foundation of claimants by lowering the unduly high scientific principles against which such claimants would otherwise be measured in a legal setting. In short, the 'weight of evidence' approach is a positive development for the prospects of multilayer access to environmental justice.

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[547] *Milward v. Acuity Specialty Products Group Inc.*, 639 f.3d 11 (1st Circuit 2011) at 17-18, as quoted by Collins and McLeod-Kilmurray, 31.
[548] Ibid.
[549] Ibid.

Finally, the incongruities between scientific inquiry and legal reasoning are implicated in causation analyses insofar as the standard of proof may be misaligned from a balance of probabilities standard towards a standard of scientific empiricism.[550] This is particularly apparent in environmental health actions in which competing expert testimonies are presented. Although the court recognized in *Ring v. The Queen* that "a meaningful scientific answer with respect to a specific dose-response relationship"[551] is qualitatively distinct from "a meaningful legal answer regarding the creation of unreasonable risks for the general public,"[552] the court also stated in *Palmer v. Stora Kopparbergs Bergslags AB* that the finding of "no scientifically acceptable proof of risk to health" contributed to its rejection of an injunction application.[553] Ultimately, however, such misalignments are infrequent in Canadian courts, attesting to the discipline with which standard of proof analyses are conducted.[554]

2. TOXIC CAUSATION IN ENVIRONMENTAL CLASS ACTIONS

Questions of scientific uncertainty gain prominence at the causation stage in environmental health-based class actions. Causation refers to the relationship that must be established between the wrongful act of the defendant and the incurred harm of the plaintiff. Without proof of causation in toxic actions, there can be no compensatory damages in the Canadian civil justice system. A substantial body of scholarship has developed over the years to address the problem of causal indeterminacy and a general consensus has emerged that

[550] Ibid., 127.
[551] *Ring v. The Queen*, 2007 NLTD 146, at 151, as quoted in Collins and McLeod-Kilmurray, 127.
[552] Ibid.
[553] Ibid.
[554] See, for example, *Snell v. Farell*, [1990] 2 SCR 311, 1990 CanLII 70 (SCC); *Clements v. Clements*, [2012] 2 SCR 181, 2012 SCC 31.

establishing causation is the greatest doctrinal barrier to multilayer access to justice in the context of environmental health and chemical consumption.[555] It is beyond the scope of this chapter to provide a comprehensive overview of Canadian approaches to toxic causation, however a critical exploration of relevant features is necessary to illustrate major barriers to multilayer access to environmental justice in Ontario's class action regime.

The scientific uncertainties that inform toxic causation relate to the capacity of a toxic substance to produce an alleged harm, as well as the empirical claim that a particular toxic substance caused a specific harm to the claimants. In other words, causation entails a necessary subdivision between (1) generic causation and (2) specific causation—a successful environmental health-based action must typically provide strong evidence relating to both forms of causation.[556] Private Attorneys General must demonstrate that a particular substance is (1) capable of producing the alleged harm, before demonstrating that the (2) represented class has empirically been harmed by the relevant substance. Within this framework, scholars have categorized the problem of causation into three forms of indeterminacy that identify particular types of uncertainty. The three types of

[555] Steve Gold, "Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence," *Yale Law Journal* 96, no. 2 (1986): 376-402; Steve Gold, "When Certainty Dissolves into Probability: A Legal Vision of Toxic Causation for the Post-Genomic Era," *Washington & Lee Law Review* 70: 237-339; Michael Arthur Simon, "Causation, Liability and Toxic Risk Exposure," *Journal of Applied Philosophy* 9, no. 1 (1992): 35-44; Lynda Collins and Heather McLeod-Kilmurray, "Material Contribution to Justice: Toxic Causation after *Resurfice Corp. v. Hanke*," *Osgoode Hall Law Journal* 48 (2010): 411-56; Robert W. Loewen, "Causation in Toxic Tort Cases: Has the Bar Been Lowered?" *Natural Resources & Environment* 17, no. 4 (2003): 228-231; Joseph Sanders and Julia Machal-Fulks, "The Admissibility of Differential Diagnosis Testimony to Prove Causation in Toxic Tort Cases: The Interplay of Adjective and Substantive Law," *Law and Contemporary Problems* 64, no. 4 (2001): 107-38; Andrew R. Klein, "Causation and Uncertainty: Making Connections in a Time of Change," *Jurimetrics* 49, no. 1 (2008): 5-50; Margaret A. Berge, "Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts," *Columbia Law Review* 97, no. 7 (1997): 2117-52; Mark Parascandola, "What is Wrong With the Probability of Causation?" *Jurimetrics* 39, no. 1 (1998): 29-44; Patrick Hayes, "Exploring the Viability of Class Actions Arising from Environmental Toxic Torts: Overcoming Barriers to Certification," *Journal of Environmental Law and Practice* 19, no. 3 (2009): 189-224.

[556] Collins and McLeod-Kilmurray, 124.

indeterminacy thus identified are plaintiff indeterminacy, defendant indeterminacy, and harm indeterminacy.[557] The interplay between generic and specific causation and the types of indeterminacy applicable in environmental health actions warrants brief consideration.

A. THREE TYPES OF INDETERMINACY

Plaintiff indeterminacy refers to situations in which generic causation is establishable, but specific causation is elusive; that is, this type of indeterminacy is applicable in situations wherein established facts confirm that a specific defendant has engaged in wrongful conduct that has harmed a subset of an exposed group, but no particular harmed individual within this group is capable of proving that they have specifically been harmed by the defendant's wrongful conduct. A classic example of plaintiff indeterminacy is the Agent Orange class action in which a carcinogenic herbicide manufactured by Dow Chemical and Monsanto Corporation was alleged to have caused a series of health-impairing events (including cancerous growths) in exposed individuals. As Paul Sherman observes, a number of broader questions were raised in this class action:

> (1) How can injury to members of a plaintiff class be shown when there is only statistical or epidemiological evidence to show a correlation between increases in the incidence of the injury and exposure to the product?
> (2) How can an individual class member establish a connection between his or her particular injury and the product?[558]

Such questions indicate that doctrinal requirements present particular challenges to access to justice in the environmental health context. A more pertinent example might be the hypothetical situation in which a toxic polluter contributes to the degeneration of a

[557] Sandy Steel, *Proof of Causation in Tort Law* (Cambridge: Cambridge University Press, 2015): 184-91, 194-5, 198-9; see also, Collins and McLeod-Kilmurray, 125-26.
[558] Paul Sherman, "Agent Orange and the Problem of the Indeterminate Plaintiff," *Brooklyn Law Review* 52 (1986): 369-395, 371.

habitable environment (whether through land, air, or water pollution) and thereby threatens the social reproductive activities of exposed individuals and communities. Although Canadian legislatures have not enacted causation reforms to address the particularities of toxic actions, the Supreme Court has exhibited an openness to such reform by observing that "new situations [may] raise new considerations"[559] and that "the scenario might arise in mass toxic tort litigation with multiple plaintiffs, where it is established statistically that the defendant's acts induced an injury on some members of the group, but it is impossible to know which ones."[560] The lack of environmental class actions that have gone to trial in Canada has impeded the development of the relevant common law to date, however, the openness towards causation reform by the Supreme Court as it pertains to plaintiff indeterminacy is a positive sign from an access to justice perspective.[561]

The second type of indeterminacy—defendant indeterminacy—simply reverses the logic: whereas plaintiff indeterminacy refers to situations in which individuals or groups have been generally harmed by wrongful behaviour by an identifiable defendant (or defendants), the second type of indeterminacy refers to situations in which the plaintiff can demonstrate that a particular substance has the capacity to cause the relevant harm *and actually* caused the relevant harm—that is, generic and specific causation is provable—however, it is impossible to identify the wrongdoer.[562] Such situations typically arise when multiple defendants have engaged in similar or identical forms of wrongful conduct, such as pharmaceutical companies who have commercialized toxic substances or industrial polluters who have poisoned the land, water, and/or air of a community using similar or

[559] *Clements v. Clements*, 2012 SCC 32 [2012] 2 SCR 181 at 44.
[560] Ibid, at 44, as quoted in Collins and McLeod-Kilmurray, 125.
[561] Ibid.
[562] Ibid., 126.

identical toxic substances. Although defendant indeterminacy was traditionally viewed as a serious impediment for environmental health class actions, this type of indeterminacy has effectively been resolved in Canada since *Clements v. Clements*.[563]

Finally, the third type of indeterminacy—harm indeterminacy—refers to situations in which claimants can reasonably posit that a defendant has exposed them to harmful toxic substances, without the concomitant ability to establish that any harm has been incurred.[564] This type of indeterminacy assumes a heightened significance in the environmental health context insofar as health-impairments as consequences of exposures to toxic substances potentially have long latency periods and may not be empirically discernible at any specific point in time. The intergenerational inequities arising from exposures to toxicity are directly implicated in this type of indeterminacy to the extent that the actualization of harm does not foreclose its possibility—nor the potential negative non-material (i.e. psychological) impacts that may arise from such exposures.

B. JURISPRUDENTIAL AND LEGISLATIVE TOXIC CAUSATION REFORMS

At present, there have not been any comprehensive legislative reforms addressing the unequal impacts of traditional causation standards in Canada. The traditional standard for establishing causation is the 'but for' test, which examines the proposition that if not for the defendant's wrongful conduct, the plaintiff would not have sustained the alleged harms; in other words, the plaintiff would not have been harmed 'but-for' the wrongful conduct of the defendant (the standard under which this test is conducted is a balance of probabilities,

[563] Ibid., 126.
[564] Ibid.

re: 50% plus one).[565] As this chapter documents, the scientific uncertainties in environmental health class actions have cumulatively produced an unfavourable climate for collective claims-makers against chemical manufacturers and toxic polluters. As Collins and McLeod-Kilmurray have pointed out, this traditional test for causation is particularly problematic in the environmental health context:

> A rigid application of the but-for test produces manifest injustice in scenarios in which the plaintiff can show that the defendant exposed him or her to an unreasonable risk of developing a particular illness and that he or she in fact did contract that illness, but he or she cannot prove causation on a balance of probabilities because of a lack of data concerning the substance in question. The injustice is particularly pronounced where this uncertainty stems from the defendant's own failure to investigate its own substance.[566]

In the face of the exceptional circumstances (i.e. environmental health), a series of alternatives have been proposed to ameliorate the 'manifest injustices' of a rigid application of the traditional causation test—these alternatives include the "radical step" of introducing the "less onerous" 'material contribution to risk' test in which risk exposures are given prominence; that is, the defendant materially contributed to the risk of harm experienced by the plaintiff.[567] According to the court in *Resurfice Corp. v. Hanke*, this alternative test only applies in exceptional circumstances in which:

> (1) It must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test.
> (2) It must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury.[568]

[565] Ibid., 128-29.
[566] Ibid., 129.
[567] Ibid.
[568] *Resurfice Corp. v. Hanke*, [2007] 1 SCR 333, 2007 SCC 7 (CanLII) at 25.

Notably, the court recognized that the impossibility of proving that the defendant's negligence caused the plaintiff's injury could be due to "current limits of scientific knowledge."[569]

The proposal that has the greatest potential to correct the power imbalances and informational asymmetries confronted by collective claims-makers seeking access to environmental justice may be the proposition to reverse the burden of proof in toxic causation.[570] As it stands, corporations associated with toxic production are incentivized to manufacture ignorance of their products (and practices). However, a reversed burden of proof could conceivably ameliorate these agnotological tendencies by imposing liability for failures to adequately monitor, investigate, and disseminate findings relating to toxicity and environmental health.[571] Hypothetically speaking, a plaintiff could demonstrate that a defendant did not engage in such monitoring, investigating, and disseminating activities, at which point the defendant must prove the contrary. Such a reversal in the burden of proof effectively penalizes agnotological strategies and aligns "defendants's commercial interests with the societal interest in constraining the release of hazardous or poorly understood chemicals."[572] Moving forward, it is foreseeable that scientific uncertainty in environmental class actions will remain one of the most significant barriers to multilayer access to justice in environmental matters.

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[569] Ibid. For an overview of the material contribution to risk test, see Lynda Collins and Heather McLeod-Kilmurray, "Material Contribution to Justice – Toxic Causation after Resurfice Corp. v. Hanke," *Osgoode Hall Law Journal* 48 (2010): 411-456.
[570] Collins and McLeod-Kilmurray, 153.
[571] This might align with Parker's meta-regulatory strategy addressed earlier.
[572] Ibid., 153. See also, Wendy Wagner, "Choosing Ignorance in the Manufacture of Toxic Products," *Cornell Law Review* 82, no. 4: 774-80. Margaret A. Berger, "Eliminating General Causation: Notes towards a New Theory of Justice and Toxic Torts," *Columbia Law Review* 97, no. 7 (1997): 2117-52.

3. PRIVATE PROPERTY IN ENVIRONMENTAL CLASS ACTIONS

The dynamics explored in the above sections have operated to cumulatively impede multilayer access to environmental justice, particularly in the health-based context. Such exclusionary dynamics apply inequitably in Ontario's class action regime. The complexities of environmental health claims are increasingly viewed as 'red flags' by Private Attorneys General. This unfavourability is substantiated by the repeated narrowing of the scope of environmental class actions by courts across Canada. In Ontario's regime, environmental class actions have developed in a restricted way to focus on environmental claims that do not involve scientific uncertainty (at least not to the extent of health-based claims). The prevailing strategy of Private Attorneys General appears to be to circumvent this intractable problem by pursuing claims with lower risk exposures and greater predictability in terms of prospects for success. Although the continuing application of the English Rule contributes to this circumvention strategy, the difficulty in certifying health-based claims and the low prospects for success feature prominently in disincentivizing Private Attorneys General from pursuing environmental health-based claims. As this section explicates, the restrictive development of class actions in Ontario has produced a regime that systematically privileges private property rights over other forms of environmental harms.

A. THE CERTIFICATION STAGE

It should not be particularly surprising that procedural barriers play a prominent role in access to environmental justice in Ontario's class action regime. After all, the modern class action is fundamentally a procedural vehicle—despite its arguably substantive dimensions.

Indeed, a multilayer claim is considered a 'class proceeding' at the outset of litigation and must be certified in order to proceed as a 'class action'. The power of class actions as collectivist vehicles for claims-making has contributed to producing a regime in which settlements are endemic.[573] In fact, only a single environmental class action has proceeded to trial on its merits: once a class proceeding is certified, it generally results in a negotiated settlement. In this context, the true battleground for class actions is the certification stage—a pre-trial motion of a proceeding seeking certification as a class action. At this procedural stage, the merits of a claim must not be considered, according to the *Class Proceedings Act*.[574] Given the pervasive settlement culture in Ontario's class action regime (and every other common law province in Canada), the primacy of certification as determinative of the relative success or failure of a class action produces a legal climate in which class actions generally (and environmental class actions especially) are not determined on their merits, but rather on strictly procedural grounds. From a broader democratic perspective, this pervasive settlement culture serves to impoverish the development of the common law as it substantively pertains to environmental justice.[575]

The importance of certifying a class proceeding can scarcely be overstated: without certification, a class proceeding cannot move forward as a class action. Although failure to certify a class proceeding does not preclude class members from pursuing their claims on individual bases, such pursuits do not benefit from the collectivist power of the class action vehicle; indeed, the prospects for individual claims against transnational corporations and

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[573] The strong judicial and public policy preference for settlements is addressed in greater detail in Chapter 5.

[574] According to the CPA, certification is not a ruling on merits: "An order certifying a class proceeding is not a determination of the merits of the proceeding. 1992, c. 6, s. 5 (5).

[575] See, e.g., Trevor C. W. Farrow, *Civil Justice, Privatization and Democracy* (Toronto: University of Toronto Press, 2014).

governments are exceedingly bleak. Moreover, environmental claims are primarily negative value claims—a strong indication that such claims would not otherwise be individually brought by 'economically rational' actors. In this light, attaining certification is a necessary condition for multilayer access to environmental justice.

At the certification stage, a proceeding must meet the five criteria enumerated in the *Class Proceedings Act* in order to be certified as a class action.[576] According to s.5(1), these criteria are the following:

> 5.(1) The court shall certify a class proceeding on a motion under section 2, 3, or 4 if,
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant who,
> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.[577]

The *Class Proceedings Act* also holds that the following matters are not barriers to certification:

> 6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
> 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.

[576] Although the term "class action" is colloquially invoked across Ontario's class action regime, technically a claim only becomes a class action once it has passed the certification stage; before certification, it is a class proceeding. The terminological distinction between a class proceeding and a class action is often waived in common parlance.
[577] *Class Proceedings Act*, SO, 1992, at s. 5(1).

2. The relief claimed relates to separate contracts involving different class members.
3. Different remedies are sought for different class members.
4. The number of class members or the identity of each class member is not known.
5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.[578]

Although certification is generally the procedural battleground upon which class actions are won and lost in Ontario's regime, this does not apply evenly across the required criteria. The requirements of (1) an identifiable class of people and (5) a representative plaintiff are generally unchallenging, however, the requirements of (1) disclosing a cause of action, (3) commonality of issues, and (4) the preferability of the procedure have consistently proven to be the most difficult criteria to fulfill for environmental class actions. These difficulties have produced an inhospitable climate in which an exceedingly low number of environmental class actions have successfully attained certification.[579]

It is beyond the scope of this chapter to explore the procedural intricacies of the certification stage, however, it must be noted that there is no statutory predominance requirement—a requirement that the drafters of the *Class Proceedings Act* intentionally did not include in the legislation.[580] In other words, there is no requirement holding that

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[578] Ibid., at s.6.

[579] The exact number of environmental class actions is currently not known given the absence of a comprehensive database for class actions in Ontario, despite repeated calls and proposals for empirical research programmes. The closest approximation to an empirical database is the National Class Action Database, instituted by the Canadian Bar Association to address the various challenges arising out of multi-jurisdictional class actions; however, the NCAD is comprised of voluntary rather than mandatory submissions by class counsel and does not attain an exhaustive standard. The Law Commission of Ontario has recently undertaken a Class Action Project, a part of which entails compiling a database of class actions in Ontario. It should also be noted that the inhospitable climate described above precedes certification as a class action; which is to say, class proceedings are not included in class action databases. However, based on qualitative interviews conducted with counsel, the general consensus is that environmental claims are among the least (if not the least) successful at certification for the reasons stipulated below. See, Canadian Bar Association, National Class Action Database, online: http://www.cba.org/Publications-Resources/Class-Action-Database/About.

[580] See, e.g., *Hollick v. Toronto (City),* 2001 3 S.C.R. 158 [2001] SCC 68; *Cloud v. Canada (Attorney General),* 2004 CanLII 45444 (ON CA).

common issues need to *predominate* over individual issues in a multilayer claim. By refusing to include such a requirement in the *Class Proceedings Act*, the drafters sought to expand the purview of possible class actions, given that predominance requirements generally result in fewer class proceedings being certified. From an access to justice perspective, this absence is a positive feature of Ontario's class action regime—a sharp contrast with approaches typical of American jurisdictions, as well as provinces such as British Columbia, which include some form of predominance requirements in their respective statutory frameworks. To narrow environmental claims on the grounds that common issues do not predominate over individual issues effectively usurps the legislation governing Ontario's class action regime. Although such valuations generally do not prefigure into considerations on common issues, they may implicitly play a role in the determination of whether or not a class action is a preferable procedure over individual justice-seeking. The repeated decisions by courts that class actions are not preferable procedures for environmental health claims given the purported need for individual health-based assessments and the predominance of individual issues is indicative of the usage of a form of predominance reasoning despite the intentional exclusion of any such requirement in the *Class Proceedings Act*.

This tension between the statutory framework and judicial decision-making recalls the major political conflict posed by class actions, namely, that the legal vehicle operates at the intersection of the liberal individualism that underscores the paradigm of Canadian law and the collectivism that is an integral part of Canadian society. The dominance of liberal individualistic judicial reasoning in certification decisions indicates that courts prefer to conceive of class actions as aggregative vehicles (rather than collectivist

vehicles); in other words, as vehicles that aggregate individual claims rather than as vehicles that possess substantive collectivist dimensions. This judicial preference is especially problematic in the environmental context insofar as environmental harms are often collective rather than individual harms; that is, the application of predominance reasoning may effectively amount to the individualization of collective harms through the invocation of judicial economy.[581]

More to the point, environmental harms, like other class actions, involve three layers: individual, collective, and public. Whereas these layers can be difficult to distinguish in various other types of claims, particularly the public interest, all three layers are easily distinguishable in environmental claims. This public interest directly relates to the secondary policy objective of behaviour modification—deterring wrongful conduct by similarly situated parties—but also involves the consciousness-raising that high-profile cases often provide in the broader Canadian society through increased media coverage. Through such individualizing tendencies, the multilayer interests involved in environmental class actions are reduced to matters of individual justice.

As the following case studies demonstrate, the interplay between these procedural requirements and scientific uncertainty in environmental claims has resulted in a restrictive focus on private property over other infringements—a proprietary focus that reflects the prevailing liberal paradigm of Canadian law.

[581] Typically, judicial decision-making that is informed by predominance reasoning cites the policy objective of judicial economy in favour of denying certification by holding that the resolution of common issues would not go very far in resolving the dispute given a preponderance or predominance of individual issues that demand individual resolution. The justification herein holds that it would not be an economic use of scarce judicial resources to allow the claim to proceed as a class action.

B. PRIVILEGING OF PRIVATE PROPERTY

From 1918 to 1984, a nickel processing refinery was owned and operated by the transnational corporation Inco Ltd (now Vale Ltd; the world's largest producer of nickel), in the small town of Port Colborne, Ontario.[582] The refinery emitted tons of nickel oxide particles into the surrounding environment during this historical period by engaging in what the trial judge referred to as "abnormally dangerous activities."[583] This contamination disproportionately affected the nearby residential area of Rodney Street, a low-income community. According to a comprehensive research study—*Soil Investigation and Human Health Risk Assessment for Rodney Street Community, Port Colborne*—commissioned by the Ontario Ministry of the Environment, an international panel of experts determined that elevated levels of nickel and lead contamination warranted action (the presence of other toxicants was also discovered, including arsenic, antimony, beryllium, cadmium, cobalt, and copper).[584] Pursuant to this incurred harm, the residents of the Rodney Street community bound together for a class action to recover damages for the toxic exposures and risks posed to human health and the natural environment, in addition to the devaluation of private property values in the surrounding region.

The class proceeding was initially denied certification, however, this decision was overturned by the Ontario Court of Appeal. Notably, the claim had undergone significant

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[582] *Pearson v. Inco Ltd.,* 2001 CanLII 28084 (ON SC); *Pearson v. Inco Ltd.,* 2004 CanLII 34446 (ON SCDC); *Pearson v. Inco Ltd.,* 2004 CanLII 4038 (ON SCDC); *Pearson v. Inco Ltd.,* 2005 CanLII 42474 (ON CA); *Pearson v. Inco Ltd.,* 2005 CanLII 5393 (ON CA); *Pearson v. Inco Ltd.,* 2006 CanLII 7666 (ON CA); *Pearson v. Inco Ltd.,* 2006 CanLii 913 (ON CA); *Pearson v. Inco Limited.,* 2008 CanLII 46701 (ON SC); *Pearson v. Inco Limited.,* 2009 CanLII 37928 (ON SC); *Pearson v. Inco Limited.,* 2009 CanLII 9371 (ON SC).

[583] *Pearson v. Inco Ltd.,* at 66.

[584] Ontario Ministry of the Environment, *Soil Investigation and Human Health Risk Assessment for the Rodney Street Community, Port Colborne* (2002), online: https://archive.org/details/soilinvestigatio4255ontauoft.

changes between these two decisions. As the Court of Appeal observed, the original claim "was much broader and included sweeping claims for damages from the alleged adverse health effects from nickel oxide contamination."[585] The modified claim, on the other hand, had been "significantly narrowed [...] to damages for the devaluation of real property values arising from soil contamination."[586] To be precise, the devaluation of real property values referred not to any decrease in property values *per se*, but rather to the retardation of property appreciation as a consequence of the stigma from nickel oxide contamination.[587] This narrowing of the scope of the claim was not inconsequential. According to the Court of Appeal, the appeal called upon the court to "consider whether a class proceeding is a suitable vehicle in an environmental case,"[588] and quoted the Supreme Court's observation in *Dutton* that "pollution cases may be especially suited to class proceedings."[589] The suitability of class actions in environmental matters was positively viewed to the extent that the claim was narrowed to focus on the devaluation of private property to the exclusion of human health-impairment claims. The Court of Appeal explicitly noted that certification was approved as a result of this narrowing with its observation that "[t]he individual claims of injury to health and related claims would dwarf the resolution of the common issues,"[590] however, "[w]ith the narrowing of the claim that is no longer the case."[591] Simply put, the

[585] *Pearson v. Inco Ltd.* at 3.
[586] Ibid.
[587] For an overview of stigma damages in real property devaluation, see, e.g., John C. McMeekin, John Ehmann, and Aaron Mapes, "Stigma Damages and Diminution of Property Claims in Environmental Class Actions," *Environmental Claims Journal* 24, no. 3 (2012): 260-87; for a general overview of the emerging field of real estate valuation in the context of environmental class actions, see, e.g., Thomas O. Jackson, "Real Property Valuation Issues in Environmental Class Actions," *Appraisal Journal* 78, no. 2 (2010): 141-49;
[588] Ibid., at 1.
[589] Ibid.
[590] Ibid., at 70.
[591] Ibid.

certification battle hinged upon the commonality of the issues and whether a class action was a preferable procedure for the resolution of the claim. In fact, the defendant's argument that individual assessments were needed and the class action was not a preferable procedure from a judicial economy perspective extended to the devaluation of property values, although the court rejected the argument that even the resolution of the private property claim required individual assessment.[592] Given the reluctance of courts to accept the viability of aggregate assessments of damages to property to date, the decision of the court in *Inco* to accept such aggregate assessments may be construed as a modest step forward in cases of historical contamination. However, it is abundantly clear that the environmental claim was successful at certification as a consequence of its narrowing to the exclusion of any health-impairment claims.

Despite this privileging of private property over human health (and concerns over the natural environment), the Court of Appeal reconfirmed the normative view that "environmental claims are well suited to class proceedings"[593] and repeated the merits of class actions as these pertain to the policy objectives of access to justice and behaviour modification that "[e]nvironmental pollution may have consequences for citizens all over the country."[594] Interestingly, although the Court of Appeal confirmed that class actions serve an important purpose in modifying the behaviour of defendants, as well as the behaviour of "other operators of refineries who are able to avoid the full costs and

[592] As the court pointed out, the claim was staked "on the propositions that public knowledge of nickel contamination in the Port Colborne area has had a detectable impact on property values in that area and that as the source of the contamination, Inco must pay damages to owners whose property values have fallen." To this end, "[r]esolution of the common issues will determine the question of Inco's liability for the nickel pollution and whether knowledge of that pollution impacted on property values in the defined area," and that a "resolution of these issues" is not "negligible in relation to the individual issues." Ibid., at 70-1.
[593] Ibid., at 88.
[594] Ibid.

consequences of their polluting activities because the impact is diverse and often has minimal impact on any one individual,"[595] it nevertheless reiterated that the environmental claim would not have succeeded without being narrowed (effectively allowing the nickel refinery to "avoid the full costs and consequences of [its] polluting activities"). As discussed below, the implications of this systemic narrowing are potentially far-reaching for Ontario's class action regime, not exclusively in terms of the secondary policy objective of ensuring deterrence for similarly situated parties, but also in terms of ensuring access to environmental justice, an objective that is not reducible to rights of private property. For the foreseeable future, however, it appears as if health-impairment will continue to be systematically excluded from environmental claims as part of legal strategies to attain certification while casting "a very large shadow" over the proceedings, as the "proverbial elephant in the room."[596]

Unlike the majority of certified class actions, *Inco* did not culminate in a negotiated settlement, but rather advanced to trial on its merits. To date, it is the only environmental class action in common law Canada to proceed to trial on its merits. Notwithstanding this relative victory at certification—'relative' in the sense that certification came at the cost of removing any health-impairing features from the claim—the claimants in *Inco* ultimately lost on the merits at trial. Although the trial was initially victorious with a damages award of $36 million—a sum that was calculated based on the speculative devaluation of property values[597] in comparison to a similar residential area—the defendants appealed the case and

[595] Ibid.
[596] Peter Bowal, "Environmental Class Actions for Historical Contamination: *Smith v. Inco Limited*," *Journal of Environmental Law and Practice* 24, no. 3: 298-99.
[597] According to Justice Henderson, "Port Colborne residential property values would have increased from 1999 to 2008 by 59.5% plus 4.35%, or 63.85%. The average residential property assessment in Port Colborne in 1999 was $103,395, and therefore if Port Colborne had kept pace with Welland the average residential property value in Port Colborne would be $169,412 as of 2008. This equates to a loss on average

ultimately won at the Court of Appeal which overturned the liability and damages assessment. The court concluded that physical changes to a given property do not necessarily constitute physical damages and that "actual, substantial, physical damage"[598] must be empirically demonstrated.

Perhaps most interestingly, it was the Court of Appeal that initially overturned the denied certification motion on the grounds that the claim no longer included the "sweeping damages" associated with health-impairing events, however, the same court held in the appeal on the merits that the nuisance claim was not constituted because "it was incumbent on the claimants to show that the nickel particles caused actual harm to the health of the claimants or at least posed some realistic risk of actual harm to their health and wellbeing."[599] That is to say, the very aspect of the claim that allowed it to gain certification—the removal of health-impairment—constituted grounds to negate liability upon appeal at trial on its merits. In other words, the collective claims-makers could not include health-impairment as part of the claim given that they would not have attained certification with such a sweeping claim, however, at trial on its merits, the narrowed claim was rejected on the grounds that the claims-makers could not prove any health-impairment effects from the nickel contamination. According to the court, if "the claimants [had] shown that the nickel levels in the properties posed a risk to health, they would have established that those particles caused actual, substantial, physical damage to their properties."[600] The irony is that a claim that includes health-impairment is generally

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of $4,514 per property for 7,965 residential properties or a total of $35,954,010, which I will round off to $36,000,000." *Smith v. Inco Ltd.* 2010 ONSC 3790, at 298.

[598] Ibid., at 52.

[599] Ibid., at 57.

[600] Ibid., at 52.

incapable of attaining certification, but a narrowed claim that focuses on private property is incapable of proving "actual, substantial, physical damage"[601] since such damage is apparently incumbent upon proof of health-impairment. This circularity suggests that certification may remain the major battleground for environmental class actions. The victory of Inco at trial similarly suggests that defendants may start challenging claims more vigorously by refusing to settle post-certification.

C. HEALTH IMPAIRMENT AT CERTIFICATION

A series of historical contamination cases attained certification across Canada post-*Inco* by pursuing the strategy of narrowing the scope of the respective claims to private property harms (to the exclusion of health-impairment). For example, the Alberta Court of Appeal in *Windsor v. Canadian Pacific Railway* upheld the certification of an environmental action in 2007 that alleged that the widespread usage of trichloroethylene by the defendant resulted in the devaluation of property values and concomitant losses in rental incomes as a consequent of toxic contamination of groundwater in a residential area near Calgary.[602] Despite the fact that trichloroethylene is a known carcinogenic toxicant, the claim in *Windsor v. Canadian Pacific Railway* did not include any health-impairment events in order to maximize the likelihood of attaining certification.

One of the major points of concern of this privileging of private property over health-impairment claims is well-illustrated in this case insofar as the claim accentuated the rights of property owners; that is, even properties that were extensively rented out to lower-income households (who suffered health-impairing effects of the contamination of

[601] Ibid.
[602] *Windsor v. Canadian Pacific Railway Limited*, 2007 ABCA 294.

their groundwater) were speculatively covered by the claim—not merely as it related to devaluation of property, but also loss of rental income—however, the low-income residents of such rental properties were systematically excluded from the claim. For such non-property owning households, the exclusion of health-impairment claims effectively excludes them from the pursuit of multilayer access to environmental justice.[603]

Another point of concern of the judicial emphasis on private property (and its extended influence on the delimitation of the scope of environmental claims by Private Attorneys General) is the reduction of the collective character of claimants into an aggregation of individual property owners rather than environmentally-concerned citizens.[604] This reduction is evidenced as early as *Hollick*—one of the trilogy of groundbreaking cases that ushered in the new paradigm of class actions in Canada. Simply put, a theoretical merit of the class action is its collectivism—a class action is not only an aggregation of individual claims, but rather permits claims-makers to act collectively in pursuit of justice. However, courts have consistently displayed liberal predilections by individualizing collective harms. The importance of the collective dimension of class actions in the environmental context is in part that "[e]nvironmentalists can present the interference as a single, continuing harm to the community and environment,"[605] which contrasts with the prevailing judicial treatment of class members as a "class of property

[603] Once again, although such health-impairment claims may proceed on an individual basis, the prospects of success for individuals against powerful defendants such as transnational corporations or governments is rather bleak; moreover, if it is a negative value claim, as environmental claims tend to be, then it would be economically irrational for claimants to pursue rights vindication through the courts.
[604] This is not an universally applicable dichotomy. Moreover, at times such actions do entail an aggregation of individual property owners rather than a collective of citizens.
[605] Heather McLeod-Kilmurray, "*Hollick* and Environmental Class Actions: Putting the Substance into Class Action Procedure," *Ottawa Law Review* 34, no. 2 (2003): 275.

owners pooling resources to recover their individual compensation, rather than as an environmental group seeking pollution prevention."[606]

In similar fashion, *Ring v. Canada* attained certification in Newfoundland in 2007 only to have the certification order overturned in 2010.[607] The class action involved the spraying of herbicides at the Canadian Forces Base at Gagetown between 1956 to the present day and represented all individuals who were exposed to dangerous levels of hexachlorobenxene and dioxin—carcinogenic toxicants that cause lymphoma. The Newfoundland Court of Appeal overturned the certification order on numerous grounds, including the notion that health-impairing environmental claims were not suited to class actions on the grounds that individual assessments needed to be conducted, including toxic causation analyses based upon those individual assessments, while additionally adjudging that the class definition was too broad; once again, the commonality and preferable procedure criteria of certification posed the greatest procedural barriers (in addition to the first criterion of an identifiable class).[608] The court's enumeration of the various obstacles in upholding certification bears recognition, given the wider applicability in the context of environmental class actions:

> [T]here would have to be a determination of the "toxic level" of each and every chemical sprayed and every combination of sprays used and a determination of how long each area was "toxic." Toxic levels, of course, would have to be related to the various lymphomas. For each claimant there would have to be an assessment of when he or she was at CFB Gagetown, where he or she went on the base, what chemicals might have been in those areas at the time of the visit or visits and whether there might be a cumulative effect from multiple visits. For others, for example, those who helped clean mud from equipment, it would require an examination of where the equipment had been on the base and what chemicals had been sprayed in those areas. For claimants who had contracted lymphoma,

[606] Ibid.
[607] *Ring v. Canada (Attorney General),* [2007] NJ No. 107 (CA).
[608] Ibid.

> even if Ring is correct regarding the chemicals used at CFB Gagetown, there would also have to be extensive medical evidence, among other things, before the connection alleged by Ring could be established between the spraying and the lymphoma. Inferences may be made in the case of environmental claims which arise out of one incident (e.g. one spill of a toxic substance). Here, in light of the time frame involved, the large number of people, the size of the base, and the different chemicals used, the proposed common issues are insignificant when compared to the large number of individual inquiries which would be needed to resolve this claim. I must conclude that judicial economy, if any, would be minimal.[609]

The court's enumeration of these obstacles in environmental class actions illustrates the interplay between procedural barriers at the certification stage and broader problems of scientific uncertainty and the lack of empirical data. From a critical policy perspective, the concluding statement of the above passage indicates that judicial economy or a lack thereof—as a primary policy objective of class actions alongside access to justice—may be sufficient cause to hinder the certification of a class proceeding. Indeed, in *Bryson v. Canada (Attorney General)*, a case that arose from the same facts of toxic herbicide usage in Gagetown (certification was denied), the court observed that "[a]ccess to justice, although one of the most important objectives of class proceedings, is not the only consideration and I am not satisfied that the proposed class proceeding would result in any significant advancement of the goal of judicial economy or that it would provide an efficient and manageable method of resolving the dispute."[610] As explored in Chapter 3, the counterbalancing of access to justice with the imperatives of judicial economy,

[609] Ibid., at 107.
[610] *Bryson v. Canada (Attorney General)*, 2009 NBQB 204, at 91.

particularly in cases involving negative value claims, gives rise to grave concerns about the compatibility of these policy objectives.[611]

A notable exception to many of the enumerated obstacles was identified above: environmental health claims based on a single event. Such was the case in *Durling v. Sunrise Propane Energy Group Inc.,* which arose out of a series of explosions at a Toronto-based propane facility on 10 August 2008.[612] These propane explosions resulted in damages to approximately 6,386 residents of the affected area, including displacement, inhalation of noxious substances, property damage, fear of life, post-traumatic stress disorder, lost income, and incidental costs.[613] In contrast to the growing tendency in Ontario's environmental class action regime, *Durling v. Sunrise Propane* was successfully certified, however this certification motion was largely uncontested by the defendants and a settlement was quickly reached.[614] Although environmental health claims based on single events more easily pass certification than historical contamination cases, it does not stand to reason that single event cases are automatically ensured certification; more to the point, it should be noted that such single event cases are relatively uncommon and that the

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[611] Such reasoning indicates that the policy objectives of class actions are not necessarily complementary—this recalls the discussion in Chapter 2 concerning the contradictory purposes of negative value class actions; that is, class actions that would not otherwise be individually pursued. In fact, the policy objectives of class actions as described in *Western Canadian Shopping Centres Inc. v. Dutton* was quoted in *Ring v. Canada*, including the well-known observation that "by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims." Of course, if the objective of judicial economy is prioritized above access to justice, it would stand to reason that the access to justice benefits of class actions in negative value claims are contradictory to the objectives of the *CPA*; that is, it would serve judicial economy to keep such claims out of the civil justice system, irrespective of their merits. *Ring v. The Queen*, 2007 NLTD 146 (CanLII) at 69.

[612] *Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 7506 (CanLII) at 16-8.

[613] Ibid., at 19.

[614] It should also be noted that such single-incident claims are qualitatively distinct from historical contamination claims that are exponentially more challenging for potential or actual claimants.

majority of environmental claims pertain to historical contamination.[615] For such claims, the mounting obstacles to attaining certification is a major source of concern, not merely for the access to justice objectives of class members in the respective claims, but also for the future of environmental health claims in class action regimes across Canada.

A prominent recent example from Nova Scotia illustrates the various obstacles faced by such actions. The claim in *Canada (Attorney General) v. MacQueen* pertained to toxic emissions from a steel production plant in Sydney, Cape Breton, which the claimants alleged harmed their personal health and private property. The steel plant operated for nearly a century—from 1903 to 2000—in the center of the city of Sydney, during which time the facility (and the coke ovens associated with steel production) were alleged to have "spewed hundreds of thousands of tonnes of contaminants, including heavy metals, polycyclic aromatic hydrocarbons and dangerous respirable particles into the air, water, and soil"[616] of the surrounding region. The Sydney Tar Ponds (as the region is called) has been widely recognized "one of the most notorious contaminated sites in Canada"[617] for decades. As a strategy to increase the likelihood of attaining certification given the aforementioned examples, the claimants did not directly seek any recovery for damages pertaining to individual injuries and health-impairments, but rather sought a series of interrelated remedies, including the "cessation of exposure by either remediation by removal of contaminants from the properties or relocation of residents,"[618] as well as the

[615] This point has been echoed by Jennifer Fairfax in private correspondence with the author and in a report delivered on 19 January 2015 at the Ontario Bar Association 2015 Institute Conference, "Rougher Waters to Come for Environmental Class Actions: Will Class Action Plaintiffs Rage Against the Dying of the Light?"
[616] *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143 at 1, 13. Another industrial facility in which coke ovens were operational was also included in the claim. This facility closed in 1998.
[617] Meinhard Doelle, "The Sydney Tar Ponds Case: Shutting the Door on Environmental Class Action Suits in Nova Scotia?" *Journal of Environmental Law and Practice* 27, no. 3 (2015): 279.
[618] Ibid., at 14.

"implementation of a medical monitoring program consisting of a large-scale epidemiological study and an education program,"[619] in addition to damages involving nuisance, trespass, negligence, battery, negligent battery, strict liability, and breach of fiduciary duty.[620]

Despite the relatively narrow claim, the certification order was overturned at the Court of Appeal on a series of grounds, including that the pleadings alleging nuisance, negligence, and breach of fiduciary duty did not meet the commonality criterion, and that no cause of action was disclosed for the pleadings alleging battery, negligent battery, and strict liability.[621] Notably, the court recognized the basic access to justice benefits of negative value claims by observing that Private Attorneys General argued that the claims of the class members "are so small that it would not be worthwhile for them to pursue relief individually and their financial resources are such that they cannot afford to bring separate proceedings."[622] However, the court reiterated that the class action was not the preferable procedure on the grounds that the claims were too individualized for a collective legal vehicle.[623] As Meinhard Doelle has observed, the "devastating effect of this decision on environmental class actions" might effectively 'shut the door' on such actions in Nova Scotia.[624] As this section has documented, this delimitation of environmental class actions is evident across common law provinces in Canada.

To the extent that health-impairing events directly affect the social reproduction of negatively affected individuals and communities, the persistent difficulty of attaining

[619] Ibid.
[620] Ibid.
[621] Ibid., at 68, 109-10, 151-52, 161.
[622] Ibid., at 184.
[623] Another complexity that bears recognition is the shifting standards of care over time and the reluctance to hold historical harmful activities to the contemporary standards.
[624] Doelle, 285.

certification for environmental health claims remains a cause of growing concern. Judicial preferences for individual resolution to collective health-impairments may be indicative of the standpoint that courts do not possess a "role in the regulatory process affecting industrial or landfill pollution or genetically modified plants, for example, which leaves extensive discretion in the legislative and executive branches by virtually eliminating citizen access to courts on these issues."[625] This judicial preference creates a substantial access to justice problem, particularly when governmental bodies are reluctant to enforce and regulate powerful polluting industries associated with toxic exposures and the production of chemicals, which speaks to the interrelations of power, production, and social reproduction in environmental justice.[626] More to the point, as explored in Chapter 2, class action legislation in Ontario was partly introduced with the neo-liberal objective of privatizing regulatory enforcement. The refusal of courts to certify environmental health class actions through the individualization of such claims produces a serious enforcement gap for claims based on health-impairing events.

Although environmental class actions involving health-impairment have proven to be particularly difficult to certify—such cases are perhaps the most challenging in class action regimes across Canada—the obstacles at certification do not exclusively apply to such claims. In fact, attaining certification for environmental class actions across the board has consistently proven to be elusive, even in cases that do not involve health-impairing claims, such as *Hoffman v Monsanto Canada Inc.*, *Roberts v. Canadian Pacific Railway*

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[625] Heather McLeod-Kilmurray, *The Process of Judging the Environment: Civil Procedure, Environmental Ethics and their Effects on Environmental Law* (SJD, University of Toronto, 2007) [unpublished]. See also, Patrick Hayes, "Exploring the Viability of Class Actions Arising from Environmental Toxic Torts: Overcoming Barriers to Certification," *Journal of Environmental Law and Practice* 19, no. 3 (2009): 189-224.

[626] The term 'access to justice' is employed here in the broad sense, i.e. formal legal and non-legal channels.

Co., *O'Neill & Chiasson v. St-Isidore Asphalte Ltée*, and *Paron v. Alberta (Environmental Protection)*.[627] According to McLeod-Kilmurray, the dominance of proceduralism in environmental class actions (and the concomitant failures at the certification stage) is partially attributable to the fact that courts have viewed class action certification "not as environmental decisions that happened to involve procedural steps of class certification but as a procedural hearing that happened to involve environmental facts,"[628] which is a view that is "reinforced by the fact that the courts rarely focused on the cumulative harm, preferring to see [...] an amalgamation of individual claims."[629]

This emerging inhospitality to environmental class actions has permeated into legal cultures of class action regimes and the gatekeeping decision-making criteria of Private Attorneys General. Prospects for success figure prominently in the case selection criteria of Private Attorneys General and given the established settlement culture of class action regimes across Canada, such success is typically conceptualized as a favourable post-certification settlement. Insofar as the major battleground for class actions remains the certification stage, the persistent difficulties in certifying environmental class actions poses a significant barrier for potential claims-makers and remains a growing cause for concern for the future prospects of multilayer access to environmental justice.

Finally, the negative effects for multilayer access to environmental justice of the numerous procedural barriers at certification are compounded by the failed outcome of *Smith v. Inco*, the only environmental class action to be decided on its merits at trial. This

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[627] *Hoffman v Monsanto Canada Inc*. [2007] SJ No 182 (CA); *Roberts v. Canadian Pacific Railway Co*. [2006] BCJ No 2905 (BCSC); *O'Neill & Chiasson v. St-Isidore Asphalte Ltée*, 2013 NBQB 72; *Paron v. Alberta (Environmental Protection)*, [2006] AJ No 573 (QB).
[628] Heather McLeod-Kilmurray, "Hoffman v. Monsanto: Courts, Class Actions, and Perceptions of the Problem of GM Drift," *Bulletin of Science, Technology & Society* 27, no. 3 (2007): 192.
[629] Ibid.

failure has produced disincentivizing repercussions on Private Attorneys General to pursue similar claims:

> It took 10 years to take the case to trial. The trial itself took months. And the plaintiffs came out of the process with nothing. Against this background, there will undoubtedly be some who will prefer more low-hanging fruit rather than take on the risk of an environmental class action and its unique challenges...[630]

In addition to the devastating loss at trial, Vale (formerly Inco) was awarded adverse costs of over $5 million from Ontario's Class Proceedings Fund, which had funded and indemnified the class action (this adverse costs award was later reduced to $1.76 million on appeal).[631] As explored in previous chapters, the economic incentives of risk-averse and resource-constrained Private Attorneys General militate against the pursuit of socially beneficial class actions possessing a high degree of uncertainty in regards to prospective outcomes—an 'investment preference' that is compounded by the emergence of litigation financing that prefers low-risk investments. To the extent that environmental class actions involve myriad difficulties from scientific uncertainty and the lack of empirical data to procedural obstacles at the certification stage, it appears as if Ontario's class action regime is moving towards the pursuit of 'low-hanging fruit' over potentially economically devastating class actions with social benefits. As previously elaborated, the recruitment strategies of Private Attorneys General has produced an "anemic class action regime, in which plaintiff's counsel prefer low-hanging fruit and focus on fairly routine, more or less guaranteed claims,"[632] in other words, the polar opposite of environmental class actions.

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[630] Bowal, 319.
[631] *Smith v. Inco Ltd.*, 2013 ONCA 724.
[632] Jones, "Litigate or Regulate? The Elusiveness of an Effective Consumer Protection Regime," 370.

D. TOWARDS A JUDICIAL ENVIRONMENTAL FRAMEWORK?

The proceduralism that dominates the certification stage continues to pose significant obstacles to multilayer access to environmental justice for claims seeking to proceed as class actions (re: claims that have already overcome the qualification stage of Private Attorneys General). However, alternative approaches that modify this austere proceduralism have been postulated by critical scholars whereby substantive law informs judicial decision-making at this crucial stage. The basic premise for such approaches is the recognition that procedure is neither trans-substantive nor apolitical. Specifically, the privileging of private property is a logical extension of classical liberalism, which informs the prevailing proceduralism in Canadian law. Despite the hegemonic insistence about the neutrality of procedural rules, civil procedure is "never neutral" insofar as it "contains or embodies the values and priorities of traditional approaches to civil litigation and its purposes, namely the protection of individuals and proprietary interests."[633] The politicality of 'apolitical procedures' is revealed most incontrovertibly in the political battles that occur when procedural rules are developed and amended.[634] In short, the privileging of private property and the dominant proceduralism at the certification stage are not mutually exclusive, but are rather complementary and interdependent features of Ontario's class action regime. As long as this proceduralistic dominance continues unabated, the socio-

[633] McLeod-Kilmurray, *The Process of Judging the Environment: Civil Procedure, Environmental Ethics and their Effects on Environmental Law*, 4.

[634] For example, as Kent Roach points out in relation to the Federal Rules of Civil Procedure in the United States: "The seemingly neutral and apolitical character of the Federal Rules of Civil Procedure is unmasked [when the details of] some of the political battles over recent amendments" are observed. Kent Roach, "Teaching Procedures: The Fiss/Weinrib Debate in Practice," *University of Toronto Law Journal* 41, no. 2 (1991): 270.

political and economic dimensions of class actions as vehicles for collective claims-making will continue to be limited in scope and viability.[635]

One promising framework – a 'judicial environmental framework' – has been articulated by Heather McLeod-Kilmurray whose appraisal of the relative failures of environmental class actions at the certification stage through the invocation of procedural technicalities has produced the conclusion that if such proceedings were viewed as "environmental decision[s]" instead of "procedural motion[s] divorced from [their] substantive context" then the individualization of collective harms may be prevented since the "perception of the class as an entity with a united purpose"[636] would be enhanced. Such a reorientation in the judicial approach at certification would aim to contextualize class proceedings according to established environmental concepts, such as sustainability and the Precautionary Principle.[637] The paradigm of scientific uncertainty in environmental harms examined earlier in this chapter testifies to the necessity of greater contextualization at the certification stage through the recognition of the underlying substantive law and the environmental principles that inform such regimes (notably, the Precautionary Principle, which has been a feature of environmental governance domestically and internationally, although its gradual delegitimization under the new constitutionalism of disciplinary neo-liberalism can be discerned). Basing certification decisions on environmental concepts such as the Precautionary Principle "might lead judges to err on the side of caution and

[635] On a related note, Richard A. Posner has suggested that judicial recourse to formalistic principles is exacerbated in complex cases, which is doubly applicable in the context of environmental class actions – which often feature high levels of complexity pertaining to toxic causation and scientific uncertainty – that must pass through the certification stage. The complexity of a given case often determines the application of decontextualized reasoning, according to Posner. See, Richard A. Posner, *Reflections on Judging* (Cambridge: Harvard University Press, 2013).
[636] McLeod-Kilmurray, 4.
[637] It should also be recalled that certification is not a ruling on the merits, as per *CPA* s.5: "An order certifying a class proceeding is not a determination of the merits of the proceeding." 1992, c. 6, s. 5 (5).

grant certification where there is uncertainty on some of the branches of the certification test."[638]As explored in this chapter, the preferability criterion has often been cited in decisions to reject certification for environmental class actions through the importation of a variant of a predominance requirement despite the rejection of such a requirement by the Ontario legislature and its noticeable exclusion from the *Class Proceedings Act*. By reorienting such proceedings as environmental decisions involving procedural steps rather than as procedural decisions involving environmental facts,[639] the prevailing tendency to individualize collective harms may be mitigated, with positive implications for multilayer access to environmental justice.

Clearly such a 'judicial environmental framework' is a radical proposal that needs to be developed further and its implemenation would require broad consensus and exploratory research on its viability, however, from the perspective of environmental justice, it is promising that such alternatives have started to be explored by environmental scholars who are beginning to recognize the shortcomings of the present framework for environmental claims.

CONCLUSION

This chapter has examined the great chasm between the widespread view that environmental claims are paradigmatic class actions and the abysmal reality of their

[638] McLeod-Kilmurray, "Hoffman v. Monsanto: Courts, Class Actions, and Perceptions of the Problem of GM Drift," 197. "At minimum, the environmental presumption that doubt and uncertainty should be resolved in favour of the environment would have led the court to err on the side of certification, to allow a full record to be brought," argues McLeod-Kilmurray, however, Canadian courts appear to prefer that "any penalty or remediation should be left to the economics of cost internalization or to the legislative and administrative structure." McLeod-Kilmurray, *The Process of Judging the Environment: Civil Procedure, Environmental Ethics and their Effects on Environmental Law*, 349-51.
[639] Ibid., 192.

floundering in Ontario's class action regime. This abysmal reality has resulted in the strategic narrowing of the scope of environmental class actions to the exclusion of health-impairing events, which has produced a class action regime in Ontario that systemically privileges rights of private property over other infringements. To the extent that multilayer access to environmental justice applies beyond restitutionary justice to include a preventative dimension—that is to say, access to justice in the twenty-first century encompasses the dual features of accessibility promotion and injustice prevention—the current anemic state of Ontario's environmental class action regime is cause for grave concern, not only for current claims-makers, but also for future claims-makers. As an integral pillar of Ontario's private enforcement regime, class actions have systemically failed to protect the social reproduction of vulnerable communities, effectively signaling to the polluter-industrial complex that health-impairing events will not be prosecuted through collective legal action. The potential weapon of environmental class actions for health-impairing events against transnational corporations and governments associated with toxic pollution has started to be viewed as a hollow threat. The ramifications of this privileging of private property over human health does not solely apply to past and present claims-makers who have unsuccessfully attempted to obtain multilayer access to environmental justice: future claims-makers are similarly affected by this weakening of environmental class actions, given the diminishment of the deterrence function.

By exploring the exclusionary dynamics that operate to impede multilayer access to environmental justice in light of the power, production, and social reproduction associated with the polluter-industrial complex and toxic exposures, this analysis has expanded the ambit of environmental class actions beyond the traditional confines of

procedural law to the broader political economy of pollution. From the production of ignorance by transnational corporations associated with toxicity and the agnotological power of knowledge production to the structural limitations of toxic causation in the legal context, this chapter has synthesized the dynamics that have produced the systemic privileging of private property over human health in Ontario's class action regime. These exclusionary dynamics conjoin with those identified in previous chapters—notably, the reversed recruitment paradigm and the gatekeeping role of Private Attorneys General according to market criteria and imperatives—to produce an inhospitable climate for multilayer access to environmental justice in Ontario. To the extent that class actions function as integral pillars of private enforcement regimes, this privileging of private property over human security is rooted in the reconfiguration of 'litigation states' and the broader neo-liberalization of civil justice. The preceding chapters have largely focused on procedural barriers to justice (i.e. certification; gatekeeping), however, in recognition of the importance of both procedural and substantive dimensions, in the next chapter the capacity to achieve substantive justice for environmental claims is examined in light of the structural shortcomings of Ontario's class action regime.

SUBSTANTIVE JUSTICE:

EXCLUSIONARY DYNAMICS OF PRIVATE REDISTRIBUTIVE JUSTICE

INTRODUCTION

In previous chapters, we have identified a series of barriers to multilayer access to environmental justice in Ontario's class action regime. These have included the exclusionary gatekeeping role played by Private Attorneys General, which is a facet of Ontario's regime that applies across sectors, as well as specifically environmental barriers, such as the paradigm of scientific uncertainty and the privileging of private property in environmental class actions to the detriment of health-impairing claims. Although these critical areas address several interrelated facets of multilayer access to environmental justice, the barriers examined in previous chapters have largely focused on procedural concerns—the notion of 'barriers' is proceduralistic as it denotes obstacles to having one's day in court. As observed in Chapter 1, however, progressive conceptions of access to justice in the early twenty-first century must incorporate substantive considerations in contrast to the strictly procedural conceptions envisaged in earlier waves of research and policy reforms. There is minimal value in procedural access without substantive justice.

To the extent that environmental class actions facilitate a form of redistributive justice in the political economy of pollution, the dynamics impacting the attainability of justice demand critical analysis. Although the difficulty of evaluating substantive justice is self-evident (given its highly subjective character), this self-evidence does not preclude critical policy analyses at a heightened level of generality, including addressing the structural inadequacies, ethical problems, misalignment of economic interests, as well as

shortcomings in the legislative framework of the *Class Proceedings Act*. These are contextual variables that independently and cumulatively impact substantive justice in Ontario's regime. As it pertains to multilayer access to environmental justice, substantive considerations are largely focused on achieving compensation, deterring misconduct, and social recognition of loss (i.e. public apologies). As we have observed, however, the monetizing preferences of Private Attorneys General and litigation financiers, as well as defendants who seek settlements for relatively modest sums without public admissions of guilt, dominate Ontario's regime to the detriment of other forms of substantive justice. The fact that nearly every certified class action results in a privately negotiated settlement heightens the decision-making powers of such legal actors in favour of monetary outcomes—only a single environmental class action has proceeded to trial on its merits in Ontario. Such privatization is endemic in Ontario's class action regime and civil justice more broadly. The starting point for a critical analysis in this context must therefore consider the dynamics that animate the settlement stage, including the misalignment of economic interests, the adversarial void, take-up rates and notice practices, and the (in)efficacy of objectors. A broader political economy analysis concomitantly considers this settlement paradigm as a facet of the privatization of civil justice and its adverse social and democratic ramifications. Notably, the strong judicial and public policy preference for settlements is partly precipitated by the insufficiency of state expenditures in civil justice in the current historical conjuncture.

The chapter proceeds by briefly sketching out the parameters of Ontario's class action settlement culture before exploring a series of contextual variables that determine outcomes for collective claims-makers in form and substance. Following the analysis of

the dynamics of settlement in Ontario's regime, the chapter considers the complexities of *cy-près* distribution programs in light of the secondary policy objective of the *Class Proceedings Act* of behaviour modification.[640] This acquires heightened significance given the mobilization of class actions as policy instruments in the implementation of a private enforcement regime in Ontario. Although many features of this analysis are applicable across Ontario's regime, the specificities of substantive justice-seeking in environmental matters are highlighted throughout the chapter.

1. THE SETTLEMENT STAGE

Access to justice analyses of class actions are typically focused on procedural barriers associated with the pre-trial certification stage. This focus on procedural barriers is understandable since the certification stage is strictly procedural—no substantive analysis of the relative merits of a class proceeding are permitted as per the *Class Proceedings Act*.[641] More to the point, these barriers are not inconsequential, particularly for environmental health-impairment claims (Chapter 4). The pre-trial certification stage is generally viewed as the major battleground for prospective class actions, since class proceedings that attain certification as class actions typically result in privately negotiated settlements rather than proceeding to trial on their merits. As such, there is a certain logicality in focusing on procedural barriers. However, the progressive standpoint of this

[640] This Chapter is gratefully indebted to Garry Watson and Michael Rosenberg, who covered a number of these issues during their co-taught Class Action Seminar at the University of Toronto's Law School, as well as Jasminka Kalajdzic, who has published extensively on these issues as a leading class action scholar in Canada.

[641] Although no consideration of merits is statutorily permitted, the general understanding in Ontario's class action regime as culled from the qualitative interviews conducted for this project is that courts often engage in a 'sniff test' in terms of evaluating the potential merits of any given proceeding. Whether and to what extent such 'sniff tests' determine outcomes is unknown.

project has consistently been that access to justice necessarily involves both procedural and substantive facets. To reduce 'access to justice' to strictly procedural concerns regressively prioritizes 'access' to the detriment of 'justice'. Given the dominant settlement culture in Ontario's regime, the dynamics of settlement should be a primary site of critical analysis (as opposed to public trials, which are exceedingly rare, even as some commentators speculate that trials are becoming increasingly common).

As explicated in previous chapters, Ontario's regime is distinguished by entrepreneurial Private Attorneys General pursuing claims that satisfy criteria based primarily on profitability and predictability. This has produced an anemic regime in which low-hanging fruit are preferable over otherwise meritorious cases involving the social reproduction of vulnerable people. In this context, the risk aversive behaviour of Private Attorneys General is conducive to a preference for privately negotiated settlements over the contingencies of public trials on the merits. As several participants interviewed for this project repeatedly emphasized, even trials in which legal claims are perceived as being exceptionally strong nevertheless contain the possibility of adverse outcomes—a possibility that is often economically intolerable to resource-constrained and risk-aversive Private Attorneys General.[642] The strong preference for privately negotiated settlements is not solely a matter of public policy or the case management priorities of the judiciary, but rather extends to the economic imperatives of entrepreneurial litigators. Similarly, defendants are averse to risk exposures and typically prefer privately negotiated settlements over the contingencies of unpredictable trials. The cumulative outcome of such economic

[642] It should be noted that the narrative of the 'resource-constrained' Private Attorney General may need to be mitigated given the dominance in Ontario of a select few class action firms who have amassed sizable 'war chests', as indicated earlier.

imperatives suggests that the major actors in Ontario's class action regime are strongly aligned with a preference for private settlements. Although legal analyses of the settlement stage have typically focused on ethical and jurisprudential concerns, a political economy analysis must necessarily start from the broader socio-political context that has produced the strong judicial and public policy preference for settlements.

A. PRIVATIZATION & EFFICIENCY

One of the distinctive features of contemporary neo-liberalism has been a reduction in social expenditures and greater privatization of state assets and services. The former process has typically operated as a justification for the latter process: privatization has been posited as a viable strategy pursuant to the principles of economic efficiency in order to address social needs that otherwise require state expenditures. The ideological imperatives of such processes are perhaps most clearly identifiable in state taxation regimes, particularly in regressive taxation policies which effectively operate to redistribute wealth upwards to privileged sectors of society. Social and democratic ramifications of such neo-liberal processes have been widely observed across Canadian society, including the deleterious effects on fundamental democratic institutions such as the civil justice system.

Trevor C. W. Farrow has persuasively argued that the privatization of civil justice demands greater visibility and politicization given the serious negative impacts across a range of critical areas, such as imbalanced power relations, procedural unfairness, the development of the common law, and broader democratic ramifications.[643] These insights apply across civil justice systems in Canada, including to environmental claims in

[643] Trevor C. W. Farrow, *Civil Justice, Privatization and Democracy* (Toronto: University of Toronto Press, 2014).

Ontario's class action regime. Moreover, Farrow's trenchant critique of civil justice privatization extends to include the inadequacies of public budgeting and political ambivalence towards civil justice by political parties and civil society actors. The budgetary constrains imposed by prevailing macro-economic policies—articulated through features such as balanced budgeting imperatives, deficit reduction, and regressive taxation schemes—has contributed to the strong public policy preference for settlements across the Canadian civil justice system. Such macro-economic policies are structured by the new constitutionalism of disciplinary neo-liberalism which creates constraints on democratic controls over economic policy-making.[644] The 'locking in' of commitments to disciplinary neo-liberalism effectively delimits the bounds of political possibility for socio-democratic expenditures, including civil justice spending.[645] Ultimately, the macro-economics of fiscal austerity in the present historical conjuncture indicate that comprehensive increases in civil justice expenditures are not forthcoming.

This dominant settlement paradigm has garnered increasing attention over the past thirty years on what Marc Galanter famously calls the phenomenon of the "vanishing trial."[646] Statistically speaking, the settlement rate for all types of civil justice disputes across Ontario is roughly 98% and the rate for class actions is estimated at a comparable

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[644] Isabella Bakker and Stephen Gill, eds., *Power, Production, and Social Reproduction* (New York: Palgrave Macmillan, 2003); Stephen Gill and Claire A. Cutler eds., *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2015).

[645] Stephen Gill, "New Constitutionalism, Democratisation and Global Political Economy," *Pacifica Review* 10, no. 1 (1998): 23. As Gill observes, a primary issue is the extent to which the new constitutionalism of disciplinary neo-liberalism serves to "'lock in' commitments to liberalization, whilst 'locking out' popular-democratic and parliamentary forces from control over crucial economic, social and ecological policies."

[646] Galanter introduced the term in "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts," *Journal of Empirical Legal Studies* 1, no. 3 (2004): 459-570. For a brief overview, see Trevor C. W. Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014): 117-20.

level.[647] Perhaps the strongest policy rationale for this settlement preference is the theoretical capacity of negotiations to promote cooperation and compromise in dispute resolution. The basic premise of this rationale is that adversarial trials typically result in polarized outcomes in favour of one party over another, whereas settlements promote a middle pathway between the two extreme positions that would otherwise constitute an adversarial process. The applicability of this logic in the class action context—particularly given conflicting economic interests, ethical challenges, and structural flaws in Ontario's institutional framework—deserves greater critical attention than has heretofore been provided. From a broader perspective, however, the preference for settlements largely derives from the neo-liberal ethos of efficiency-based civil justice reforms that valorizes economic efficiency as a determinative principle. As Binoy Kampmark has observed in a critique of legal efficiency as neo-liberal dogma, the "coupling of justice, efficiency and cost" in this paradigm illegitimately assumes a relationship between justice and efficiency that is often conflictual rather than complementary. Kampmark observes that "[c]ase management has become code for efficiency, the watchword of legal reformers,"[648] a paradigm that has produced so-called 'managerial judges' who actively promote settlements and various alternative dispute resolution mechanisms. From this viewpoint, the primary objective of the judicial preference for private settlements is not the inherent merits of a conciliatory or compromising process as a preferable means to substantively just outcomes, but rather the preservation of scarce judicial resources through 'expediting

[647] Such high rates are largely the outcome of the advent of the case management paradigm. Farrow, 119. See also, Honourable Warren K. Winkler, "Civil Justice Reform – The Toronto Experience," 12 September 2007, *The Warren Winkler Lectures on Civil Justice Reform*, accessed 7 February 2016. Online: http://www.ontariocourts.ca/coa/en/ps/speeches/civiljusticereform.htm; Kalajdzic, "Access to Justice for the Masses?" 101.

[648] Binoy Kampmark, "Legal Efficiency as Dogma: Neo-liberalism, justice and the Australian civil law system," *Social Alternatives* 35, no. 2 (2016): 69.

the process' and preventing any delays.[649] The valorization of economic efficiency as a determinative principle privileges expeditious resolutions (typically achieved through privatizing initiatives) over substantive justice considerations.

To recall the brief discussion of Ontario's settlement culture from Chapter 2, the reason offering the greatest explanatory force for such high settlement rates may be the preservation of 'scarce judicial resources'. In point of fact, a double privatizing movement is discernible: (1) macro-economic policies have produced restrictive budgeting for public bodies which has contributed to the mobilization of class actions as policy instruments in Ontario's private enforcement regime; (2) further privatization is occurring through the strong preference for settlements within this private enforcement regime. In other words, regulatory enforcement is privatized through class actions and the resolutions of such class actions are subsequently privatized through settlement preferences.

This imperative to preserve 'scarce judicial resources' must be viewed in light of the constraining fiscal space in the current conjuncture. The scarcity of judicial resources is not a spontaneous development. Critical access to justice programs must therefore confront the politico-economic dynamics that have facilitated this scarcity of judicial resources. The macro-economic fiscal policies of the Canadian state in the current conjuncture (i.e. post-1980) emphasizing balanced budgets, fiscal austerity, deficit reduction, and other similar measures designed to facilitate the restructuring of Canadian society and state formations (at both federal and provincial levels) must be incorporated in

[649] Catherine Piché, "Judging Fairness in Class Action Settlements," *Windsor Yearbook of Access to Justice* 28, no. 1 (2010): 125. For Piché's book-length study of class action settlements, see Catherine Piché, *Fairness in Class Action Settlements* (Toronto: Carswell, 2012). See also, Maximo Langer, "The Rise of Managerial Judging in International Criminal Law," *American Journal of Comparative Law* 53, no. 4 (2005): 835-909.

critical analyses of access to justice. It simply does not suffice to uncritically accept the constraining parameters imposed by the macro-economics of fiscal austerity as intractable facts beyond the scope of access to justice analyses; rather, these very processes must be critiqued as problematically structuring the major institutions of democratic states and societies according to the dictates of market fundamentalism.

Although the foreseeable prospects for increased state expenditures remain bleak, this "does not have to be, and should not be, the case,"[650] as Farrow observes. In point of fact, several participants interviewed for this study expressed exasperation at the insufficient funding for civil justice in the class action context. The principled stance that must inform progressive visions of access to justice in the twenty-first century should similarly reject the notional impracticability of increased state expenditures by moving beyond the "horizon of feasibility"[651] imposed by disciplinary neo-liberalism. David Singh Grewal and Jedediah Purdy have observed that one of the major premises of this paradigm is "a set of implicit bounds that is ostensibly pragmatic but typically less than fully argued for, which defines some policy options (such as nationalizing banks) as 'off-the-wall' in respectable and influential conversations, thus setting presumptive limits on political possibility."[652] The standpoint that increasing state expenditures for greater civil justice accessibility typically falls beyond these presumptive limits. However, such "politically expedient budgetary choices and preferences do not replace principled bases for decision-making when it comes to public resources as important as civil justice."[653] To date, the

[650] Farrow, *Civil Justice, Privatization, and* Democracy,306.
[651] Richard Falk as quoted by Stephen Gill and A. Claire Cutler, "New Constitutionalism and World Order," 19.
[652] David Singh Grewal and Jedediah Purdy, "Introduction: Law and Neo-liberalism," *Law and Contemporary Problems* 77, no. 4 (2014): 6.
[653] Farrow, *Civil Justice, Privatization, and Democracy*, 306.

imposition of market rationality on civil justice has operated to replace its democratic principles in favour of market principles to the detriment of vulnerable justice-seekers.[654]

Fundamentally, it has become evident that neo-liberal legality, distinguished by the widespread ethos of economic efficiency and privatization, produces strong settlement preferences across the civil justice system, including class actions. What are the dynamics of this settlement paradigm? How do these dynamics operate to impede or promote substantive justice? In short, what are the ramifications for multilayer justice-seekers of the prevailing macro-economic policies that have produced this settlement paradigm? To start, this chapter turns to one of the major structural impediments in Ontario's class action regime: the adversarial void.

B. THE ADVERSARIAL VOID

Notwithstanding the ethical challenges posed by private settlement negotiations, the structural problem of settlement approval hearings in which the respective attorneys no longer assume their traditional adversarial stances takes centre stage.[655] In contrast to ordinary civil actions—wherein settlements are only legitimate and binding upon the named parties that have provided consent—class action settlements are binding on every member of the defined class, with or without the explicit consent of class members. Given this vulnerable position of absent class members, the *Class Proceedings Act* stipulates that class action settlements must receive court approval. As section 29(2) states, a proposed

[654] Such justice-seekers are vulnerable to a host of negative impacts, including power imbalances, procedural unfairness, a lack of transparency, and so forth. In class actions, settlements must be approved by courts to ensure the protection of absent class members.
[655] See, e.g., Richard A. Nagareda, *Mass Torts in a World of Settlement* (Chicago: University of Chicago Press, 2007).

settlement is not binding unless it has been approved by the court.[656] Although such mandatory court approval may appear as a strong precautionary measure for the protection of absent class members, the atypical dynamics of approval hearings diminishes the veracity with which courts can determine the fairness of settlements.[657] These atypical dynamics are institutionally characterized by the absence of an adversarial process. A basic incongruity arises in examining the adversarial void in light of the strong settlement preference: this preference is normatively rooted in a 'presumption of fairness' by courts concerning proposed settlements. This 'presumption of fairness' is explicitly recognized among the evaluative criteria employed by judges during approval hearings.[658] However,

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[656] Class Proceedings Act, 1992, S.O. 1992, c. 6, s.29(2).

[657] The criteria employed by the judiciary to determine the fairness of a proposed settlement during approval hearings includes the following factors:

(a) to approve a settlement, the court must find that it is fair, reasonable, and in the best interests of the class;
(b) the resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;
(c) there is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;
(d) to reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;
(e) a court must be assured that the settlement secures appropriate considerations for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs obligation.
(f) it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or, on the other hand, to simply rubber-stamp a proposal;
(g) the burden of satisfying the court that a settlement should be approved is on the party seeking approval;
(h) in determining whether to approve a settlement, the court takes into account factors such as (i) the likelihood of recovery or the likelihood of success; (ii) the amount and nature of discovery, evidence or investigation; (iii) the proposed settlement terms and conditions; (iv) the recommendations and experience of counsel; (v) the future expense and likely duration of litigation; (vi) the recommendation of neutral parties, if any; (vii) the number of objectors and nature of objections; (viii) the presence of arm's-length bargaining and the absence of collusion; (ix) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiations; and (x) the degree and nature of communication by counsel and the representative plaintiff with class members during the litigation.

See *Nunes v. Air Transat A.T. Inc.*, 2005 CanLII 21681 (ON SC) at 7.

[658] As enumerated in *Nunes v. Air Transat A.T. Inc.*, 2005 CanLII 21681 (ON SC) at 7, "there is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval."

the very notion that settlements are 'presumptively fair' is not congruous with the inquisitorial role demanded of the judiciary given the adversarial void.[659]

In common law provinces of Canada, the basic structure of the justice system is an adversarial system in which competing attorneys represent their respective positions to a passive and impartial judge who arrives at a verdict after hearing the arguments. The only province that possesses a hybrid model is Quebec wherein public law upholds the common law tradition and private law upholds the civil law tradition—a notable distinction since the common law tradition involves an adversarial system with a passive judge who arrives at an impartial decision, as opposed to the civil law tradition which involves an inquisitorial judge who actively investigates the veracity of claims. As it pertains to the common law province of Ontario, the adversarial system is primarily a binary structure in which plaintiffs and defendants are positioned in directed opposition. It is beyond the scope of this analysis to examine whether and to what extent the adversarial character of the Canadian civil justice system is conducive to producing substantively just results (or whether a cooperative model might possess greater efficacy, for example). The point at stake is that common law judges are positioned as formally neutral adjudicators in a court structure wherein competing attorneys assume adversarial stances. In the class action settlement stage, however, an adversarial void is produced since the respective attorneys have arrived at a privately negotiated settlement that is subsequently presented to the court for approval. This can be conceived as blurring the distinction between the role of judges in the common law adversarial mode and the civil law inquisitorial mode—that is, the adversarial void compels judges in the common law tradition to assume the characteristics

[659] Kalajdzic, "Access to Justice for the Masses?" 113.

of judges in the civil law tradition. In other words, during settlement approval hearings in Ontario, the respective attorneys abdicate their adversarial stances by presenting an unified front before the presiding judge, who is subsequently thrust into an inquisitorial position.

The Ontario Superior Court of Justice summarized this problematic structural arrangement in 2010 as follows:

> Normally, courts make determinations in the context of the dynamics of the adversary system where opposing views are heard. The theory of the adversary system is that truth and justice will emerge from the crucible of the opposing arguments and presentations of competing cases. However, for settlement and fee approvals because of the obvious conflict of interest of class counsel, the absent class members – who will be bound by the settlement – have no one to make their argument, unless a class member comes forward to raise an objection, which rarely occurs, or unless the court takes on the role of being an active advocate for the class, which the court is ill-equipped to do.[660]

Garry Watson similarly observes that settlement approvals are the "most difficult and problematic area of class action practice" for the same reason:

> Although the court is entitled to insist on sufficient evidence to permit the judge to exercise an objective, impartial, and independent assessment of the fairness of the settlement, it is questionable whether common law judges (trained in the adversarial tradition and inexperienced in inquisitorial decision-making) are well-equipped to make these kinds of inquiries in the absence of adversarial presentation.[661]

The limited capacity of judges to adequately interrogate the fairness of proposed settlements is compounded by the typically complex nature of class actions, which produce significant informational and expertise asymmetries. For example, the capacities of a presiding judge without any scientific expertise in pesticide usage to adequately interrogate a settlement in which both class and defence attorneys presenting an unified front have

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[660] *Smith v. National Money Mart,* 2010 ONSC 1334 at 27. See also *Smith Estate v. National Money Mart Company*, 2011 ONCA 233 at 19: "The process [...] places the court in the position of adversary and adjudicator at the same time; the court must test the case being put to it, while impartially adjudicating it."
[661] Ibid., at 28.

exhaustively researched the subject matter for months or years, typically with extensive recourse to expert consultations, remains questionable. Such asymmetries may be partially mitigated when judges preside over cases from start to finish, however, in contrast to Quebec—a province in which judges preside over actions from start to finish, thereby allowing for greater familiarity with the specificities of any given case—judges in Ontario do not preside over actions in similar ways and may be confronted with an unfamiliar case for which they are asked to approve a settlement.[662]

The adversarial void at settlement approval hearings has precipitated discussion among justice stakeholders about the possibility of appointing an *amicus curiae*—typically external counsel who is not a party to the case to advise the court and provide adversarial opposition where necessary. This would restore the traditional role of presiding judges and permit greater interrogation of the fairness of proposed settlements.[663] The justifying rationale for such a proposal is the representation and protection of absent class members; that is to say, such a proposal is designed to ensure that the interests of the class are not secondary to the profit-maximizing imperatives of Private Attorneys General or the cost reduction imperatives of defendant corporations or governments. In short, the proposal for the implementation of an *amicus* broadly aligns with access to justice priorities.

Interestingly, among the interviewed participants for this project, the greatest resistance against the introduction of an *amicus* was offered by class attorneys who generally maintained that such a development would be unwarranted. The open question concerning the source of compensation for this theoretical *amicus* was also raised during

[662] Piché, "Judging Fairness in Class Action Settlements," 117.
[663] A good overview of such monitoring in light of the adversarial void, including amicus, monitors, guardian ad litem, and independent counsel, is provided in *Smith v. National Money Mart*, 2010 ONSC 1334 at 23-33.

interviews, with universal dismissal of the proposition that such compensation should be deducted from class counsel compensation. There was greater ambivalence towards this proposal among defence counsel. Needless to say, increased state expenditures for civil justice could be mobilized to cover the expenses of ensuring adversariality in the form of an *amicus*—such expenditures could also be directed towards increasing the resources available to the judiciary (i.e. clerks) to better equip judges during this crucial stage. In the argument against such a proposal, one participant (class counsel) suggested that an *amicus* would not 'stand a chance' against the unified front of attorneys who have expended thousands of hours (or tens of thousands) on a particular case, as opposed to an *amicus* who would be inserted into the proceedings at the latest stage. This viewpoint suggests that any such position would be largely formal in character. Needless to say, if an experienced *amicus* with a fair amount of preparation does not 'stand a chance' against this unified front during a settlement approval hearing, it does not bode well for the presiding judge whose very function of an impartial adjudicator is reconstructed into an inquisitorial role and who has neither the experience nor expertise to adequately interrogate the fairness of any given settlement. If an *amicus* is ill-equipped to perform this function, then the same (if not worse) is true of the presiding judge.

As it stands, the class action settlement approval hearing in Ontario's regime has acquired the characteristics of a formal stage to eventual approval. Notwithstanding the well-intentioned exertions of presiding judges, the structural flaw posed by the adversarial void remains a pivotal area of concern for ensuring substantive justice for collective claims-

makers. This impediment to greater substantive justice is compounded by the largely absent characteristics of class members and the formality of objectors to proposed settlements.[664]

C. OBJECTORS TO SETTLEMENTS

The structural flaw posed by the adversarial void can be partially mitigated by class members who raise objections to proposed settlements. Such objectors potentially play an important role in ensuring that settlement approval hearings incorporate a semblance of adversariality. Unfortunately, the role of objectors occupies a largely neglected area of access to justice research.[665] At approval hearings, any class members who do not approve of the terms of the settlement may submit formal objections to be considered by the court. These formal objections are typically written submissions. In contrast to several American jurisdictions, class members in Canada do not possess a statutory right to submit objections, although courts may grant leave for objectors to participate, as per the *Class Proceedings Act*. In Ontario, there is no systematic collection of quantitative data to provide a statistical foundation for empirical analyses of the prevalence and outcomes of objections to proposed class action settlements at approval hearings.[666] The qualitative evidence collected for this project, however, paints a dismal picture about the relative success rates of objectors to substantively modify or impede proposed settlements before the granting of approval.

The precarious role of objectors in Ontario's class action regime is accentuated by the competing economic interests of their own legal representatives. It remains in the

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[664] Without an *amicus*, it is largely incumbent upon class members to restore a semblance of an adversary process by formally objecting to proposed settlements.
[665] The topic of objectors in class action scholarship is fairly impoverished, with much of this scholarship based in the United States. See, e.g., Edward Brunet, "Class Action Objectors: Extortionist Free Riders or Fairness Guarantors," *University of Chicago Legal Forum* 1, no. 1 (2003): 403-74.
[666] This might change with the forthcoming Class Action Project of the Law Commission of Ontario.

economic self-interests of Private Attorneys General to gain approval of proposed settlements expeditiously, without substantive modifications to the privately negotiated terms. The existence of objectors who may delay or modify the terms of any given settlement directly contravenes these economic interests. Needless to say, the absence of objectors does not necessarily indicate that the terms of the settlement are acceptable to the entire class: given the largely absent character of class members, the extent to which class members are aware of such approval hearings in the first place remains questionable. The absence of objectors may plainly amount to an extension of the general absent characteristics of class members. Although courts have typically interpreted the absence of objectors as indicative of the fairness of settlement terms and the presence of objectors as indicative of unfairness, to interpret the absence or presence of objectors in such ways does not reflect the myriad factors influencing class member behaviour. For example, the absence of objectors may be indicative of a failure to provide adequate notice of a settlement approval hearing or a failure to provide accessible language in order to facilitate greater comprehension among class members about the terms of the settlement. Conversely, the presence of objectors does not necessarily indicate that the terms of the settlement are unfair to the class as a collective entity; for example, any given class member may reject the terms of a proposed settlement based on individual self-interest rather than based on the interests of the entire class as a collectivity. As courts have maintained on numerous occasions, in "determining whether a settlement is reasonable and in the best interests of the class," one of the factors that must be considered is "the number of objectors and nature of objections."[667] However, this complicated interpretive terrain is indicative of

[667] See, e.g., *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.) at 38; *Farkas v. Sunnybrook and Women's Health Sciences*

the serious difficulties faced by courts in determining the fairness of proposed settlements with an adversarial void.

Christopher R. Leslie has pointed out that the absence or 'silence of objectors' is not indicative of class approval of a proposed settlement and that class member silence at the settlement stage is likely indicative of (1) ignorance of the ongoing class action and/or the settlement approval hearing; (2) insufficient time to prepare a formal objection; (3) insufficient resources to mount an objection; and (4) perceived futility of objecting.[668] As Leslie concludes, silence is simply "a lack of response" rather than a "reaction to the proposed settlement," and if "rational class members would remain silent when confronted with either an adequate *or* inadequate settlement, then a judge should read nothing into their silence."[669] It is exceedingly unlikely that 'economically rational' individuals will suspend their everyday activities of social reproduction (and arrange possible childcare, take time off work, etc.) to submit objections to environmental class action settlements, which are typically negative value claims. The confluence of the above factors strongly suggests that the absence of objectors is not indicative of an endorsement of the proposed settlement. A leading Canadian scholar on class action settlements, Catherine Piché, similarly observes that irrespective of "the presence or absence of objectors to a proposed settlement, courts should pursue an independent analysis of the settlement terms."[670] The

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Centre, [2009] O.J. No. 3533 (S.C.J.) at 43; *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868 (CanLII); Keyton v Canada Lithium Corp., 2016 ONSC 7354 at 41; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at 10; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 2005 CanLII 8751 (ON SC), 74 O.R. (3d) 758 (S.C.J.) at 117; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at 8.

[668] Christopher R. Leslie, "The Significance of Silence: Collective Action Problems and Class Action Settlements," *Florida Law Review* 59, no. 1 (2007): 71-134.

[669] Ibid., 134.

[670] Catherine Piché, "A Critical Reappraisal of Class Action Settlement Procedure in Search of a New Standard of Fairness," *Ottawa Law Review* 41, no. 1 (2010): 37.

extent to which courts are capable of pursuing such independent analyses given the structural flaws of the settlement stage leaves much to be desired.

The typically individuated character of objectors also implicates a range of access to justice factors that are not commonly involved in class actions, particularly the heightened levels of legal empowerment and legal consciousness on an individual basis that is required to formally object to enormous proposed settlements involving highly experienced legal actors. The self-represented status of many objectors additionally limits the efficacy of such class members to modify or impede proposed settlements. As access to justice research has demonstrated throughout the Canadian justice system, self-represented litigants are not evenly distributed across social locations, but are rather disproportionately distributed amongst vulnerable, low-income, gendered, and racialized groups. The social locations associated most problematically with lower levels of legal empowerment and legal consciousness disproportionately account for self-represented litigants. As it pertains to environmental claims, the inequitable distribution of accessibility correlates with the inequitable distribution of environmental injustices, which suggests that obstacles confronted by potential objectors are compounded in the context of environmental class actions. Based on anecdotal evidence, the strongest objections are typically posited during investor rights disputes in which relatively privileged actors are capable of hiring legal representatives to submit formal objections.[671]

These accessibility dimensions are contributing factors to the general inefficacy of objectors. Moreover, to the extent that the distinguishing feature of class actions from an access to justice perspective is their collectivist nature and strength-in-numbers logic, the

[671] Overall, there are multiple layers of accessibility concerns involved in submitting objections in environmental class actions.

benefits of this collective logic are deprived of individual objectors who are not only positioned against powerful defendants, but also against their own legal representatives. The promotive capacities resulting from this collective logic are largely inapplicable in the context of class member objections unless class members independently organize opposition against a proposed settlement (a theoretical possibility, but an empirical rarity). Simply put, the odds are significantly stacked against objectors. It may not be inaccurate to describe the role of objectors as a formality in the settlement approval process.[672] This recognition of the formality or futility of objecting is a contributing factor to refusals to participate, as Leslie observes—a silent abstention that can be simultaneously cited as a justification for approving proposed settlements.

Furthermore, the capacity of class members to mount strong objections to proposed settlements is substantively limited by restrictions to access documentary evidence. Objectors are positioned against the unified front of highly experienced legal actors with full access to all relevant documentary evidence at their disposal, whereas objectors are not permitted to comprehensively access this evidence. Jasminka Kalajdzic has pointed out that this "lack of access to documentary evidence renders it very difficult for any objector to mount a serious, substantive argument in opposition to the terms of the settlement."[673] This indicates that institutional reform is required in order to facilitate stronger objector capacities in Ontario's class action regime.

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[672] John Kleefeld corroborates this insight by observing that the "class action participant who has not fared well in Canadian class actions so far [is] the objector. An objector may be seen as a thorn in the side of both class and defence counsel at the time of a settlement hearing, but a relatively minor one at that – to be treated respectfully but not especially seriously. At least this is the impression one might be left with from the few objector decisions in Canadian class action law. Objectors have, in a word, been given short shrift." John Kleefeld, Book Review, *The Modern Cy-Prés Doctrine: Applications & Implications* by Rachael P. Mulheron, *Canadian Class Action Review* 4, no. 1 (2007): 209.

[673] Kalajdzic, "Access to Justice for the Masses?" 115.

As a final option for class members whose objections to the terms of a proposed settlement are rejected, courts have proposed that such objectors can opt-out of the proceedings and individually pursue their claims. As Kalajdzic observes, however, the capacity of class members to opt-out of a proposed settlement is only applicable when certification and settlement are sought simultaneously—in cases where certification precedes settlements (i.e. contested certification), this capacity to opt-out is not available, which precludes class members from individually pursuing their claims by opting out of a proposed settlement that has been perceived as unfair: "Access to justice in such a scenario is turned on its head; the binding nature of the representative proceeding denies dissatisfied class members formal access to the courts."[674] This does not suggest access to justice is obtained in cases where class members *are* provided the choice of opting out of a proposed settlement: the viability of this choice is questionable given the basic rationale for pursuing class actions in the first place. The premise that objectors can simply opt-out and individually pursue their claims directly contradicts the access to justice logic of class actions as "making economical the prosecution of claims that would otherwise be too costly to prosecute individually."[675] The 'choice' of opting out is categorically unviable for negative value claims. Conversely, as it pertains to positive value claims—where litigation costs do not outweigh potential damages—the choice of opting out may acquire a modicum of viability; however, positive value claims are not pursued through class actions solely based on economic viability, but also given the strength-in-numbers logic of collective redress. Even in positive value claims, opting out effectively diminishes the power capacities of claims-makers against powerful adversaries.

[674] Ibid., 106, 119.
[675] *Western Canadian Shopping Centres v. Dutton*, 2000 S.C.J. 63, [2001] 2 S.C.R. 534; at 28.

To conclude, the perceived futility of class members mounting objections to proposed settlements is perhaps well-founded in the structural flaws of the approval process as outlined in this section. Although Private Attorneys General typically provide notices to class members as a means of relaying information about class action settlement hearings, such notices similarly take on the characteristics of a formality. As Deborah Hensler points out:

> [Class members] are told that they may object to a settlement, but sometimes they are not told much about how to go about doing that, and often what they are expected to do—e.g., appear in some place miles away or secure a lawyer to appear on their behalf—is infeasible. Whatever the notices say, the real message to class members is 'stay away'.[676]

Ultimately, the formality and futility of objectors remains a significant impediment to greater access to substantive justice, which indicates that reforms are required to facilitate greater class member participation. At root, these structural flaws are accentuated by the misalignment of economic interests to the detriment of class members.

D. CONFLICT OF INTERESTS

Perhaps the strongest argument in favour of deeper penetration of market forces into civil justice is the potential promotive benefits for multilayer access to justice. The basic trajectory of this position holds that Private Attorneys General are incentivized by economic self-interest to pursue claims that would otherwise remain unvindicated. This premise implies that the economic interests of Private Attorneys General align with those of collective claims-makers, which reinforces the belief that market forces can be harnessed

[676] Leslie, 101. See also Deborah R. Hensler, Nicholas M. Pace, Bonnie Dombey-Moore, Elizabeth Giddens, Jennifer Gross and Erik Moller, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Santa Monica, CA: RAND Corporation, 2000).

for the pursuit of access to justice. However, the 'access to justice' that is promoted through market forces remains severely restricted by those very same forces. For example, meritorious claims are systematically excluded when they do not satisfy the economic qualification criteria of gatekeeping Private Attorneys General. In the environmental context, the strategic privileging of private property over health concerns is a prime example of restricting procedural access to justice for collective claims-makers. As this section posits, however, substantive considerations are also negatively impacted by the marketization of civil justice. This section strikes at the core of the argument in favour of such marketization by exploring the misalignment of economic interests that rises to the foreground in the settlement stage.

To recall, class action critiques have generally been advanced by conservative critics who take exception to a 'socialistic' vehicle promoting redistributive justice. As Martin Redish has argued, the "class action functions as a form of litigation socialism, because it is for the most part designed to redistribute wealth from large concentrations of economic power."[677] Such critics raise the spectre of 'legalized blackmail', which is to say, the notion that class actions operate by "extorting unjust settlements from defendants."[678] The victims in these accounts are typically multinational corporations who are unjustly persecuted by frivolous litigants in search of personal enrichment. In such accounts, corporations are incentivized to settle any claims, whether meritorious or frivolous, in order to minimize legal costs and avoid the potential for large adverse outcomes. This

[677] Martin Redish, "Rethinking the Theory of the Class Action: The Risks and Rewards of Capitalistic Socialism in the Litigation Process," *Emory Law Journal* 64 (2014): 113. For Redish's book-length critique of class actions, see Martin Redish, *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* (Stanford: Stanford University Press, 2009).
[678] Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982): 146.

redistributive instrument is viewed as impeding the 'spontaneous ordering of the market' by legally abusing powerful economic actors to the benefit of litigious claims-makers. Firstly, as it pertains to meritorious actions, the OLRC Report aptly pointed out that "any increased pressure to settle meritorious class actions that flows simply from the potential of such actions to overcome barriers to litigation and provide greater access to the courts is legitimate and desirable."[679] Secondly, given the high costs and risk exposures involved with class actions in Ontario's regime, the prospect of Private Attorneys General advancing frivolous claims for the purposes of 'blackmailing' corporations is exceedingly remote.[680] In Ontario, class action firms are highly incentivized to pursue claims with strong legal merits. The spectre of frivolous claimants taking advantage of vulnerable corporations appears rather as a rhetorical strategy of 'de-democratization' and the further retrenchment of multilayer access to justice. Ultimately, the notion of 'unfair settlements' in these accounts applies to this type of 'legal blackmail'; which is to say, the party to whom settlements are unfair is the defending corporation (or government).

On the other hand, the progressive critique of this project reorients the object of analysis towards collective claims-makers in its evaluation of settlement fairness. That is to say, the notion of 'unfair settlements' applies primarily to absent class members. Interestingly, although conservative and progressive critiques diverge on the character of collective claims-makers in class actions—legal blackmailers versus justice-seekers—the respective standpoints are broadly aligned concerning their critical appraisal of economically self-interested Private Attorneys General. From both standpoints, class

[679] Ibid., 147.
[680] This is corroborated by a simple overview of the substantive content of class actions pursued in Ontario since the introduction of class action legislation in 1992. As the OHRC Report exhaustively detailed, the 'legal blackmail' argument is statistically unverifiable and empirically dubious. Ibid., 149-63.

attorneys are primarily self-interested entrepreneurs who capitalize on legal claims for economic gain. The protection of processes of social reproduction for vulnerable people does not feature as a determinative criterion in such pursuits. Moreover, the primacy of economic self-interest of Private Attorneys General conflicts with those of class members to the point where such entrepreneurialism can be viewed as capitalizing on incurred harms for profit.

This conflict of interests between Private Attorneys General and collective claims-makers is primarily economic. The typical situation in which such misalignment of economic interests occurs is where Private Attorneys General privately negotiate settlements that maximize their own compensation to the detriment of the potential recovery for the class members.[681] The OLRC Report describes the situation as follows:

> [W]hile the class members' financial interest is in their share of the total recovery, less the proportion of the recovery that is awarded as lawyers' fees, lawyers, in determining their net compensation, must deduct from any fee award the value of the time and effort required to produce it. In other words, from the lawyer's point of view, a relatively small settlement at an early stage of the proceedings may well yield a gross monetary return for the lawyer that bears a higher ratio to the cost of the work than a much larger recovery obtained only after extensive discovery, a long trial, and an appeal.[682]

The economic interests of Private Attorneys General therefore favours the expeditious resolution of class actions in order to maximize the ratio of input work to output rewards, with strong risk-aversive conditioning. This contrasts with the economic interest of class members that chiefly resides in the maximization of the total recovery (within a reasonable time-frame). Although it is clear that delayed justice means denied justice, particularly in prolonged class action battles, this misalignment of economic interests is palpable from a

[681] Ibid., 167.
[682] Ibid.

class member perspective (and critics of entrepreneurial litigation, progressive or conservative).

E. COLLUSION BETWEEN PARTIES

The two major objectives of courts during settlement approval hearings are (1) the protection of absent class members and (2) the prevention of collusion between attorneys.[683] These objectives are interrelated since collusion operates to disadvantage absent class members.[684] The prospect of collusive activity directly results from the misalignment of economic interests described above. Although the existence of such diverging economic interests is not determinative of collusive activity, such activity typically arises out of this divergence. As Janet Walker and Garry Watson have pointed out (quoting the OLRC Report):

> There is a real possibility that, without the benefit of appropriate safeguards, parties and their counsel might be tempted to abuse the class action procedure in reaching a settlement. For example [...] class members' interests could be sacrificed for lawyers' fees [...] in the context of a settlement negotiated on behalf of the entire class, the agreement reached could be inadequate or unfair to the class members.[685]

The divergence of economic interests is most straightforwardly apparent in situations where settlements as privately negotiated by the respective parties "absorb the fees of the class lawyer, calculated at a premium rate, in return for the acceptance of an inadequate

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[683] Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982): 788-89.
[684] This does not suggest that the protection of absent class members is limited to prevention of collusion.
[685] Janet Walker, "Class Proceedings in Canada – Report for the 18th Congress of the International Academy of Comparative Law," *All Papers* (2010): 29-30; Garry Watson, "The Canadian Experience with Class Actions: Access to Justice or Just a New Moneymaking Product Line for Lawyers?" *Amicus Curiae* 45 (2003): 31. See also, Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982): 163-68.

class award and discontinuance of the class action."[686] Richard Posner articulates this situation in starker terms by observing that the "lawyer for the class will be tempted to offer to settle with the defendant for a small judgment and a large legal fee, and such an offer will be attractive to the defendant, provided the sum of the two figures is less than the defendant's net expected loss from going to trial."[687] The resultant settlements are identified as 'sweetheart deals' since they involve class attorneys settling otherwise meritorious claims for significantly lower values than they are worth.[688]

Although collusive activity of this nature implies a modicum of intentionality on the part of Private Attorneys General, Walker and Watson suggest (quoting the OLCR Report) that such situations may occur "through indirect financial pressures, without any conscious misbehaviour on the part of the lawyer."[689] The blurry distinction between conscious and unconscious conduct is indicative of the limitations of behavioural analyses, however, the empirical observation of the misalignment of economic interests independently raises substantive concerns from the perspective of multilayer access to justice. As the OLRC Report perceived as early as 1982, this misalignment is a serious impediment to multilayer access to justice—a precautionary observation that precipitated the policy recommendation of greater court monitoring in the form of settlement approval hearings. In fact, the potential for collusive activity has been considered serious enough to warrant explicit inclusion as a key factor to be considered by courts in determining fairness of settlements.[690] Once again, however, such approval hearings are distinguished by an

[686] Walker, 29-30.
[687] Watson, 31.
[688] John C. Kleefeld, "Class Actions as Alternative Dispute Resolution," *Osgoode Hall Law Journal* 39, no. 4 (2001): 818-37.
[689] Ibid., 30.
[690] See, *supra* note 638.

adversarial void in which judges are ill-positioned to adequately interrogate proposed settlements and determine fairness for class members.

Finally, it may be the case that framing this problem of substantive justice as the *risk of collusion* serves to behaviouralize a structural problem. In other words, the fundamental problem of class action settlements from the perspective of substantive justice is not the potential for "conspiratorial wrongdoing"[691] by unscrupulous or unethical attorneys, which applies to individual behavioural decision-making, but rather the misalignment of economic interests, which structurally applies across Ontario's class action regime. This narrow framing of the substantive justice problem to collusive behaviour largely supplants the structural problem of misaligned economic interests and unduly limits the potentially objectionable impediment to settlement approval to an extreme situation of illegality.

The point at stake is not that Private Attorneys General are engaging in explicitly illegal conduct with defendants in order to maximize their profits at the expense of class members. The grave access to justice concerns are not restricted to a 'few bad apples' engaging in unscrupulous behaviour (although these exist), but rather the broader economic forces that determine outcomes for justice-seekers. Although such unlawful behaviour is objectionable and rightly warrants consideration during approval hearings, the extremity of the behaviour serves as a 'red herring' for the broader structural problem: the economic interests of Private Attorneys General are conditionally aligned with those of defendants rather than class members. This misalignment generates situations in which the respective parties do not need to resort to collusive behaviour in order to maximize profits: simply

[691] Howard M. Erichson, "The Problem of Settlement Class Actions," *Washington University Law Review* 82, no. 3 (2014): 953.

pursuing their economic interests is typically sufficient for the production of such outcomes.

F. NOTIFICATION & IGNORANCE

Given the largely absent character of class members, the extent to which they are informed of the various developments relevant to their actions is pivotal for ensuring substantive justice. Such periodical informational notifications ('notice') are essential to overcoming different types of ignorance that prevail in Ontario's regime. For example, the lack of knowledge that an action has been initiated or certified is a critical agnotological failure that impacts the capacity of class members to opt-out of actions.[692] As it pertains to settlements, failure to adequately notify class members of approval hearings negatively impacts their capacity to mount formal objections.[693] To the extent that public policy favours active participation of informed class members—in recognition of the largely entrepreneurial attorney-driven character of class actions—the provisioning of notice is paramount to satisfy this policy objective.

Ontario's *Class Proceedings Act* recognizes the importance of providing notice in several sections at various stages of actions.[694] At certification, notice may involve (a) descriptions of the proceeding, (b) manner and deadlines of opting out for class members, (c) possible financial consequences, (d) summaries of any fee and disbursement agreements, (e) descriptions of any counterclaims by or against the class, (f) the binding

[692] Kalajdzic, "Access to Justice for the Masses?" 121, 125.
[693] Irrespective of the largely formal character of such objections.
[694] Class Proceedings Act, 1992, S.O. 1992, c. 6, s.17-22 covering (17) notice of certification, (18) notice where individual participation is required, (19) notice to protect interests of affected persons, (20) approval of notice by the court, (21) delivery of notice, and (22) costs of notice. Section 27(4) also involves notice of discontinuance, abandonment, and settlement.

nature of judgments, (g) rights of participation for class members, (h) addresses at which class members can direct inquiries, and (f) any other relevant information.[695] The ways in which notice may be given to class members typically varies according to the determinations of courts, including (a) in person or by mail, (b) advertising, publishing, etc., (c) individualized notice to a sample group of the class, and (d) any combination of the above.[696] As it pertains to the resolution of actions, including settlements, courts may consider the provisioning of notice that includes (a) a summary of the proceeding, (b) the result of the proceeding, and (c) the plan for distributing settlement funds.[697] At first glance, it appears that such informational notifications are exhaustive in scope and breadth, thereby facilitating greater class member awareness and participation. However, the existence of formal guidelines as enumerated in the *Class Proceedings Act* is not necessarily reflective of the empirical reality of Ontario's regime.

Firstly, the enumerated guidelines are not statutory requirements. Courts may consider the relative merits of notice provisioning, but the *Class Proceedings Act* does not require such provisioning. Although courts customarily order notifications as appropriate, the optionality of such provisioning is cause for reservation.

Secondly, the guidelines for notice provisioning do not include any considerations of the inaccessibility of formal legal language to the great majority of legally illiterate claims-makers (or claims-makers with low legal literacy).[698] This contrasts with American practices as outlined in Rule 23 of the Federal Rules of Civil Procedure section 2(b), which

[695] Class Proceedings Act, 1992, S.O. 1992, c. 6, s.17(6).
[696] Ibid., s.17(4).
[697] Ibid., s.29(4).
[698] Kalajdzic, "Access to Justice for the Masses?" 122-23.

holds that "notice must clearly and concisely state in plain, easily understood language"[699] the relevant information. Moreover, this second obstacle entails two interrelated factors from an access to justice perspective: (1) in light of the emergence of the Plain Language Movement (PLM) as a major feature of access to justice in the late twentieth and early twenty-first century, the inaccessibility (and incomprehensibility) of formal legal notice constitutes a legitimate barrier to access to justice; (2) to the extent that legal information is a growing feature of access to justice, impediments to the provisioning of legal information constitute barriers to access to justice.[700] The provisioning of legal information in inaccessible language concurrently implicates both of these concerns.

The basic imperative of a strong notice program is good communication, which involves plain and accessible language, but also "dissemination methodologies to ensure that people are effectively reached by notices, by frequency of exposure that people get multiple opportunities to act on messages that will result in benefits coming to them, and from design and style aspects that cause messages to come to the attention of those affected."[701] In an appropriately titled article, "Do You Really Want Me to Know My Rights?" Todd B. Hilsee et al observe that "[n]otice and notice programs amount to nothing more than a mere gesture when they seek the least amount of notice that will be acceptable to a judge who is not presented with any appropriate evidence to assess it."[702] In Ontario,

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[699] Federal Rules of Civil Procedure, 23(2)(b).
[700] See, e.g., Janice Gross Stein and Adam Cook, "Speaking the language of justice: a new legal vernacular," in eds., Frederick H. Zemans, W.A. Bogart, & Julia Bass, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005); Rabeea Assy, "Can the Law Speak Directly to its Subjects? The Limitations of Plain Language," *Journal of Law and Society* 38, no. 3 (2011): 376-404; Kali Jensen, "The Plain English Movement's Shifting Goals," *Journal of Gender, Race and Justice* 13, no. 3 (2010): 807-34.
[701] Todd B. Hilsee, Shannon R Wheatman, and Gina M Intrepido, "Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice Is More Than Just Plain Language: A Desire to Actually Inform," *Georgetown Journal of Legal Ethics* 18, no. 4 (2005): 1381.
[702] Ibid., 1382.

in addition to the absence of legislative requirements for notice provisioning and the typically inaccessible content of such notices on a linguistic level, a major component of notice provisioning is the ways in which such information is distributed. The problem of distribution is particularly apparent in cases with diffuse harms affecting a wide socio-demographic range, which increases the difficulty of contacting every class member.[703] Although the effectiveness and commitment to engage in adequate notice distribution varies on a case-by-case basis, especially across class action firms, recent developments indicate that greater efforts are being dedicated to this end.[704]

The costs associated with mounting such extensive notice campaigns is typically cited as a chief concern among Private Attorneys General, particularly when such costs are proposed to be reduced from their profit margins. Given the entrepreneurialism of Ontario's class action regime, it is logical for Private Attorneys General to "bear the expense of notice as one of their investment costs."[705] Attempts to offload this expense to class members through deductions from the settlement fund (excluding Private Attorney General fees) should be strongly discouraged by courts at approval hearings (or legislatively prohibited). Needless to say, accessing substantive justice in the prevailing monetary settlement paradigm of Ontario's class action regime is directly associated with the provisioning of adequate notice. If absent class members are not informed of the existence of an action or a settlement, then they can scarcely submit claims to the settlement fund, receive monetary redress, or lodge formal objections to unfair settlements. Such dependencies on economically self-interested actors gives rise to the reservation of

[703] For an overview of distribution types, see, e.g., Jordan S. Ginsberg, "Class Action Notice: The Internet's Time Has Come," *University of Chicago Legal Forum* 2003, art. 18 (2003): 739-72.
[704] Kalajdzic, "Access to Justice for the Masses?" 126.
[705] Ibid., 126-27.

overreliance on strictly legal vehicles in the pursuit of social objectives in the political economy of pollution; that is to say, the limitations of legalistic collectivism over broader socio-political coalitions and collective movements for substantive environmental justice. Although environmental class actions are pivotal aspects of environmental justice programs, the exclusionary dynamics of Ontario's regime that have been identified in this chapter testify to the demand for non-legal channels of social protection in the political economy of pollution.

G. FINALITY OF SETTLEMENTS

The cumulative effects of the dynamics explored in this chapter is the disadvantaging of collective claims-makers through the strong preference for settlements, the adversarial void, the presumption of fairness, the formality and futility of objectors, and the misalignment of economic interests. This problematic situation is compounded by the *res judicata*[706] effect of approved settlements, which prevents claims-makers from attaining vindication in the future given the finality of settlements. The approval of a class action settlement precludes claims-makers from pursuing future action against the wrongdoers. The largely absent character of class members and the enumerated shortcomings of the settlement stage (as described above) produce situations in which harmed individuals and collectives may not be aware that a class action has even been undertaken in the name of

[706] An overview of the doctrine is provided in a recent case: "The doctrine of *res judicata* is a time-honoured cornerstone of Canadian justice. Where a cause or a fundamental issue has been decided, it is said to be *res judicata* and, absent special circumstances, is precluded from being adjudged a second time. When *res judicata* applies, a litigant is stopped by the prior suit, from proceeding in the subsequent action... The paramount policy consideration include the avoidance of duplicative litigation, potential inconsistent results and inconclusive proceedings. Finality to litigation is the prime objective." Tylon Steepe Homes Ltd. v. Pont, 2011 BCSC 385 (CanLII) at 52.

vindicating their incurred harms, yet they are bound by the terms of the settlement as privately negotiated by Private Attorneys General possessing diverging economic interests in a questionable institutional framework distinguished by an adversarial void and judges incapable of comprehensively evaluating the fairness of settlements. Such settlements possess legal finality and claims-makers are precluded from pursuing vindication for their incurred wrongs at a future date.

Even in cases where class members are aware of the ongoing proceedings and seek to dispute the terms of proposed settlements, the formality and futility of objections effectively neutralizes any agency that such awareness may have granted class members. As argued above, the capacity of objectors to opt-out of proposed settlements is typically either (1) a false choice that directly contradicts the access to justice rationale justifying class actions in the first place or (2) categorically unavailable.

The finality and binding nature of settlements is especially disadvantageous in the environmental context. The structural flaws of the settlement process are compounded in environmental claims involving health-impairment given that certain toxic exposures have extended latency periods and adverse health impacts may not manifest for several years after exposure (i.e. asbestos poisoning). In such cases, absent class members may not even be cognizant of their inclusion in a class action that has already been settled. This differs from absent class member ignorance concerning ongoing actions in the sense that the former case involves class members who are aware of incurred wrongs yet unaware of ongoing actions, whereas the latter case involves class members who are unaware of incurred wrongs—in this latter case, whether class members are aware or unaware of ongoing actions is largely irrelevant given that they do not perceive themselves as having

incurred wrongs. Such situations of harm-related ignorance are broadly categorizable under the rubric of the 'futures problem' which refers to vulnerable people who have been exposed to a noxious substance or toxicant, but who have not yet manifested health-impairing effects, as examined in Chapter 2. John C. Coffee has observed that in such cases it may paradoxically be the case that class actions are "less the plaintiff's sword and more the defendant's shield."[707] That is to say, class action settlements effectively operate in these cases to *protect defendants*. Kalajdzic echoes this sentiment with the observation that the binding finality of settlements effectively 'turns access to justice on its head' by transforming an instrument for the promotion of access to justice into a mechanism for its delimitation.[708]

These dynamics point towards the bleak reality of Ontario's class action regime as structurally flawed from the perspective of multilayer access to justice. However, these structural flaws are not evenly distributed across Ontario's regime. Positive value claims involving spatially concentrated class members with heightened legal consciousness and legal empowerment are likely best suited to avoid a few of the pitfalls in Ontario's class action regime. By contrast, negative value claims involving diffusive harms incurred by vulnerable people with diminished legal consciousness and legal empowerment are likely poorly situated to avoid these pitfalls. Such structural flaws are particularly applicable in the context of many environmental class actions since these typically involve negative value claims for low-income and racialized people with strong gendered impacts. The systemic disadvantaging of future claims-makers is similarly applicable most directly in cases involving environmental health-impairment claims. These impediments are

[707] John Coffee Jr., *Entrepreneurial Litigation*, 118.
[708] Kalajdzic, "Access to Justice for the Masses?" 106.

capitalized upon in the political economy of pollution through corporate governance strategies involving the concerted targeting of vulnerable people who do not possess the capacity to access justice (i.e. environmental racism).

H. ACCESSING SETTLEMENT FUNDS

Notice adequacy directly impacts the capacity of class members to access funds by providing information about the relevant details of the claims process (i.e. where/when/how claims can be submitted; any relevant deadlines; etc.). Although settlement funds can be distributed directly to claims-makers (such as bank deposits), the standard practice in Ontario is establishing a claims process through which submissions can be deposited. The provisioning of legal information is pivotal at this juncture since class members may not be aware of submission deadlines and may effectively 'miss their chance' at recovery.

Take-up rates (i.e. the rates at which settlement funds are distributed to class members) have been widely posited as indicative of the adequacy of notice programs—the higher the take-up rate, the better the notice program. Some have disputed this logic, however. For example, one judge has observed that "the actual take-up rate is immaterial to the issue of legal sufficiency of the notice. The test to be applied to the notice is an objective one."[709] In other words, although conveying legal information is a necessary condition for ensuring the compensation of class members, such conveyance is not determinative for increasing take-up rates; that is, adequate notice is a necessary (but not a sufficient) condition for ensuring greater compensation for class members.

[709] *Meeking v. The Cash Store Inc. et al.,* 2012 MBQB 58 (CanLII) at 56.

Notwithstanding the causal effects of adequate notice on take-up rates, critical analyses must consider the rates at which class members attain compensation from settlement funds. As the Superior Court of Justice observed in *Gariepy v. Shell Oil Co.*, "if very few of the members of the class wind up taking advantage of the settlement, that might be some evidence that the results of the settlement were less favourable than they might otherwise appear to be and/or that the issue itself was not one of great importance to the members of the class."[710]

By the same token, it must be noted that calculating take-up rates is not a straightforward endeavour: for many class actions, the actual size of the class is not definitively known.[711] Although Private Attorneys Generally typically provide estimates of class sizes, the actual scope of a class action as it pertains to class members is often a matter of speculation. This is particularly apparent in the context of environmental claims in which the purported wrongful conduct affects a diffuse range of vulnerable people across spatial and temporal contexts (i.e. historical contamination in air pollution). Clearly calculating take-up rates with speculative numbers produces conjectural results. This is an acute problem in a regime such as Ontario's where affected members of the public are automatically included unless they explicitly opt-out of the proceeding. Nevertheless, despite the fact that absolute precision may be unattainable for any number of class actions, the general tendency to provide estimations of class size could similarly extend towards take-up rates (based on such estimations). It should not be acceptable that Private Attorneys General provide high estimates of the class size as a strategy to inflate the public importance of their respective actions, but take-up rates are viewed as secondary

[710] *Gariepy v. Shell Oil Co.*, 2003 CanLII 24438 (ON SC) at 16.
[711] Kalajdzic, "Access to Justice for the Masses?" 129.

afterthoughts and statistically unreliable given that they are based on speculative estimates of class sizes.

Although comprehensive statistical data on take-up rates is currently unavailable in Ontario, an exhaustive search of take-up rate citations in case law databases indicate that take-up rates are extremely low across Ontario's class action regime. Leading class action practitioner Ward Branch has observed that "take-up rates are the dirty little secret in class actions in Canada" and that "class actions are losing respect because the numbers are so low."[712] In *Hislop v. Canada (Attorney General)*, the Superior Court observed that "it is rare that a class action has more than a 75% 'take-up' rate,"[713] although the average take-up rate is estimated at between 2% to 40%.[714] For critics, such as Paul Morrison and Michael Rosenberg, this 'dirty little secret' suggests that Private Attorneys General are pursuing 'faux class actions'—class actions in which harmed people do not possess any interest in pursuing their claims in court, yet their claims are advanced by entrepreneurial class attorneys capitalizing on the opportunity for generating revenue.[715] The objection of such critics largely rests on the pursuit of 'faux class actions' as engendering litigiousness

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[712] Paul Morrison & H. Michael Rosenberg, "Missing in Action: An Analysis of Plaintiff Participation in Canadian Class Actions," *Supreme Court Law Review*, Vol. 53 (2011 at para. 42.

[713] *Hislop v. Canada (Attorney General)*, 2004 CanLII 11203 (ON SC) at para. 17.

[714] Daryl-Lynn Carlson, "Class actions: Taking on the low take-up rates for settlements," *Financial Post* 8 December 2011. Online: http://business.financialpost.com/legal-post/class-actions-taking-on-the-low-take-up-rates-for-settlements.

[715] Morrison & Rosenberg, *supra* note 70. In point of fact, the misalignment of economic interests consistently emphasized in this analysis is also evident at the certification stage wherein the interests of access to justice is to shorten the time-span of certification, whereas the interests of attorneys is to prolong the certification battle, thereby increasing billable hours. For example, the proposal of Morrison and Rosenberg to introduce a proportionality test during certification to account for the size of the litigious class—extracting the 'non-litigious class members' from class size estimations, which effectively reduces the compensatory (and deterrence) scope of the class action. In this critical light, concerns over the litigiousness (or lack thereof) of the proposed class effectively serves to diminish the compensatory scope of class actions and their potential deterrence function. As a participant interviewed for this project noted: "The plaintiff wants as big as possible a class size because the settlement will be higher. They want to get economies of scale and economies of heft. The defendant wants to minimize the class size to reduce the settlement." Participant 14, interview conducted on 18 October 2015.

where none exists, thereby straining judicial resources, rather than the objectionable capitalization of incurred harms for private gain.[716] This latter objection aligns with the commodification critique. The pursuit of 'faux class actions' effectively obviates the primary policy objective of access to justice through legal channels—after all, those who have incurred harm do not wish to pursue their claims in court, which is to say, they do not wish to access the justice system. Such 'faux class actions' also contradict the other primary policy objective of judicial economy—far from preserving judicial resources by aggregating individual claims into a single vehicle, 'faux class actions' expend judicial resources on cases where no individual claims would have been advanced (hence these could not be aggregated).

Qualitative assessments based on anecdotal evidence indicate that low take-up rates are a systemic failing of Ontario's class action regime. In *Eidoo v. Infineon Technologies AG*, the Superior Court observed:

> Based on anecdotal evidence, one of the problems of modern class action regimes is that too often the take up by class members of a settlement is poor. From a policy perspective [...] a poor take up rate has bad optics and can leave the impression that the major beneficiary of the class action was class counsel and not the class members who receive no or little compensation for their injuries.
>
> If the access to justice goal of a class proceeding is to be achieved, then class members should be encouraged to take up the settlement proceeds and thus an effective and robust notice program is money well spent.[717]

[716] Moreover, such critics emphasize the prioritization of access to justice over deterrence, holding that deterrence alone does not justify class actions, which directly implicates the litigiousness (or lack thereof) of class members.
[717] *Eidoo v. Infineon Technologies AG*, 2014 ONSC 6082 (CanLII) at 77-78.

The extremely low take-up rates in Ontario's class action regime have most recently been observed in *Lozanski v. The Home Depot, Inc.* (2016) in which the Superior Court plainly noted that "the take up of benefits of settlements is often disappointing."[718] This indicates a systemic failure to adequately ensure substantive justice for class members in the form of accessing settlement funds.

Ultimately, the primary problems of take-up rates in Ontario are twofold: (1) rates are extremely low, which leads to legitimate questions about the actual beneficiaries of class actions; that is to say, whether Private Attorneys General are the primary beneficiaries rather than collective claims-makers; (2) the absence of empirical data and any state directive for its collection is a policy failure that directly impacts the capacity to evaluate multilayer access to substantive justice in Ontario's class action regime. Ward Branch and Greg McMullen describe the contingent character of take-up rate assessments in Canada as "operating on assumptions, hunches, and anecdotal evidence,"[719] given the absence of any systematic collection of data by state or non-state actors—a dearth of systematic empirical data that extends across virtually every aspect of Ontario's regime.

The extremely low take-up rates in Ontario's class action regime indicate that direct compensation for collective claims-makers accounts for a fraction of any given settlement fund. What happens to the rest of the settlement? Should any unclaimed funds revert back to the defendants? Perhaps the remainder should be escheated to the state? Or proportionally distributed to identified class members who have already submitted claims

[718] *Lozanski v The Home Depot, Inc.*, 2016 ONSC 5447 (CanLII) at 53.
[719] Ward Branch & Greg McMullen, "Take-up Rates: The Real Measure of 'Access to Justice'," paper delivered at 8th Annual National Symposium on Class Actions (Toronto: Osgoode Hall Law School, York University, 2011): 7. Online: http://static1.1.sqspcdn.com/static/f/299713/12187013/1305222675693/branch_mcmullentake_up_rates.pdf?token=xec3SOMITT%2BSWWxgveirktwbv7Y%3D.

(i.e. increasing pro-rata shares)? The critical question over the distribution of unclaimed settlement funds is fundamentally a matter of public policy. For example, if unclaimed funds are reverted back to defendants, does that not negatively impact the achievement of the policy objective of behaviour modification? An innovative (though not unproblematic) solution to the problem of unclaimed funds has been embraced by common law jurisdictions around the world, including Canada: *cy-prés* distributions.

2. CY-PRÉS IN CLASS ACTION SETTLEMENTS

The extremely low take-up rates in Ontario's class action regime indicate that only a fraction of settlement funds are directly claimed by class members, leaving significant undistributed remainders. A number of reasons can produce situations in which settlement funds are not distributed to class members, including agent-oriented reasons such as apathy or ignorance of ongoing actions or claims processes, as well as structural reasons such as the possibility (or impossibility) of identifying class members, or the infeasibility or impracticability of distributing relatively small amounts to class members (in cases where costs of distribution outweigh the value of distributable funds). How should such unclaimed funds be distributed? What type of justice is achieved when class members are not directly compensated for the harms they have incurred? Such questions are imperative to the extent that class actions facilitate a form of redistributive justice in the political economy of pollution. Moreover, the distribution of settlement funds speaks to the broader policy objectives of class actions, particularly the interplay between behaviour modification and access to justice.

The concept of *cy-prés* refers to the principle of 'as near as possible'—derived from the French '*cy-prés comme possible*'—in the context of distributing settlement funds; that is, in cases where distribution of settlement funds to class members is impracticable or infeasible, a *cy-prés* program can be applied which distributes settlement funds in ways that would most closely benefit class members (i.e. 'as near as possible' or 'the next best' form of distribution).[720] For example, in an environmental class action in which non-identifiable class members have been exposed to airborne toxicants, undistributed funds may be diverted to environmental organizations associated with clean air promotion rather than reverting back to the polluting parties. This notionally ensures that the polluters internalize the total costs of the settlement while simultaneously promoting the underlying substantive objectives of the action in a general way (as opposed to specifically benefiting class members who were directly harmed by the airborne toxicants). A similar process is applicable in cases with low take-up rates, whereby the remainder of unclaimed funds is distributed to actors broadly aligned with the substantive objectives of the action (i.e. clean air promotion).

Although the historical origins of *cy-prés* trace back to Roman antiquity, its common law manifestation in recent centuries largely applies to the law of charitable trusts in cases where literal compliance with a donor's intentions are impracticable or infeasible, thereby necessitating the distribution of the donated funds in a manner 'as near as possible' to the donor's stated intentions.[721] For example, in cases where an individual donates a

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[720] *Cassano v. Toronto-Dominion Bank*, 2009 CanLII 35732 (ON SC); *Sutherland v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 (S.C.J.); *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 (CanLII), 2012 ONSC 5891 (S.C.J.).

[721] An excellent historical review of the *cy-prés* doctrine is provided by Rachael P. Mulheron, *The Modern Cy-Prés Doctrine: Applications & Implications* (London: University College London Press, 2006). See also, E. Rebecca Potter & Natasha Razack, "*Cy Pres* Awards in Canadian Class Actions: A Critical

portion of their estate to a hospital for research into a disease and the disease is subsequently cured, the remaining donation may be diverted according to the principle of 'as near as possible' to research into a related disease (rather than, for example, being used to pave the hospital's garage). Since the early 1980s, however, the concept of *cy-prés* has progressively expanded into other legal areas in common law jurisdictions around the world. Notably, class action regimes have witnessed a significant rise as post-settlement distribution programmes have viewed *cy-prés* as an efficacious method of distributing unclaimed or undistributed funds.

This development has received scarce critical commentary in the literature on class actions despite its growing popularity. As Martin Redish, Peter Julian, and Samantha Zyontz have observed in their trenchant critique of the practice, it "is difficult to know for certain why the practice's [*cy-prés*] growth has gone nearly unnoticed, much less criticized, by the scholarly world."[722] Indeed, the popularity of *cy-prés* distributions is evident across common law jurisdictions that have introduced class action legislation, including Canadian provinces like Ontario which permits *cy-prés* distributions under the *Class Proceedings Act*.[723] In Ontario, as early as 1999 in *Chadha v. Bayer Inc.*, sections 24 and 26 of the *Class Proceedings Act* have been interpreted by courts as supporting *cy-prés* distributions.[724] Before developing this section further, it should be noted that courts in Ontario must approve any proposed *cy-prés* distribution during settlement hearings. As such, the issues raised in this section concerning the various shortcomings of *cy-prés* distributions from an

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Interrogation Of What Is Meant By 'As Near As Possible," *Canadian Class Action Review* 6, no. 2 (2010): 299-329.

[722] Martin H. Redish, Peter Julian, and Samantha Zyontz, "Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis," *Florida Law Review* 62 (2010): 620-21.

[723] The earliest usage of *cy-prés* in the class action context is rooted in an American case from 1974 in the Southern District of New York, *Miller v. Steinbach*. Ibid., 635.

[724] *Chadha v. Bayer Inc., 1999 CanLII 14812 (ON SC).*

access to justice perspective can partly be mitigated by increased judicial scrutiny during such hearings. The few scholars examining this issue in Canada, like Jasminka Kalajdzic and Jeff Berryman, have observed that judicial scrutiny during such hearings involving *cy-prés* distributions have tended to focus on the selected receivers of *cy-prés* funds rather than whether a *cy-prés* distribution is a legitimate recourse in the first place.[725]

As this section suggests, the development of *cy-prés* in the contemporary historical conjuncture serves to reinforce the mobilization of class actions as policy instruments in the privatization of regulatory enforcement by facilitating the private regulator duties of Private Attorneys General through the legitimization of class actions in which the underlying compensatory function of civil justice is reoriented in favour of a deterrence function.

A. CY-PRÉS IN ONTARIO'S CLASS ACTION REGIME

Ontario has hosted the highest number of *cy-prés* distributions in Canada.[726] This is perhaps unsurprising since Ontario is Canada's dominant class action regime (by volume). The usage of *cy-prés* distributions can be viewed as a method of ensuring defending corporations or governments fully internalize the costs of their wrongful conduct. By pursuing such distributions, Private Attorneys General can ensure that defendants do not

[725] Kalajdzic observes that "[i]n contrast to the paucity of judicial guidance as to *when* cy prés payments should be used at all, there is a comparatively rich jurisprudence on the second question of *who* should receive the cy près money." Jasminka Kalajdzic, "The 'Illusion of Compensation': Cy Prés Distributions in Canadian Class Actions," *Canadian Bar Review* 92, no. 2 (2013): 181.

[726] Although there is no comprehensive database or collection of empirical data on a national scale for class actions in Canada, based on available publicly accessible information, a Canadian Legal Information Institute database search in December 2016 reveals 116 citations of *cy-prés* in Ontario, in comparison to the 60 in British Columbia, 18 in Nova Scotia and Saskatchewan, 16 in Alberta, 10 in Quebec, 7 in Prince Edward Island, 6 in New Brunswick, 5 in Newfoundland and Labrador, 3 in Manitoba, 2 in the Northwest Territories, and 1 in the Yukon. There have not been any citations in Nunavut. For an older dataset, see Kalajdzic, "The 'Illusion of Compensation': Cy Prés Distributions in Canadian Class Actions," 190.

benefit from low take-up rates by recovering the undistributed remainders of the settlement fund. The availability of this distributive recourse is particularly important in Ontario given that the *Class Proceedings Act* explicitly stipulates that any unclaimed or undistributed funds must be returned to defendants.[727] At the same time, Ontario's legislation allows for *cy-prés* distributions.[728] As long as *cy-prés* is available as a recourse for distributing settlement funds, the systemic failure in Ontario's regime to directly compensate class members does not operate in favour of wrongdoers by allowing the reversion of unclaimed or undistributed funds.

Furthermore, without the sanctioning of *cy-prés* distributions, class actions involving unidentifiable class members would not receive certification by virtue of the fact that any recoveries would not be distributed to class members.[729] This would negatively impact procedural access to justice. Unsurprisingly, one prominent critic of class actions has advocated against *cy-prés* with the explicit acknowledgement that a total prohibition would undermine access to justice.[730] In this light, *cy-prés* can be viewed as advancing procedural access to justice by promoting claims that would otherwise remain unvindicated. By allowing such claims to proceed as class actions (in the case of

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[727] Class Proceedings Act, 1992, S.O. 1992, c. 6, s.26(10): "Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court."
[728] Ibid., s.26(4): "The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied to any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order."
[729] This would involve *fixed cy-prés* distributions.
[730] In his overview of the so-called 'pathologies of class actions', Martin Redish endorses the option of "simply denying class certification" rather than permitting *cy-prés* distributions. Although Redish acknowledges that "[t]hose who wish to see widespread corporate or governmental misbehaviour punished, however, understandably find this alternative unsatisfactory," he nevertheless posits that the usage of *cy-prés* in class actions "improperly distorts the remedial structure through use of a nakedly procedural device." Redish et al, "Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis," 639-40.

unclaimable funds) and preventing remaining funds from reverting back to defendants (in the case of unclaimed funds), *cy-prés* also promotes the secondary policy objective of deterring future misconduct. But who should receive the unclaimed or undistributed funds in such arrangements?

Ontario's *Class Proceedings Act* rejects any escheatment of unclaimed or undistributed funds to the state. This provision precludes the diversion of settlement funds away from the substantive interests of class members; that is, escheatment to the state does not ensure that the escheated funds will be deployed for socially beneficial purposes aligned with the substantive objectives of the action (i.e. clean air promotion). Without the option of diverting unclaimed or undistributed funds to the state, the objective of ensuring total cost internalization by defendants largely rests on selecting third parties that may receive the funds to satisfy the 'as near as possible' criterion of *cy-prés* distributions. These parties are typically civil society actors, such as charities, NGOs, but also law schools, research institutes, and similar organizations that can be viewed as advancing the substantive goals of any given action. Kalajdzic has developed a clarifying taxonomy that categorizes *cy-prés* distributions in class actions into two scenarios:

1. *Residual Cy-Prés* – when settlement funds have not been exhausted by class members, in which case *cy-prés* distributions generally ensure that remaining funds do not revert back to wrongdoers;
2. *Fixed Cy-Prés* – when settlement funds are inaccessible to class members, which typically occurs when class members are unidentifiable or the costs of distribution to individual members outweigh the value of the distributable funds.[731]

[731] Jasminka Kalajdzic, "Access to a Just Result: Revisiting Settlement Standards and Cy Pres Distributions," *Canadian Class Action Review* 6, no. 1 (2010): 215-51.

The first scenario applies to cases of *unclaimed* funds, whereas the second scenario applies to cases of *unclaimable* funds. Although both scenarios involve discretionary decision-making on the part of Private Attorneys General as it pertains to the third party beneficiaries, the two scenarios differ in their implications for access to justice. In the first scenario, the pursuit of *cy-prés* distributions is preferable to the reversion of funds to wrongdoers. Although greater efforts should be undertaken to ensure direct compensation for collective claims-makers, when confronted with a choice of reverting unclaimed or undistributed settlement funds to wrongdoers as opposed to diverting such funds to third parties according to the 'as near as possible' principle, the latter option is certainly preferable in light of the secondary policy objective of behaviour modification, which may be promoted by total cost internalization of wrongdoers.

The second scenario is not as straightforward. References to *cy-prés* distributions in the OLRC Report appear to be focused on *residual cy-prés*, with repeated references to the 'residue' of settlement funds and citations of unclaimed funds, as opposed to unclaimable funds; that is, to funds that have not yet been distributed, which logically implies that some funds *have* been distributed and *cy-prés* applies to the remainder; in other words, *residual cy-prés*.[732] A host of difficulties are present in cases where the settlement fund is inaccessible to class members, including the implications of reorienting the primarily compensatory function of civil justice in favour of deterrence, as well as potentially questionable economic calculations involved in determining costs of distribution. These interrelated concerns will be examined in the following sections.

[732] Kalajdzic, "The 'Illusion of Compensation'," 180.

Although both scenarios legitimate the usage of *cy-prés* in class action settlements, the former scenario principally aims towards the fulfillment of the primary policy objective of access to justice (conceptualized as achieving compensation for class members) and recourses to *cy-prés* distribution when this compensatory function has reached its limit, whereas the latter scenario articulates the secondary policy objective of behaviour modification as an independently justifiable objective.

B. DETERRENCE & COMPENSATION

The major point of criticism for applying *cy-prés* to class action settlements is the reprioritization of the policy objectives of the *Class Proceedings Act*. Class action policy in Ontario posits access to justice and judicial economy as primary policy objectives, whereas behaviour modification is a secondary objective. From a critical policy perspective, the emergence of *cy-prés* distributions effectively reorients this secondary objective to primary status. As the Superior Court observed in 2016 in *Lozanski v The Home Depot, Inc.*:

> [I]deally or optimally, if the access to justice goals of the *Class Proceedings Act, 1992* and other class action statutes across the country are to be achieved, the judgment or the settlement funds should be distributed to the class members and not be refunded to the defendant or distributed *cy près*, which achieves behaviour modification but not access to justice for individual class members. A fundamental policy factor underlying class action statutes across the country is the goal that class members should have access to justice and defendants should not get away with perpetrating small harms to many victims who as individuals would not sensibly incur the costs and risks of litigating for their individual claims. In other words, the ideal distribution scheme for a class action gets the compensation into the hands of the class members.[733]

[733] *Eidoo v Infineon Technologies AG*, 2015 ONSC 5493 (CanLII) at 26-7.

However, the Superior Court continued by recognizing the empirical realities of extremely low take-up rates in Ontario's class action regime:

> Ironically, achieving this can be frustrated by class members not taking up the recovery available to them. The practical realities of human nature are such that historically, take up rates of class action settlements have been poor where amounts to be distributed to individual class members are small...[734]

The importance of the preceding aspects of Ontario's class action regime—adequate notice provisioning, take-up rates—is premised upon a traditional understanding of multilayer access to justice of preserving a compensatory function for class members. In this traditional account, the objective of class actions is the attainment of compensation for those who have been harmed by the illegal conduct of the wrongdoer. To the extent that substantive justice entails compensation for class members, the preceding sections on notice provisioning and take-up rates take centre stage in access to justice evaluations.

This compensationalist focus aligns with the economic interests of entrepreneurial Private Attorneys General (and, if applicable, third party litigation financiers) who prioritize monetary recoveries. However, this prioritization neglects the multi-dimensionality of recoveries sought by environmental claims-makers, including clean-up of contaminated sites, public apologies, de-toxification, and other non-monetary forms of justice. Needless to say, such restrictions may be acceptable to claims-makers provided that sufficient compensation is achieved. In a recent panel discussion, Ward Branch posited that claims-makers prefer a *cy-prés* distribution over a one-dollar cheque by questioning the audience who voted in favour of the former in this scenario.[735] The question as posed,

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[734] Ibid., 26-7.
[735] Michael Rosenberg, "The Good, The Bad, and The Ugly: Report on a Panel Discussion of Class Actions Past and Future," *Canadian Business Law Journal* 51 (2011): 101.

however, contains a compensationalist assumption leading to a false choice between *cy-prés* and a miniscule recovery. One could reasonably inquire whether harmed parties might not prefer a public apology over a one-dollar-cheque, or other types of non-monetary justice. In such situations, Private Attorneys General economically benefit from settlements by extracting their respective fees, whereas claims-makers do not receive any compensation. The distribution of the remainder of settlement funds post-fee withdrawals are an economic externality for Private Attorneys General. This effectively obviates any access to justice benefits of harnessing market forces by incentivizing private enforcement; in other words, with this economic externality, Private Attorneys General are no longer economically incentivized to promote access to justice by compensating claims-makers for their incurred harms. The misalignment of economic interests is perhaps most palpable in such situations given the reduction of class member interests to the status of an economic externality.

More to the point, the applicability and usage of *cy-prés* distributions strongly favours the economic interests of Private Attorneys General to the extent that prospects for actions without identifiable class members (and therefore without the possibility of compensation for harmed individuals or collectives) to attain certification may be improved with the availability of *cy-prés* distributions.[736] Insofar as private regulatory enforcement through class actions was justified according to the market logic of permitting private

[736] As Redish et al observe: "Plaintiff class attorneys may have even stronger motivations for use of cy pres [*sic*] relief. As already noted, in a number of situations individual claims of absent class members will be too small, too difficult to prove, or too expensive or difficult to distribute. Thus, in many cases it will not be all that difficult for a certifying court to determine at the outset that it is highly unlikely that resolution of the suit would result in significant transfer of damages from defendant to its victims. If the only practical alternative are reversion to defendant or escheat to the state, a certifying court may well be unwilling to certify the class. The availability of a possible cy pres [*sic*] award to a worthy charity might well alter the situation sufficiently, in the court's mind, to justify certification." Redish et al, "Cy Pres Relief and the Pathologies of the Modern Class Action," 640-41.

actors to wield the coercive power of the state in the pursuit of public goals, this imbalanced outcome caused by the misalignment of economic interests structurally disadvantages collective claims-makers, particularly in negative value claims, such as many environmental class actions in which harmed individuals or collectives have neither the incentive nor expertise to actively pursue or effectively monitor their claims.

The normative critique of *cy-prés* in class action settlements is straightforward: the perversion of the compensatory function in favour of deterrence. To the extent that 'access to justice' is traditionally perceived as compensation for harmed individuals or collectives, this development effectively prioritizes deterrence (or behaviour modification) over access to justice. However, this emphasis has been critiqued by Miriam Gilles and Gary B. Friedman as the "compensationalist hegemony"[737] in class action policy, which unduly prioritizes direct compensation to class members over other social benefits, including deterring future misconduct. A broader understanding of access to justice as entailing non-monetary recoveries, including the deterrence of future misconduct by wrongdoers, which has historically been a major objective of environmental claims-makers, can potentially be viewed as mitigating the negative implications of this prioritization. In this understanding, a type of justice can be achieved without direct compensation in the form of deterring future misconduct.

Nevertheless, by reorienting the basic remedial structure in favour of deterrence, the usage of *cy-prés* serves to transform the compensatory framework of civil justice into a *civil fine* framework.[738] This could be viewed as the logical culmination of the

[737] Myriam Gilles & Gary B. Friedman, "Exploding the Class Action Agency Costs Myth: The social utility of entrepreneurial lawyers," *University of Pennsylvania Law Review* 155 (2006): 108.
[738] Redish et al., 641. See also, John J. Chapman & Patti Shedden, "Class Proceedings, Gains-Based Claims, and Deterrence," *Canadian Class Action Review* 4, no. 1 (2007) 47-82.

privatization of regulatory enforcement and the transformation of entrepreneurial legal actors into Private Attorneys General. The deterrence objective of *cy-prés* actions is largely rooted in the forfeiture of unjust enrichment by wrongdoers, irrespective of the impracticability of returning those monies to the individuals or collectives originally harmed by the wrongful conduct that produced the enrichment. The distribution of such recoveries to third parties, typically charities, contrasts with the traditional civil fine framework in which a state receives the fined sums, as well as the adversarial bilateral process of civil justice by introducing a third party that has not been harmed by the wrongful conduct.

For critics, this 'trilateralization of the bilateral adjudicatory process' is objectionable given its promotion of a "redistribution of wealth for social good" rather than the adjudication of a private dispute in a bilateral process.[739] In this critique, the recipient charity has not incurred any legal wrongs and should therefore not receive any recoveries for any such violations. Accordingly, whether the recipient of recoveries is the state or a third party such as a charity is largely irrelevant, since both a traditional civil fine model and a *cy-prés* civil fine model are substantively distinct from the remedial model of civil justice requiring compensation for victims of incurred harms.[740] Whether and to what extent the relevant third party is connected to the substantive cause of action is similarly irrelevant in this critique; that is, it does not matter whether the charity is an organization that promotes clean air, for example, or a charity benefiting homeless shelters. The point at stake is the illegitimacy of a third party benefiting from an action in which it has not been

[739] Ibid., 642. The authors posit that *cy-prés* is indefensible as it violates both American constitutional law and liberal democratic theory. Moreover, in Ontario, escheatment to the state is explicitly prohibited under the *Class Proceedings Act*.
[740] Ibid., 646.

harmed in any way. The social good of wrongdoers forfeiting their unjust enrichment and the distribution of this enrichment to worthy charities are perceived as justifiable casualties in such a critique.

This critique applies across both scenarios described above. Firstly, in the scenario in which the settlement fund is inaccessible to class members—for example, in cases where class members are not identifiable or the costs of distribution to individual victims outweighs the value of the settlement—this critique posits that the proceedings should simply not be certified. In other words, denying procedural access to justice is preferable to a *cy-prés* distribution. Secondly, in the scenario in which the settlement fund has not been exhausted by class members—that is, in cases of unclaimed funds remaining of the settlement—this critique posits that any remainders should revert back to wrongdoers.[741] Simply put, the extremist critique of *cy-prés* denies procedural access to justice in the former case and advocates in favour of wrongdoers keeping their unjust enrichment over the distribution of this enrichment to worthy charities in the latter case. This project rejects both options as contrary to public policy in Ontario.

Firstly, the standpoint that procedural access to justice should be denied on the basis of the illegitimacy of *cy-prés* distributions flatly contradicts the primary policy objective of access to justice. Moreover, this produces strong incentives for potential wrongdoers to diffuse harms in ways conducive to non-identification of harmed parties as corporate strategies in order to ensure legal protection from any class action sanctioning. This is particularly consequential in the political economy of pollution given the non-identificatory diffusiveness of harms associated with toxic production and consumption,

[741] Ibid., 665.

with deleterious implications for processes of social reproduction. Secondly, the reversion of unclaimed funds to wrongdoers is contrary to the secondary policy objective of behaviour modification to the extent that wrongdoers do not internalize the total costs of their illegal activities.[742]

Finally, one of the major underexplored areas of class action policy in Ontario has been the efficacy of deterrence as a secondary policy objective. Although it is beyond the scope of this analysis to examine the complexities of evaluating the extent to which deterrence is actually achieved in class actions, it should be recognized that insurance protection that indemnifies defendants must be considered as a mitigating factor in deterrence promotion.[743] Needless to say, a staple feature of corporate governance in Canada has been the endemic usage of insurance schemas; this feature can be viewed as effectively precluding total cost internalization. It is becoming increasingly apparent that insurance companies are providing the funds for class action settlements. The extent to which insurance pay-outs can be considered 'cost internalization' by corporate wrongdoers leaves much to be desired from a deterrence perspective. Although insurance premiums may increase as a consequence, this is a pale consolation for those seeking behaviour modification—a civil fine surrenders its sanctioning force when paid by a third party. Cost internalization can be circumvented through other strategies as well, which further undermine the deterrence function. For example, a corporation can simply download settlement costs to the general public (or strictly paying consumers) by increasing prices

[742] Not only will wrongdoers fail to fully internalize the total costs of their illegal activities, wrongdoers will be incentivized to produce conditions averse to the collection of settlement funds by harmed parties (i.e. claims processes that are difficult to navigate).

[743] Such an evaluative analysis is exceedingly difficult (if not impossible) in most cases. In my discussions with the Law Commission of Ontario concerning the forthcoming Class Action Project, the difficulties (and impossibilities) of actually evaluating deterrence were identified as significant obstacles without foreseeable solutions.

for products or services as a counterbalancing strategy. Ultimately, the difficulties of ensuring deterrence indicate that elevating behaviour modification to the status of a primary policy objective that independently justifies class actions may be a shortsighted development.

C. Economic Prohibitions on Distributing Funds

In cases where *fixed cy-prés* is proposed by Private Attorneys General as the best choice for settlement distributions, the justifying rationale is premised on the impracticability or infeasibility of direct compensation of class members. First and foremost, the doctrinal term of 'impracticability' in Canadian jurisprudence should not be conflated with 'impossibility'. A course of action that is impracticable is not a course of action that is impossible, but simply a course of action that is difficult or cost prohibitive. This contrasts with everyday parlance in which 'impracticability' refers to impossible actions, whereas 'impractical' refers to difficult or cost prohibitive actions. In the context of class action settlements involving *cy-prés*, an impracticable distribution plan refers to a course of action in which the distribution of settlement funds is difficult or cost prohibitive.

When proposing *fixed cy-prés* distributions, Private Attorneys General typically argue that direct compensation for class members is cost prohibitive based on their own economic calculations. As explored in previous sections, however, courts do not have the resources or capacities to adequately interrogate such propositions, resulting in the general acceptance of the 'impracticability' of distributing funds to class members as posited by Private Attorneys General. This judicial passivity has combined with the absence of any objective criterion to evaluate the 'impracticability' of direct compensation to class

members to produce a class action settlement culture in which Private Attorneys General are largely able to dictate the form of distribution.[744] This strengthened position is not unrelated to the misalignment of economic interests. Producing robust notice programs and actively pursuing the identification and direct compensation of class members involves time investments and cost expenditures that can be expediently foregone with a *cy-prés* distribution.[745] Without adequate interrogation of the economic logistics of pursuing direct compensation, any determination of the 'impracticability' of a direct compensation program is marked by this misalignment of economic interests to the detriment of class members.

Interestingly, the economic calculations that ostensibly preclude the distribution of settlement funds to class members through the rationale that the costs of distribution outweigh the value of available funds speak to an intrinsic facet of class actions. To recall: the traditional procedural justification for class actions as promoting access to justice is that the vehicles make it economical for the collective pursuit of claims that would otherwise be individually non-viable. That is, the claims are not individually viable in terms of the costs of litigation versus the potential recoveries (i.e. negative value claims). In economic calculations on the relative distribution costs of direct compensation and the impracticability of distributing funds to class members, the individual non-viability (i.e. the low value of individual claims) features as a factor justifying *fixed cy-prés* distributions. That is to say, the value of the settlement fund is not sufficiently high to justify the costs of distribution. For example, in a case with thousands of potential claimants with claims

[744] Kalajdzic, "The 'Illusion of Compensation'," 181.
[745] These often only involves determining appropriate charities or organizations (with some loose connection to the substantive objectives of the action).

worth a few dollars, the total settlement fund may not be sufficiently high to justify identifying and directly compensating every individual claimant. However, individually low-value claims are an intrinsic factor of the rationale justifying class actions on procedural access to justice grounds. To mobilize the individually low-value of claims as a means to circumvent compensating class members is a rather paradoxical inversion of the justifying rationale for class actions.

Alternatively, this economical rationale may be indicative of the compatibility of *cy-prés* to class actions, particularly when the rejection of *cy-prés* would effectively counteract the access to justice benefits of individually low-value claims. In other words, the prohibition of *cy-prés* would create a baseline threshold for the value of claims, whereby claims must be worth more than the cost of their distribution to class members—and conceivably higher by a certain margin in order to justify the action on judicial economy grounds—in order to proceed as actions, and claims worth less than the cost of their direct distribution would effectively be denied access to justice.

D. BENEFICIARIES OF CY-PRÉS

As it pertains to the beneficiaries of *cy-prés* distributions, the justifying rationale holds that it allows for 'indirect benefit' to collective claims-makers in cases where direct compensation is impracticable or infeasible.[746] The hypothetical scenario above concerning the diversion of unclaimed or unclaimable funds to an organization engaged in clear air promotion illustrates the concept of 'indirect benefit'. A correlativity must exist between the direct beneficiaries of a *cy-prés* distribution (i.e. organization promoting clean air) and

[746] Kalajdzic, "The 'Illusion of Compensation'," 186.

the substantive objective of the action (i.e. environmental claim over airborne toxicants).[747] In other words, a clear nexus should be identifiable between the remedy and the underlying purpose of the action. This clear nexus indicates that the compensatory function of class actions cannot be suspended in favour of a strictly deterrence function; that is to say, if behaviour modification was independently a justificatory basis for class actions, then the directness of the benefit to class members would largely be irrelevant given that the objective would primarily be total cost internalization by the defendant. The fact that a clear nexus must exist in *cy-prés* distributions between recipients and the statutory objectives of class actions suggests that the compensatory function remains an important factor (however indirect this 'compensation' may be).

An empirical examination of *cy-prés* in Ontario's regime suggests that this correlativity should not be taken for granted. Third party beneficiaries of *cy-prés* distributions have not universally been related to the underlying purposes of the violated statute. This raises serious questions about the extent to which such beneficiaries are legitimate recipients of settlement funds. That is, whether and to what extent such beneficiaries satisfy the 'as near as possible' criterion that legitimates the usage of *cy-prés*. Where such beneficiaries do not satisfy this criterion, a class action involving *cy-prés* amounts to a capital-accumulative vehicle for entrepreneurial Private Attorneys General with neither direct nor indirect benefit for class members apart from the speculative possibility of behaviour modification. The "[u]nprincipled payments to third parties with no connection to the class members or the issues at the heart of the class action risk

[747] Although the viability of this logic of 'indirect benefit' appears fairly straightforward, critics of *cy-prés* have problematized this logic, as Richard Posner plainly contends: "There is no indirect benefit to the class from the defendant's giving the money to someone else." Luiz Arthur Bihari, "Saving the Law's Soul: A Normative Perspective on the Cy Prés Doctrine," *Canadian Class Action Review* 7, no. 2 (2011): 305.

converting private litigation into civil penalties,"[748] which recalls Redish's critique. In such cases, the compensatory function of class actions is effectively circumvented.[749] Moreover, such a civil fine framework reinforces the legitimacy of a private enforcement regime in Ontario by elevating deterrence as an independently justificatory objective of class actions.

First and foremost, therefore, the selection criteria for such third party beneficiaries must be examined.[750] Such critiques have predominantly occurred in the United States, however, Canadian commentators have increasingly taken critical stances on the usage of *cy-prés*, largely through reform-oriented approaches rather than wholesale rejections of the concept. Jeff Berryman has demonstrated that in numerous class actions in Ontario, the nexus between third party beneficiaries and class members is "extremely tenuous, if not non-existent."[751] For example, an action against the Bank of Nova Scotia over foreign currency charges resulted in a *cy-prés* distribution to cancer research, the Law Society of Upper Canada's Feed the Hungry initiative, and the Class Proceedings Fund.[752] As worthy as these beneficiaries may be, it remains a logical stretch to view any of these parties as connected either directly or indirectly to the substantive objective of the action. In point of fact, the biggest *cy-prés* distribution in Ontario exhibited precisely such a questionable

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[748] An overview of a principled approach can be found in Christina Sgro, "The Doctrine of Cy Prés in Ontario Class Actions: Toward A Consistent, Principled, and Transparent Approach," *Canadian Class Action Review* 7, no. 2 (2011): 267-92; Kalajdzic, "The 'Illusion of Compensation'," 198.
[749] And the primary beneficiaries of *cy-prés* distributions reveal themselves to be Private Attorneys General and their favoured third parties (i.e. preferred charities; alma mater law schools; etc.)
[750] American commentaries have led the way in such critiques of *cy-prés* aimed towards the improvement of its usage as opposed to the wholesale rejection (as Martin Redish advocates). See, e.g., Chris J. Chasin, "Modernizing Class Action Cy Pres Through Democratic Inputs: A Return to *Cy Pres Comme Possible*," *University of Pennsylvania Law Review* 163 (2015): 1463-95; Kevin M. Forde, "What Can a Court Do with Leftover Class Action Funds? Almost Anything!" *The Judges' Journal* 35, no. 3 (1996): 1-12.
[751] Jeff Berryman, "Nudge, Nudge, Wink, Wink: Behaviour Modification, Cy-Prés Distributions and Class actions," *Supreme Court Law Review* 53 (2011): 162. See also, Jeff Berryman, "Class Actions (Representative Proceedings) and the Exercise of Cy-Pres Doctrine: Time for Improved Scrutiny," in Jeff Berryman and Rick Bigwood, *The Law of Remedies: New Directions in the Common Law* (Toronto: Irwin Law, 2009).
[752] Ibid.

receiver of funds: in *Cassano v. Toronto-Dominion Bank*, a $28 million settlement was approved with $14 million distributed to the Law Foundation of Ontario with the purpose of establishing the Access to Justice Fund—this is the first national fund in Canada dedicated for this purpose and it has since received several other *cy-prés* awards, including *Skopit v. BMO Nesbitt Burns Inc., Smith Estate v. National Money Mart*, *Wein v. Rogers Cable Communications Inc., Markson v. MNBA*, and *Carom v. Bre-X Minerals Ltd.*[753] The difficulties in assessing this type of *cy-prés* distribution from an access to justice perspective are self-evident: clearly, the Access to Justice Fund is an important organization that contributes to promoting access to justice across Canada, with a focus on vulnerable members of society (i.e. indigenous peoples; victims of family violence who are predominantly women and children; self-represented litigants); however, the class members who were harmed by the wrongdoing that prompted the class action in the first place do not specifically benefit from the distribution. In other words, the Access to Justice Fund can be viewed as generally promoting access to justice without specifically promoting access to justice for the harmed class members.[754] The prevalence of such distributions leads Berryman to conclude that for many cases, considerations apart from the benefit of class members "appear to account for the selection of *cy-prés* distribution recipients, particularly the idiosyncrasies of legal counsel and the charities they wish to benefit."[755]

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[753] *Skopit v. BMO Nesbitt Burns Inc., 2010 ONSC 6039; Smith Estate v. National Money Mart 2010 ONSC 1334*; *Wein v. Rogers Cable Communications Inc., 2011 ONSC 7290; Markson v. MNBA, 2012 ONSC 5891; Carom v. Bre-X Minerals Ltd. 2014 ONSC 2507.*
[754] Kalajdzic, "'The Illusion of Compensation'," 184.
[755] Ibid., 37.

Although such arbitrary usage of *cy-prés* distributions nevertheless ensure that undistributed funds do not revert back to defendants, the non-correlativity between beneficiaries and class members gives rise to serious concerns. This is compounded in situations where it is Private Attorneys General who indirectly benefit from *cy-prés* distributions (where third party beneficiaries have relationships with Private Attorneys General). The reverse situation is similarly problematic—that is, in cases where defendants benefit from *cy-prés* distributions; for example, when defendants are able to present *cy-prés* distributions to worthy charities as donations that they have chosen to bestow for a particular cause rather than as punishments for wrongful conduct.[756] A recent example of such conflicts of interest occurred in *Sorensen v. easyhome Ltd.* in which the court rejected the proposed *cy-prés* distribution plan on the grounds that improper linkages were present between the intended third party beneficiary and class counsel, ultimately noting:

> *Cy prés* relief should attempt to serve the objectives of the particular case and the interests of class members. It should not be forgotten that the class action was brought on behalf of the class members and a *cy-prés* distribution is meant to be an indirect benefit for the class members and an approximation of remedial compensation for them. However well meaning, the prospect of a *cy-prés* distribution should not be used by Class Counsel, defense counsel, the defendant, or a judge as an opportunity to benefit charities with which they may be associated or which they may favour. To maintain the integrity of the class action regime, the indirect benefits of the class action should be exclusively for the class members.[757]

In the present situation in which the usage of *cy-prés* and the beneficiaries of *cy-prés* are both privately determined by Private Attorneys General to the exclusion of class members who have the strongest claim to the distributable funds, serious questions must be raised

[756] This would similarly apply to defense counsel who may have relationships with third party beneficiaries or who may, in some way, benefit from a *cy-prés* distribution.
[757] *Sorenson v. easyhome Ltd.,* 2013 ONSC 4017 (CanLII) at 30. See also, O'Neil v Sunopta, 2015 ONSC 6213 (CanLII).

about the "policy implications of this privatized form of distributive justice,"[758] including the legitimacy of financializing the justiciable problems of collective claims-makers and the private distribution of subsequent proceeds without any class member participation. The prevalence of this type of private distributive justice raises legitimate concerns about the extent to which collective claims-makers are actually benefiting from class actions in Ontario's regime.

E. CY-PRÉS & POLLUTION

Clearly there are serious access to justice concerns about legitimizing *cy-prés* distributions. In cases where settlement funds are inaccessible to class members (i.e. *fixed cy-prés*), objections about circumventing compensation in favour of deterrence are increasingly posited by critics of class actions. Such cases arise for reasons of non-identifiability or prohibitive costs of distribution. Although greater efforts should be undertaken to improve direct compensation for class members, the wholesale rejection of *cy-prés* effectively signals to potential wrongdoers that it is advantageous to distribute harms in ways conducive to non-identification or by diffusing harms to ensure cost prohibitiveness, thereby insulating a vast range of harmful activities from the purview of private enforcement. To the extent that class actions operate as policy instruments in private enforcement regimes, this produces systemic under-protection for a range of social reproduction activities.

The political economy of pollution is significantly implicated in such retrenchment given the prevalence of non-identifiability and the diffusiveness of low-value harms

[758] Kalajdzic, "The 'Illusion of Compensation'," 191.

associated with toxic production and consumption, with uneven distribution along social locations burdening racialized and low-income people with strong gendered impacts. Such non-identifiability is prevalent in cases involving plaintiff indeterminacy (Chapter 4) which arise, for example, where wrongdoers expose vulnerable people to toxicants, but identifying the exposed parties is not possible. Without *fixed cy-prés* distributions, such actions would be categorically rejected.[759] As environmental health researchers have repeatedly emphasized, the 'routes of exposure' of toxic contamination are often circuitous and dispersed across spatial and temporal contexts, producing situations of non-identifiability of harmed parties.[760] This is especially evident in chronic low-level toxic consumption.

Such routes of exposure are discernible across the political economy of pollution, including trace chemicals in water, land, and air consumption, genetically modified organisms and pesticide usage, and a host of other contaminating pathways conducive to non-identifiability. The diffusiveness of such harms contributes to this non-identifiability, although spatio-temporally concentrated harms may be similarly implicated, such as in cases of occupational health-related harms and exploitative labour conditions, which typically do not involve diffusiveness. In such cases, the precariousness of workers may contribute to non-identifiability; for example, foreign domestic workers whose social reproductive activities involve constant chemical exposures (i.e. household cleaning products), but whose precarious employment and transitory residential status may make identification for class action purposes exceedingly difficult or impossible. This is similarly

[759] Notwithstanding the likelihood of rejection by Private Attorneys General according to their qualification criteria for case selection.
[760] See, e.g., Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Cambridge: Harvard University Press, 2011).

evident at the production-consumption nexus; for example, migrant farmland workers exposed to pesticides.[761] The detrimental social impacts of such harms often transcend national borders via global care chains. Although direct compensation may be difficult or impossible in such cases, *cy-prés* distributions that benefit aligned interests (i.e. toxicity research) may contribute to preventing similar future harms (as well as promoting behaviour modification in wrongdoers).

A developing tension is evident in this discussion: on one hand, the legitimization of *cy-prés* effectively elevates deterrence as an independently justificatory objective pursuant to the privatization of regulatory enforcement; on the other hand, its delegitimization removes a range of harmful activities from the purview of class actions, subverting their 'power potentials' as instruments of social protection on issues of power, production, and social reproduction in the contemporary period of disciplinary neo-liberalism in which state restructuring has curtailed public regulatory enforcement in favour of privatizing governance strategies.[762] Stronger environmental health standards and principles (i.e. Precautionary Principle) in conjunction with increased state expenditures for greater regulatory capacities of public agencies largely obviates overreliance on private vehicles such as class actions for strictly deterrence objectives (which, by extension, mitigates justification of *fixed cy-prés* distributions), preserving the primacy of access to justice as a policy objective.[763]

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[761] Adrian A. Smith and Alexandra Stiver, "Power and Control at the Production-Consumption Nexus: Migrant Women Farmworkers and Pesticides," in ed., Dayna Nadine Scott, *Our Chemical Selves: Gender, Toxics, and Environmental Health* (Vancouver: University of British Columbia Press, 2015), 364-86.
[762] Bakker and Gill, eds., *Power, Production, and Social Reproduction,* 25.
[763] See Chapter 2 for a discussion on the question of 'regulatory capture' and the need to maintain private vehicles such as class actions as options for social protection in the face of negligible public enforcement.

CONCLUSION

This chapter has sought to critically analyze the problematic dynamics of substantive justice accessibility in Ontario's class action regime. In so doing, several pivotal areas of concern have been examined as operating against the interests of collective claims-makers. The starting point for substantive analyses remains the strong judicial and public policy preference for privately negotiated settlements pursuant to the principles of economic efficiency. Although such privatization is endemic across the Canadian civil justice system, the structural flaws of class action settlements indicate that the social and democratic ramifications are particularly relevant in this context. To the extent that class actions are 'crucial instruments' of social protection for vulnerable people, the ways in which these structural flaws operate to substantively disadvantage collective claims-makers to the economic benefit of Private Attorneys General and defendant corporations and governments is cause for concern. Perhaps the predictable outcome of permitting market forces to determine access to justice priorities is that the major beneficiaries of class actions have consistently been Private Attorneys General rather than the vulnerable people whose social reproduction is threatened with destabilization in advanced capitalist societies. Among these flaws, the most critical is the adversarial void during approval hearings, which fundamentally transforms the institutional structure of the common law tradition. In the absence of a mandatory amicus curiae (external counsel who is not party to the case to advise the court and provide adversarial opposition where necessary), the primary actors to ensure a semblance of adversariality are class objectors, whose formal role in the settlement approval processes borders on futility.

As consistently maintained throughout this critical policy analysis, the misalignment of economic interests operates to privilege Private Attorneys General and defendant parties against the interests of collective claims-makers, yet the privatization of dispute resolution in the form of privately negotiated settlements does little to temper the ramifications of this misalignment, despite the statutory requirement of public approval. Moreover, the finality of approved settlements effectively closes the door to future claims-makers, giving rise to the apposite description of class action settlements as operating to *deny* (even as they purport to *provide*) access to justice. This is especially apparent in the context of environmental health-impairment claims in light of the long latency periods of various toxicants.

Finally, the complexities of *cy-prés* distributions gives rise to a series of difficult questions without straightforward answers. As it pertains to the politics of class actions, the problematics of prioritizing strictly deterrence over compensation—when compensation is a viable alternative that subsumes deterrence[764]—remains a legitimate concern moving forward, particularly for progressive critics of Ontario's emerging private enforcement regime. These difficult questions are perhaps especially prominent when considering the Access to Justice Fund, which promotes access to justice in Canada generally, but not specifically for the class members whose incurred harms have prompted the class action in the first place. In this context, the legitimization (or delegitimization) of a civil fine model for Private Attorneys General may serve to reinforce a private enforcement regime in Ontario by elevating deterrence as an independently justificatory

[764] That is to say, compensation for class members also satisfies the policy objective of behaviour modification or deterrence interpreted as total cost internalization by wrongdoers, whereas strictly deterrence in the form of *fixed cy-prés* only satisfies the cost internalization objective without compensating class members for their incurred harms.

objective of class actions—a logical culmination of the privatization of regulatory enforcement.

To bring this chapter to a close, the cumulative outcome of the shortcomings identified above is a sober verdict for the substantive justice that is achieved or achievable in Ontario's class action regime at present, particularly for environmental claims. Whether and to what extent justice stakeholders will address these shortcomings remains to be seen. Although the issues raised in this chapter warrant further consideration, these shortcomings should not come as a surprise for researchers examining class actions from an access to justice perspective. Low take-up rates, the adversarial void, the futility of class objectors, the possibility of collusion and the misalignment of economic interests, and the myriad difficulties involved with accessing funds for class members, in addition to the various problems associated with *cy-prés* distributions—all of these issues pose serious challenges for justice stakeholders seeking to improve Ontario's class action regime. In light of the recognition that access to justice in the early twenty-first century must incorporate both procedural and substantive considerations, this chapter has sought to identify and explicate the various obstacles to substantive justice that class members face in Ontario.

CONCLUSION

The early promise of class actions was to allow relatively powerless individuals and collectives to band together against powerful adversaries to access justice. Environmental class actions were envisaged as paradigmatic of this type of legal resistance since such actions typically involve negative value claims with diffuse harms across vast spatial and temporal contexts with acute power imbalances between victims and perpetrators. The negligible public enforcement of environmental regulations further contributes to the standpoint that class actions are necessary as instruments of social protection in the political economy of pollution. Through a critical policy analysis, this project has empirically evaluated the extent to which the early promise has actualized in Ontario's class action regime for environmental claims. Although the promotive benefits of class actions from an access to justice perspective vary across sectors, the findings of this study indicate that for environmental claims, class actions have not fulfilled their early promise.

To this end, I have sought to critically explore Ontario's class action regime for environmental claims by considering various contextual variables that are not commonly addressed in the established literature. Existing research on access to justice tends to focus on individuals rather than collectives, whereas class action research is largely proceduralistic with select high-profile cases garnering isolated attention. At the same time, environmental justice research in Canada generally posits class actions as available vehicles for environmental justice-seeking without fully considering the exclusionary dynamics as uncovered in this study. This project has contributed to the under-explored cross-section of these interrelated fields of research. By exploring the exclusionary

dynamics that operate to impede multilayer access to environmental justice in light of the power, production, and social reproduction associated with toxic exposures, this study has expanded the ambit of environmental class actions beyond the traditional confines to the broader political economy of pollution. In so doing, this study has incorporated descriptive and normative aspects of traditional access to justice research with explanatory argumentation for an integrated approach to evaluating multilayer access to environmental justice in Ontario. This contextual approach reveals a more complicated and socially reflective picture of environmental class actions in Ontario than has heretofore been available in extant scholarship.

First and foremost, it must be noted that despite the prevailing anemic class action regime in Ontario that has been documented in this analysis, this project does not support the retrenchment or delegitimization of class actions, as advocated by conservative critics. Amid the 'intensifying contradiction' between the power of capital and its accumulative logic and the destabilizing ramifications for social reproduction, class actions retain their status as 'power potentials'. Few terrains are more straightforwardly implicated in this central contradiction of capitalist societies than the political economy of pollution in which the capacities of vulnerable people to socially reproduce is directly at stake. As class action scholar Deborah Hensler has observed, class actions possess the "potential to disrupt the power structure" and the "fear that collective procedures will disrupt the economic, political and social status quo powers much of the opposition"[765] to class actions. This indispensable fact testifies to the urgency of examining class actions through a political

[765] Deborah Hensler, "Class actions in context," in ed., Deborah Hensler, *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Northampton: Edward Elgar Publishing, 2016), 401.

economy approach—a methodological framing that had not been previously undertaken in Canada before this study. Far from delegitimizing class actions, therefore, I have argued that such retrenchment initiatives are forms of de-democratization (to borrow Wendy Brown's concept) that prevent vulnerable people from accessing justice. However, this is not tantamount to unconditional deference to the present functioning of class actions in Ontario (or elsewhere). It remains instructive to consider the extent to which class actions as 'power potentials' have actually fulfilled this potential, as well as identifying and contextualizing the dynamics that impact this empirical reality, thereby allowing for greater clarity of the limitations of class actions moving forward.

With this in mind, I have identified a central paradox between class actions as crucial instruments of social protection and class actions as policy instruments in private enforcement regimes by tracing the ways in which the neo-liberalization of civil justice serves to undermine social protection and human security. This paradox can be articulated through the analytical schema of *complementation* and *co-optation*: to the extent that class actions operate as collective claims-making vehicles that *complement* public agency enforcement, they are crucial instruments in promoting multilayer access to environmental justice, especially in cases where states are recalcitrant to enforce regulations; however, the shift towards a *co-optative* role of class actions as vehicles that replace rather than support public agencies serves to destabilize the very processes of social reproduction that class actions in their complementary role can be mobilized to protect. One of the distinctive facets of this development is the reversal of the traditional recruitment process in class action regimes: attorneys recruit clients as opposed to clients recruiting attorneys. In this paradigm, the conditions of recruitment acquire the characteristics of barriers based on

profitability and predictability as dictated by Private Attorneys General. The racial hierarchies and gender orders that produce and reproduce social injustices are compounded by the prioritization of profitability over social and democratic principles, with claims involving environmental harms, exploitative labour conditions, discrimination, human rights, and similar causes of action that disproportionately affect women, racial and ethnic minorities, and other vulnerable people, generally failing to attract these gatekeepers of justice. At root, proponents of the privatization of regulatory enforcement typically cite the supposedly neutral and value-free dictates of markets as a chief good to the extent that any particular interest is not directly served. As we have seen, however, allowing market forces to overdetermine enforcement priorities privileges certain types of actors and interests over others. In class actions, securities actions are prioritized over environmental health-based claims—this prioritization has strong socio-demographic characteristics to the extent that relatively privileged actors are affected by securities disputes, whereas largely low-income and racialized people are affected by environmental health-impairment with strong gendered outcomes. The alleged neutrality of this type of privatization exhibits a "strategic silence"[766] about the racial hierarchies and gender orders constituted by the marketization of civil justice.

This marketization of civil justice is compounded by the emerging litigation finance industry in Ontario which reconceptualizes class actions as 'investment commodities' for global financial capital. The theoretical insularity of courtrooms from the instabilities and fluctuations of the global political economy has contributed to the growing appeal of litigation finance in the aftermath of the Global Financial Crisis. Such investments are

[766] Isabella Bakker, *The Strategic Silence: Gender and Economic Policy* (New York: Zed Books, 1994).

portrayed to potential investors as a strategic form of portfolio diversification while simultaneously portrayed to lawmakers and the general public as promoting access to justice. The nascent industry in Ontario has been prompted by the dual factors of (1) risk aversion and (2) budget constraints on the part of Private Attorneys General. The typically percentage-based returns on litigation investments are withdrawn from the portion of the recovery that would otherwise have been distributed to class members, which gives rise to concerns that litigation financing is a form of *buying access at the expense of justice*; that is to say, promoting procedural access through the diminishment of substantive justice. The growing consensus that the creation of a securities market is an inevitable outcome of litigation finance has precipitated the recognition by even ardent proponents that such a probabilistic development would effectively "turn litigation into a stock market."[767] Importantly, the fact that there is currently no statutory framework for regulating third party litigation financing in Ontario has effectively permitted market forces to dictate the parameters of the emerging industry with scant judicial (or legislative) oversight.

A major concern that we have raised throughout this project about the deeper penetration of market forces and rationalities into civil justice has been the misalignment of economic interests of Private Attorneys General. This misalignment manifests in several ways, including the dominant preferences of financial investors and Private Attorneys General for short-term gains resulting in early (lower-value) settlements that disadvantage class members. Moreover, the financialization of civil justice effectively prioritizes the monetization of multilayer access to justice since financial investors are principally

[767] Peter Senkpiel, "Three's a Crowd: Third-Party Litigation Funding of Class Actions in Canada", *Canadian Class Action Review* 5, no. 2 (2009): 314.

motived by profit maximization rather than access to justice. Such a prioritization of monetary recoveries over other forms of substantive justice is particularly worrisome in the environmental context, which often involves non-monetary interests and societal calls for restoration of polluted land, air, and water, as well as myriad other forms of redress, including de-toxification, medical and educational programs, and public apologies. As the financialization of the global political economy extends into material life, the dictates of financial capital accumulation take precedence over sustainable conditions of social reproduction, such as maintenance over the biological and ecological foundation upon which human health is dependent. This is reflected in the incongruity of monetizing imperatives with the non-monetary forms of substantive justice typically sought by environmental claimants.

This monetary paradigm dictates the substantive justice that is currently achieved (or achievable) in a class action regime in Ontario that is determined by a dominant settlement culture and its associated dynamics, including the adversarial void, extremely low take-up rates, insufficient notice practices, and the inefficacy of objectors. To the extent that class actions facilitate a form of redistributive justice, the widespread usage of *cy-près* programs in which settlement funds are not directly distributed to class members raises legitimate concerns about the primary beneficiaries of class actions. The divergence of economic interests directly compromises the basic policy rationale of Private Attorneys General as economic drivers of multilayer access to justice. To what extent can compensatory justice for class members be a priority when it is reduced to an economic externality for Private Attorneys General? Martin Redish has referred to class actions as

"capitalistic socialism"[768] given that Private Attorneys General engage in entrepreneurial capitalization of mass harms with redistributive outcomes from economically powerful actors to vulnerable people; however, the widespread usage of *cy-près* removes this redistribution towards vulnerable people—effectively obviating the 'socialistic' facet and remodeling class actions as 'capitalistic' vehicles for entrepreneurial actors.

As we have observed, the development of environmental class actions in Ontario has privileged private property rights over other types of harms, notably health-impairment claims. This privileging has occurred for several reasons, including scientific uncertainty, toxic knowledge production, toxic causation requirements, and broader procedural problems that occur at the certification stage. In light of these exclusionary dynamics, environmental health class actions continue to flounder in Ontario. As a policy instrument in a private enforcement regime, this floundering is indicative of a regulatory enforcement gap that must be addressed with greater public enforcement, as well as stronger environmental regulations, including comprehensive adoption of the Precautionary Principle in environmental governance frameworks. Ultimately, the bleak reality of multilayer access to justice in environmental health-impairment points towards the limitations in the type of *ex post facto* justice that is achieved or achievable in Ontario's class action regime. Given this situation, increased efforts should be undertaken to promote preventative measures, which aligns with Fourth Wave conceptualizations of access to justice. A fence at the top of the cliff is certainly preferable to an ambulance at the base, particularly when the ambulance does not address health-impairment. It goes without

[768] Martin Redish, "Rethinking the Theory of the Class Action: The Risks and Rewards of Capitalistic Socialism in the Litigation Process," *Emory Law Journal* 64 (2014): 113.

saying that these critical findings do not obviate the need for collective redress in the environmental context. Compensation for incurred harms remains a pillar of the Environmental Justice paradigm. Rather, this analysis can be viewed as a 'friendly' critique of class actions in the environmental context, recognizing their 'power potentials' as instruments of legal resistance and social protection against powerful adversaries, while striving to objectively document their shortcomings from an access to justice perspective. Certainly access to justice discourse and reforms have progressed beyond strictly legal channels to encompass non-legal avenues of justice-seeking; however, this does not diminish the importance of the former pathway. As this study has maintained throughout, there remains an important place for class actions as vehicles of collective redress in access to justice discourse and reforms moving forward.

A recurring theme in this project has been the dearth of empirical data, which extends across virtually every aspect of Ontario's regime. This can be conceptualized as an agnotological outcome in the passive production of ignorance. In the broader socio-political context, Janine Brodie has identified a problematic aspect of Canadian governance (particularly under Stephen Harper) as the "active production of ignorance" as evidenced by (for example) the cancellation of the mandatory long-form census.[769] This broadly refers to governing bodies *actively* operating to delimit the scope of available knowledge to the Canadian public. Employing this agnotological framing, it may be possible to describe situations in which such processes are not actively produced, but are rather outcomes of passivity in knowledge production. This would refer to critical areas in which governing

[769] Janine Brodie, "Social Literacy and Social Justice in Times of Crisis," Trudeau Foundation Lecture given on 30 May 2012 in London, Ontario. Available online: http://www.fondationtrudeau.ca/sites/default/files/u5/social_literacy_and_social_justice_in_times_of_crisis_janine_brodie.pdf.

bodies display reluctance to adequately collect information to construct knowledge bases. In this light, the systemic failures to collect empirical data on the basic functioning of Ontario's class action regime can be described as outcomes of the passive production of ignorance, particularly since demands for greater state intervention in empirical data collection have remained largely unheeded for several years.[770] Without such comprehensive data, evaluating multilayer access to justice in Ontario is practically impossible apart from ad hoc initiatives by independent researchers who do not possess sufficient resource capacities to comprehensively evaluate access to justice across the province or by NGOs engaging in curated research. The systemic unavailability of baseline empirical data relevant to evaluations of Ontario's class action regime is truly startling from an access to justice perspective. This systemic dearth must inform future empirical research moving forward. This has been a long-standing concern among justice stakeholders for many years. To raise the obvious questions: What type of state does not consider it a priority to gather basic information about the workings of its own civil justice system? What are the potentials for empirically-informed policies to bolster access to justice for vulnerable people when such data is unavailable to policy-makers and researchers?

This dearth of empirical data is particularly apparent in environmental claims. As we have seen, the assessment and management of chemical substances that pose a potential threat to human health and the natural environment are not comprehensively covered by

[770] See, e.g., Deborah Hensler, "Empirical and Theoretical Approaches to Measuring Access to Justice," in Jasminka Kalajdzic, ed., *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick and Rumley* (Toronto: LexisNexis, 2011). Michael Molavi, "Beyond the Courtroom: Access to Justice, Privatization, and the Future of Class Action Research," *Canadian Class Action Review* 10, no. 1-2 (2015): 8-31. The Law Commission of Ontario has recently undertaken a Class Action Project aimed at evaluating the *Class Proceedings Act*, although it has been placed on hold (at time of writing).

prevailing environmental governance frameworks in Canada. For example, a major framework is constituted by the *Canadian Environmental Protection Act* (CEPA) which is limited in scope: the assessment and evaluation of potentially harmful chemicals is limited to the testing of new chemicals that were introduced post-1988 into Canada (approximately 2,000 chemicals per year) without simultaneously testing the estimated 23,000 chemicals already in circulation. Although the *Chemical Management Plan* (2006) has sought to identify a subset of 1,550 high-priority chemicals for assessment, budgetary constraints of regulatory bodies and associated research institutes have precluded comprehensive assessment of roughly 20,000 chemicals currently in use in Canada. Such budgetary constraints are produced by prevailing fiscal policies with adverse impacts on social reproduction with gendered, racialized, and class-based dimensions. By declining to adequately research substances to which communities are exposed, the Canadian state effectively (re)privatizes social reproduction[771] by downloading the responsibilities for chemical consumption and toxic exposures to households largely through the promotion of 'precautionary consumption', a gendered practice operating as a form of "self-protection in response to insufficient regulatory protection"[772] that disproportionately burdens women and domestic workers.[773] Moreover, without sufficient extant research, Private Attorneys General are strongly disincentivized to pursue environmental class actions. In interviews undertaken for this project, not a single participant would consider an environmental

[771] Bakker pioneered the thesis of the "reprivatization of social reproduction." See, e.g., Isabella Bakker, "Neo-liberal Governance and the Reprivatization of Social Reproduction: Social Provisioning and Shifting Gender Orders," in ed., Bakker and Stephen Gill, *Power, Production and Social Reproduction* (New York: Palgrave Macmillan, 2003), 66-82.
[772] Scott et al, "The Production of Pollution and Consumption of Chemicals in Canada," 18.
[773] Norah MacKendrick, "Protecting Ourselves from Chemicals: A Study of Gender and Precautionary Consumption," in ed., Scott, *Our Chemical Selves: Gender, Toxics, and Environmental Health* (Vancouver: University of British Columbia Press, 2015), 58-77.

health-impairment claim without significant extant empirical research—the potential of independently undertaking such research was viewed as practically inconceivable. Simply put, the dearth of empirical data on environmental harms directly impacts the capacities of vulnerable people to pursue multilayer access to environmental justice.

Another recurring theme has been the insufficiency of state expenditures impacting public enforcement capacities, settlement preferences, civil justice budgeting, toxic knowledge production, and other critical areas for multilayer access to environmental justice. One of the most illuminating revelations about the origins of class actions in Ontario has been that the legal vehicle was introduced as part of a private enforcement regime, thereby alleviating financial pressures on insufficiently funded public agencies. The standpoint that increasing the budgets of such agencies to facilitate their proper functioning in regulatory enforcement is viewed as beyond the realm of possibility under neo-liberalism, or to borrow Richard Falk's terminology, beyond the "horizon of feasibility."[774] The budgetary constraints imposed by prevailing macro-economic policies—articulated through features such as balanced budgeting imperatives, deficit reduction, and regressive taxation schemes—are structured by the new constitutionalism of disciplinary neo-liberalism which constrains democratic controls over economic policy-making.[775] The 'locking in' of commitments to disciplinary neo-liberalism effectively delimits the bounds of political possibility for social and democratic expenditures. Although calls for increasing expenditures for access to justice are often dismissed as

[774] Richard Falk as quoted by Stephen Gill and A. Claire Cutler, "New Constitutionalism and World Order," 19.
[775] Isabella Bakker and Stephen Gill, eds., *Power, Production, and Social Reproduction* (New York: Palgrave Macmillan, 2003); Stephen Gill and Claire A. Cutler eds., *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2015).

idealistic, these budgetary constraints should not be accepted as presumptively legitimate, particularly when these negatively impact the capacities of vulnerable people to access justice. This does not suggest that access to justice can only be served through public means; as repeatedly observed, class actions are particularly well-suited as crucial instruments of social protection in cases where states are relcalcitrant to enforce or where 'regulatory capture' is a political reality.

The globalization of class actions in the early twenty-first century indicates that the various dynamics and developments examined in this project have potentially far-reaching implications. Despite the myriad shortcomings, class actions nevertheless constitute 'power potentials' as collectivist instruments of social protection. The mere availability of class actions can have the practical effect of deterring misconduct by powerful economic actors (which is one of the reasons why corporate interests have sought their retrenchment as part of de-democratization strategies). In the political economy of pollution, a *complementary* form of this collectivist resistance vehicle remains a pivotal (although independently insufficient) aspect of environmental justice-seeking.

At the same time, the *co-optative* role of class actions as policy instruments in the privatization of regulatory enforcement demands greater scrutiny. The global proliferation of private enforcement regimes concurrent with the globalization of class actions deepens the extent to which market forces impact the capacities of vulnerable people to socially reproduce. A private enforcement regime constitutes a structural reconfiguration of state forms, which indicates that contemporary processes of privatization extend beyond state assets and services to include the basic functioning of state agencies. Relatedly, the emergence of litigation finance indicates that the financialization of the political economy

in the current historical conjuncture extends to fundamental democratic institutions such as civil justice, exposing these to the dictates of financial capital. This latter development is a fertile field for research moving forward. To what extent has litigation finance promoted multilayer access to justice? What type of access and what type of justice, and for whom? What is the distribution across sectors? To what extent can litigation finance address access to justice problems beyond the class action context?

From a broader political economy perspective, the relationship between financialization and the political-ecological dimension of social reproduction is similarly unexplored at present. A recent pathway of analysis has been developed by Adrienne Roberts who expresses the relationship between everyday household capacities and global finance as the "financialization of social reproduction," which impairs sustainable conditions of social reproduction through the "financial expropriation" of households.[776] This focus on households can be expanded to include the environmental foundation upon which all reproduction rests, in light of Cindi Katz's seminal theorization of social reproduction which explicitly identifies the importance of the political-ecological dimension. Targeted environmental racism that focuses on vulnerable communities who cannot access justice against such encroachments and the ways in which financialization reinforces the disadvantaging of such environmental claims, particularly health-impairment claims, are underexplored areas of future research. In Canada, this type of environmental racism has disproportionately impacted Indigenous peoples—a vulnerable

[776] Adrienne Roberts, "Household Debt and the Financialization of Social Reproduction: Theorizing the UK Housing and Hunger Crises," in ed., Susanne Soederberg, *Risking Capitalism (Research in Political Economy, Vol. 31)* (Bingley: Emerald Group Publishing, 2016), 135-164; see also, Gerald A. Epstein, ed., *Financialization and the World Economy* (Northampton: Edward Elgar Publishing, 2005).

subset of the population with historically negative experiences with the Canadian state resulting in differential legal consciousness, lower legal empowerment, and mistrust of the justice system. A 'bottom-up' analysis based in the specific social context of Indigenous struggles to access justice in environmental matters could be a beneficial contribution to the broader research topic of multilayer access to environmental justice. The increasing role of financial capital in mediating everyday life and relations of social reproduction demands greater attention, as well as the transformation of pensions, mortgages, student debts, auto loans, even justiciable problems and mass litigation into investment products, with pervasive social impacts, including increased inequality along familiar social gradients of gender, race, class, and ability. Such political economy analyses can provide greater contextual breadth by speaking to the heart of the progressive critique of class actions, namely, that collective harms are being capitalized by entrepreneurial actors with minimal benefits to the former and significant benefits to the latter.

Throughout this project, several areas of potential reform have been identified as worthwhile to examine further. These include the potential abolishment of the English Rule ('loser pays') for class actions to mitigate the risk exposures that negatively impact the access to justice benefits of class actions and the inclusion of an amicus curiae during settlement approval hearings to address the adversarial void, as well as broader reforms that address the significant knowledge gaps in both class actions and the environmental context. These reforms may contribute to improving the bleak reality of environmental class actions in the future. For now, it is difficult to envisage significant change to the present functioning of Ontario's class action regime for environmental claims. It goes without saying that this project has focused on environmental claims and its conclusions

do not necessarily extend to other sectors of Ontario's regime (notwithstanding the fact that some of the reforms affect all class actions). In light of the global proliferation of class actions, the concerns raised about the shortcomings of environmental claims warrant consideration in jurisdictions that seek to mobilize class actions as policy instruments in the privatization of enforcement. Although class actions as crucial instruments of social protection should likely be welcome legal transplants in jurisdictions around the world that do not already possess collective redress mechanisms, sector-by-sector analyses may be necessary to be able to determine their potential strengths and weaknesses in different contexts.

Through a critical policy analysis, this project has identified and contextualized the limitations of class actions in the political economy of pollution. In so doing, I have sought to provide greater clarity about the type of environmental justice that is presently achieved and achievable in Ontario's regime by exploring the relevant exclusionary dynamics. This explication of the limitations of class actions may serve to inform the tactical usages of this instrument of social protection. Notably, it must be recognized that social relations and problems cannot be diverted into strictly legalistic channels pursuant to the juridification of politics and class actions cannot replace broader collective action; rather, class actions constitute an available legal recourse for such action. The myriad limitations of environmental class actions that have been uncovered in this study testify to the validity of the multidimensional progression of access to justice in later discursive waves; that is to say, multilayer access to environmental justice must move beyond formal court procedures by incorporating both legal and non-legal pathways to justice. As such, class actions are pivotal (but not independently sufficient) facets of social protective programs. If nothing

else, this project has documented the inadequacy of *overreliance* on legal vehicles such as class actions for the pursuit of social objectives. As we have observed, the nascent history of class actions in Ontario (and Canada, more broadly) has restricted the range of available empirical data for critical analyses. It is my hope that the forerunning status of this study on multilayer access to environmental justice has contributed to addressing this knowledge gap moving forward.

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APPENDIX A: INTERVIEW PROCESS & METHOD

The principal objective of the data collected during the interview process has been as a primary source that informs the interpretative analysis of this project by guiding thematic selection, structuring the analysis, and contributing to greater comprehension of complex topics, rather than assuming a central status through usage of direct quotations or representational paraphrases. This holistic project has included this form of data collection as one form among others, including purposive case study analysis, archival research, theoretical and empirical texts bearing on the substance of the topic, governmental and non-governmental reports, and relevant jurisprudence.

Interviews with 21 class and defense attorneys were conducted from April 2015 to March 2016. This time period includes the completion of action research cycles and member checks for maximum accuracy and transferability of collected data. It was my determination that a data saturation point was achieved with this number of qualitative participants with strong factual confluence. This is within the parameters of the typical point of saturation beyond which qualitative data collection yields 'diminishing returns', with some investigations yielding such points much earlier, depending on the type of investigation.[777] The confidential interviews ranged from 15 minutes to 2.5 hours with a median length of 30 minutes. I originally sought to conduct interviews in person, but given participant time constraints and work schedules, 11 interviews were conducted over

[777] See, e.g., Barbara DiCicco-Bloom and Benjamin F. Crabtree, "The Qualitative Research Interview," in *Medical Education*, Vol. 40, No. 4 (2006): 314-321; Greg Guest, Arwen Bunce, and Laura Johnson, "How many interviews are enough? An experiment with data saturation and variability," in *Fields Methods*, Vol. 18, No. 1 (2006): 59-82; Jane Ritchie and Jane Lewis, eds., *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (London: Sage Publications, 2003).

telephone and 10 were conducted in person. The distribution of participants was 14 class attorneys and 7 defense attorneys; 17 Ontario-based attorneys, 2 Quebec-based attorneys, and 2 British Columbia-based attorneys. A full list of participants identified by date of interview, province of employment, and class/defense categorization is included in Appendix B. Although interviews had conversational adaptability, interactions were guided by a series of predetermined themes and areas of focus permitting standardized yet open-ended interviews. A sample template of guide-based interview questions is provided in Appendix C (all questions are not applicable to both defense and class attorneys nor were all questions posed to all participants given time constraints). Initial participants were purposively selected based on experience, relevance, and availability, including this researcher's contacts formed over years of seminar and conference participation, with subsequent non-random participants recruited using a chain-referral sampling technique ('snowball sampling') which effectively expanded the breadth of participants and permitted greater access via introductions to previously inaccessible participants.

One of the strengths *and* weaknesses of this project has been its focus on class and defense attorneys as participants given their role as pivotal actors in Ontario's class action regime. This is particularly important in light of the reversed recruitment paradigm and the gatekeeping role played by class attorneys in facilitating multilayer access to environmental justice. Defense attorneys are also ideally situated to provide instructive and critical perspectives on the largely class attorney-driven nature of class actions. The selection of participants was undertaken on the basis that both class and defense attorney perspectives could contribute to a more holistic and multidimensional understanding of Ontario's class action regime. That said, given the resource constraints of a doctoral project

in terms of time and financial expenditures, as well as various logistical impediments in data collection on a mass scale, empirical data collection from past and present class members has not been included in this study. The exceedingly high number of class members involved in past and present actions requires extensive resource expenditures in order to satisfy basic methodological requirements. This knowledge gap is a promising area for future research. This could take multiple forms, including concentrated qualitative interviews of class members involved in a single case or a large-scale survey involving hundreds or thousands of class members encompassing multiple class actions. Similarly, this research could have been strengthened with the inclusion of judges as research participants. Although this inclusion was considered at the outset of this project, the inaccessibility of such participants was ultimately a prohibitive and deciding criterion for focusing exclusively on class and defense attorneys. This is also a fertile area of future research as the inclusion of the perspective of judges would improve the holistic nature of this analysis and contribute to a greater understanding of the issues facing justice-seekers in Ontario's class action regime.

Research Ethics

This project obtained research ethics approval in March 2015 by the Human Participants Review Sub-Committee of York University's Office of Research Ethics with full compliance with the Tri-Council Policy Statement on *Research Involving Human Participants*. All collected data was encrypted and securely stored in an external hard drive locked in a filing cabinet in a locked office pursuant to the Data Security Guidelines of

York University's Human Participant Review Committee for Research Involving Human Participants. As per the Tri-Council Policy Statement and the conditions of approval for research ethics, all collected data maintains strict confidentiality, which includes my ethical duty as sole researcher to protect collected data from "access, use, disclosure, modification, loss or theft" by others in order to preserve "the integrity of the research project."[778] All participants were assured and instructed that their identities would not be disclosed to any individual apart from this researcher during any point of this project as part of their consent agreements for participation as interviewed subjects. After collection, data was de-identified and coded with numerical assignations. I have attempted to de-identify the collected data to ensure strict confidentiality, with full recognition that 'blanket anonymization' is often a practical impossibility as it pertains to 'indirectly identifying information'. Where such data is directly cited or paraphrased, I have sought to present it in a general and objective manner to prevent any such potential identification. I have also refrained from identifying research locations in this study to prevent site-based identification pursuant to the principles outlined in the Tri-Council Policy Statement on Research Involving Humans. The only extant pathway to research location identification may be the dates of certain interviews which coincide with notable dates in the calendars of class action practitioners and scholars in Canada. Where applicable, this was transparently relayed to participants prior to interviews. The non-vulnerable and legally competent status of participants (re: attorneys) contributed to the timely approval process—research ethics was sought in February 2015 and was obtained in March 2015.

[778] Tri-Council Policy Statement, *Ethical Conduct for Research Involving Humans* (2014): 58.

APPENDIX B: LIST OF INTERVIEWS

1. Class Attorney, Ontario Law Firm
   Date: 24 April 2015

2. Class Attorney, Ontario Law Firm
   Date: 24 April 2015

3. Class Attorney, Ontario Law Firm
   Date: 24 April 2015

4. Class Attorney, Quebec Law Firm
   Date: 24 April 2015

5. Class Attorney, Ontario Law Firm
   Date: 24 April 2015

6. Class Attorney, Ontario Law Firm
   Date: 25 April 2015

7. Class Attorney, Ontario Law Firm
   Date: 29 April 2015

8. Defense Attorney, Ontario Law Firm
   Date: 1 May 2015

9. Class Attorney, Ontario Law Firm
   Date: 6 May 2015

10. Defense Attorney, Ontario Law Firm
    Date: 17 May 2015

11. Defense Attorney, Ontario Law Firm
    Date: 17 May 2015

12. Defense Attorney, Ontario Law Firm
    Date: 17 May 2015

13. Class Attorney, Ontario Law Firm
    Date: 27 May 2015

14. Class Attorney, British Columbia Law Firm
    Date: 7 June 2015

15. Defense Attorney, British Columbia Law Firm
    Date: 7 June 2015

16. Class Attorney, Ontario Law Firm
    Date: 28 June 2015

17. Defense Attorney, Ontario Law Firm
    Date: 2 August 2015

18. Class Attorney, Ontario Law Firm
    Date: 29 August 2015

19. Class Attorney, Quebec Law Firm
    Date: 14 September 2015

20. Defense Attorney, Ontario Law Firm
    Date: 29 November 2015

21. Class Attorney, Ontario Law Firm
    Date: 13 March 2016

APPENDIX C: SAMPLE INTERVIEW QUESTIONS

1. How many years have you practiced class action litigation (in Ontario)?
2. How many actions have you represented/defended?
3. How are class proceedings initiated at your firm?
4. What are the case selection criteria you/your firm employ(s)?
5. Is there an order of priority among these criteria? If so, identify and explain.
6. Is there a minimum monetary threshold in case selection? If so, identify and explain.
7. Are there particular types of claims that are privileged over others? If so, identify and explain.
8. What types of actions are most commonly pursued?
9. What types of actions are least commonly pursued?
10. What is your experience with environmental claims?
11. In your experience, what are the merits and shortcomings of environmental claims?
12. What are the prospects for environmental claims?
13. What are the impediments to environmental claims?
14. Would you undertake independent empirical data collection for an environmental claim?
15. Would you represent an environmental claim in which independent empirical data collection is required?
16. What has been the impact of third party litigation financing (in Ontario)?
17. What has been the impact of public financing (re: Class Proceedings Fund)?

18. Do you/does your firm indemnify representative plaintiffs?
19. Do you agree with the application of the English Rule in class actions?
20. What are the merits and shortcomings of private enforcement?
21. Is the "Private Attorney General" a viable concept?
22. What is your view on "entrepreneurial litigation"?
23. How would you define "access to justice"?
24. To what extent have class actions fulfilled their originary promise of increasing access to justice?
25. Who are the primary beneficiaries of class actions?
26. How do you respond to the critique of the misalignment of economic incentives between class members and class counsel?
27. How effective have objectors been at settlement approval hearings?
28. How do you view the adversarial void at the settlement stage?
29. Should an *amicus curiae* be appointed? If so, how should this be funded?
30. What are the take-up rates in actions you have been involved with?
31. Should merits be considered at the certification stage?
32. Are class actions collectivist vehicles and/or aggregative vehicles?
33. What is the future trajectory for Ontario's class action regime?
34. Is a secondary market for litigation financing inevitable? Explain.
35. How does litigation financing impact multilayer access to justice?
36. Do you have any proposed reforms to improve multilayer access to justice?
37. How would you describe Ontario's class action regime?