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The Cultural Analysis of Class Action Law

Catherine Piché

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THE CULTURAL ANALYSIS OF CLASS ACTION LAW

Catherine Piché*

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I. INTRODUCTION

In April 2008, the Québec Court of Appeal in *Hocking c. Haziza*¹ refused to recognize and enforce an Ontario Court judgment because it disagreed with how the Ontario judge decided the case, and found the judgment to be incompatible with fundamental principles of Québec law.² By this ruling, the Court implicitly sought to change not just class action culture, but legal

1. *Hocking c. Haziza*, (2008), QCCA 800 (CanLII). This class action arose from a motion for certification filed by Robert Hocking against HSBC Bank on behalf of all Canadian customers of HSBC who had made an early pay-out of their mortgage and consequently incurred a penalty. David Haziza, a Québec resident, filed a similar motion in Québec, limiting the class to Québec residents only. The Ontario Court approved the class action for settlement purposes a few months later. Accordingly, the Ontario decision at stake was an order certifying a multi-jurisdictional class action for settlement purposes. The Québec Superior Court concluded that the Ontario Court had no jurisdiction over class members residing in Québec. In her reasons upholding the Superior Court decision, the Court of Appeal stated that the Ontario Court had no right to get involved in defining the rights and liabilities of residents of another province, and that the territorial limits on the scope of provincial legislative authority prevented the application of the law of a province to matters that were not sufficiently connected to it. The Court of Appeal held that the Ontario judgment failed to meet the requirements of the CIVIL CODE OF QUÉBEC for recognition and enforcement of personal actions of a patrimonial nature. Interestingly, it concluded that the Ontario judgment was rendered in violation of the essential principles that govern civil proceedings in Québec since the interests of the non-resident class members were not taken into consideration by the Court, and the adequate notice requirements regarding the proposed settlement were not met.

2. *Id.* at ¶. 223 et seq. (“ . . . je suis également d'avis que le jugement ontarien, en l'espèce, a été rendu en violation des principes essentiels de la procédure, au sens de l'article 3155, paragr. 3, C.C.Q., en ce que la juge saisie du recours collectif et, au même moment, de la ratification d'un règlement amiable, n'a pas examiné la question de savoir ce qu'il en était des intérêts des non-résidents (dont les Québécois) visés par le recours, de la protection de leurs intérêts et de sa propre compétence sur ces justiciables.”).

norms applicable in that area of law. Indeed, it recognized the importance of protecting class action members' rights by notifying them appropriately about proposed settlements through extensive notice requirements.³ Accordingly, *Hocking* illustrates how one Canadian province's legal culture influences class action law developments and how class actions and their applicable law can, reciprocally, influence and affect culture.

In this paper, I will first review the different theories of law and culture, and define the concept and breadth of legal culture. Second, I will discuss the relationship between law and culture, referring to the existing literature on the subject. I will also discuss how authors have connected culture to civil procedure, and why the concept of "modern legal culture" is important in the context of class action law. Third, I will address the main thesis of my paper: the cultural construction of class action law. I will argue that the class action encourages the transmission of culture, and discuss how the history of the North American class action was influenced by culture. I will thereafter argue that the class action mirrors society's structure and culture, in light of the following three characteristics of North American contemporary culture: access to justice, managerial judging and the preference for settlements. Fourth, I will argue that class actions affect North American legal culture, as evidenced by changes in the legal institutions, in the role of judges and in the legal profession. Last, I will argue that the cross-constitutive relationship between class action law and culture must be studied both theoretically and empirically.

Ultimately, I will demonstrate that the class action is a disputing institution that is culturally constructed, that plays a role in the construction and transmission of culture—that is, of social arrangements, systems of beliefs and values. This project is ambitious, but distinctive as no author has to my knowledge related class action law to culture in such a way.⁴

3. *Id.* at ¶228 et seq.

4. *But see*, Steven Penney, *Mass Torts, Mass Culture: Canadian Mass Tort Law and Hollywood Narrative Film*, 30 *QUEEN'S L.J.* 205 (2004) (where the author argues that Canadian mass tort law may be influenced by American popular culture, and in particular by Hollywood films) and Carole Younes, *Le recours collectif québécois: les réalités collectives à travers le prisme du droit*, 15 *R.C.D.S.* 111,130 (2000). Many authors, however, have examined the relationship between civil procedure law and culture. *See*, notably, Daniel Jutras, *Culture et droit processuel: Le cas du Québec* (2008) (unpublished, on file with

II. THE THEORIES OF CULTURE

A. *Cultivating Law*

Culture is important to our understanding of legal systems. But what exactly do we mean by “culture?” It is a vague, “amorphous and diffuse”⁵ concept that can include both a local culture—such as the *Québécois* culture, for instance—and a more global one—such as the North American culture. Moreover, it occasionally is compared to or confused with the concepts of tradition⁶ and civilization.⁷

In fact, the word “culture” originates from the Latin *cultura*, stemming from *colere*, which means “to cultivate.”⁸ The dictionary defines culture as “[t]he distinctive ideas, customs, social behaviour, products, or way of life of a particular society,

author); ANTOINE GARAPON & IOANNIS PAPADOPOULOS, *JUGER EN AMÉRIQUE ET EN FRANCE* (Éditions Odile Jacob 2003); ANTOINE GARAPON, *BIEN JUGER—ESSAI SUR LE RITUAL JUDICIAIRE* (Éditions Odile Jacob 2001); Mauro Cappelletti, *Social and Political Aspects of Civil Procedure—Reforms and Trends in Western and Eastern Europe*, 69 MICH. L. REV. 847 (1971). Finally, Professor Francisco Valdes of the University of Miami School of Law has recently written about class actions and social justice in his article entitled, *Procedure, Policy and Power: Class Actions and Social Justice in Historical and Comparative Perspective*, 24 GA. ST. U. L. REV. 627 (2008) (where Professor Valdes concludes that “consideration of bedrock social and legal values . . . can help point the way toward a systemic, principled solution to basic questions of power, policy, and procedure associated with class action controversies.”) Valdes’ focus, however, is different from mine, as he principally seeks to explore why the class action has moved from a “venerable fixture of procedure” to a device increasingly under attack.

5. Rodney MacDonald, *Civil Justice Reform Working Group*, Discussion Paper presented at the Civil Justice Reform Working Group, February 23, 2005, BRITISH COLUMBIA JUSTICE REVIEW, available at http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_paper_02_23_05.pdf (last visited September 26, 2009).

6. H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 3 et seq. (3d ed. 2007). Glenn defines tradition as principally including the transmission of information.

7. Loïc Cadiet, *Droit et culture*, Journées Louisianaises, Association Henri Capitant 2008, at 3.

8. DOUGLAS HARPER, *ONLINE ETYMOLOGY DICTIONARY*, 2001 (“Culture”), available at <http://www.etymonline.com/index.php?term=culture> (last visited August 21, 2009).

people, or period.”⁹ The UNESCO refers to culture “as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and . . . to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”¹⁰

When we think of *legal* culture, we generally refer not so much to rituals, systems of belief and habit, language and religion, but to norms of behaviour such as law and morality. Accordingly, law is no doubt part of a given society’s culture. And, as will be argued in this paper, this given society’s culture explains, creates, and is influenced by its legal system.

Legal academics have acknowledged that the definition of legal culture is flexible, and may vary depending on the purpose of the one defining it.¹¹ Lawrence Friedman, for instance, has defined legal culture as the:

. . . [I]deas, values, attitudes, and opinions people in some society hold, with regard to law and the legal system. Every person has a ‘legal culture,’ just as every person has a general culture, and a social culture; every person has individual, unique traits, as distinctive as his or her fingerprints; but each person is at the same time part of a collective, a group, a social entity, and shares in the ideas and habits of that group.

Legal culture *is the source of law*—its norms create the legal norms; and it is what determines the impact of legal norms on society. After all the ‘subjects’ of law, the people it affects, are not robots or inert lumps of clay; they are living human beings, with thoughts, ideas, minds, habits,

9. OXFORD ENGLISH DICTIONARY 2008, s.v. “culture.” Also see the COLLINS ENGLISH DICTIONARY AND THESAURUS 2008, s.v. “culture:” “the total of the inherited ideas, beliefs, values, and knowledge, which constitute the shared bases of social action,” or “the total range of activities and ideas of a group of people with shared traditions, which are transmitted and reinforced by members of the group.”

10. PREAMBLE TO THE UNESCO UNIVERSAL DECLARATION ON CULTURAL DIVERSITY (2001), *available at* <http://unesdoc.unesco.org/images/0012/001271/127160m.pdf> (last visited September 26, 2009).

11. OSCAR G. CHASE, LAW, CULTURE AND RITUAL 7 (2005) (noting that the definition of culture depends on its purposes); David Nelken, *Disclosing/Invoking Legal Culture: An Introduction*, 4 SOC. & LEGAL STUD. 435, 438 (1995).

behaviours; *they react to orders and institutions of laws, and their reactions determine the effect of these orders and institutions. . . .*

Legal culture is a *broad term for attitudes and opinions*; the phenomenon shows up in the literature sometimes as ‘*legal consciousness*’ . . . , or as *knowledge and opinion about law* . . . We can measure [legal culture] directly, by asking people questions; or indirectly, by watching what people do and inferring their attitudes from what we see. . . .¹²
[emphasis added]

Oscar Chase similarly defines culture as including: “the ‘traditional ideas, values and norms’ that are widely shared in a social group,” as well as “propositions of belief that are both normative (‘killing is wrong except when authorized by the state’) and cognitive (‘the earth is round’).”¹³ On whether culture should include the institutions and social arrangements that are specific to a community, Chase argues that “[d]isputing institutions are at once a product of, a contributor to, and an aspect of culture.”¹⁴ Hence, for Chase, dispute resolution institutions both *result from* culture and *influence or affect* culture.

Generally, academics have noted the difficulty of defining the concept of legal culture, as well as its specific scope and the relationship between each of its relevant elements.¹⁵ Roger Cotterrell, notably, has stated that, “[t]he imprecision of the [various formulations of legal culture] makes it hard to see what

12. Lawrence M. Friedman, *Is There a Modern Legal Culture?*, 7:2 *RATIO JURIS* 117, 118-119 (1994).

13. CHASE, *supra* note 11, at 6, who quotes MELFORD E. SPIRO, *CULTURE AND HUMAN NATURE* viii, 32 (1994). *See also* Oscar G. Chase, *Legal Processes and National Culture*, 5 *CARDOZO J. INT’L & COMP. L.* 1, 9 (1997) (“. . . the culture of a community of people includes those beliefs about how to properly relate to each other that are deeply held, widely shared, and persistent over time.”).

14. CHASE, *supra* note 11, at 7.

15. ROGER COTTERRELL, *LAW, CULTURE AND SOCIETY—LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY* 83 (Ashgate Publishing Ltd. 2006). *See also* GARAPON & PAPADOPOULOS, *supra* note 4, at 17 et seq.; and generally: *DICIONNAIRE DE LA CULTURE JURIDIQUE* (Denis Alland & Stéphanie Rials eds., 2003).

exactly the concept covers and what the relationship is between the various elements said to be included within its scope.”¹⁶

B. The Breadth of Legal Culture

Accordingly, one major obstacle to working with the concept of legal culture is agreeing on exactly what it encompasses, and on where its limits should be drawn. What is the most relevant social unit to legal culture? Exactly *which* legal culture should be focused upon? Indeed, as Friedman remarked, “one can speak of legal culture at many levels of abstraction.”¹⁷

North American legal culture includes the legal norms generated by the two major prevalent systems of justice—the civil law, applicable in the province of Québec and in the State of Louisiana and U.S. territory of Puerto Rico, and the common law, applicable in the rest of Canada and in the rest of the U.S. It also includes elements of the inquisitorial and adversarial systems, specific to the civil and common law traditions.¹⁸ Moreover, it incorporates countless ideas, values and norms derived from provincial, state, territorial, and local (city) or regional legal activity.

Is ascertaining national culture and distinguishing it from the more global or international culture necessary and relevant to the study of law?¹⁹ And if it is, what exactly must be included in national or local culture? For instance, how specific to *Québécois* culture is a particular cultural trait that also exists at the North

16. COTTERREL, *supra* note 15, at 83.

17. LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 204 (1975); *cf.* Friedman, *supra* note 12, at 120.

18. Since Québec has adopted most aspects of the adversarial system regarding its civil litigation procedures and its class action procedure, this latter issue is less critical to my study, however. *See, e.g.*, W.A. Bogart et al., *Class Actions in Canada: A National Procedure in a Multi-Jurisdictional Society?* (2007), Report prepared for The Globalization of Class Actions Conference, Oxford University, December 2007, at 1, available at: http://www.law.stanford.edu/display/images/dynamic/events_media/Canada_National_Report.pdf (last visited September 26, 2009). *See also*, Jutras, *supra* note 4, at 3, citing JEAN-MAURICE BRISSON, LA FORMATION D’UN DROIT MIXTE : L’ÉVOLUTION DE LA PROCÉDURE CIVILE DE 1774 À 1867 (Thémis 1986).

19. *See, e.g.*, John D. Jackson, *Playing the Culture Card in Resisting Cross-Jurisdictional Transplants: A Comment on “Legal Processes and National Culture”*, 5 CARDOZO J. INT’L & COMP. L. 51, 52-53 (1997).

American level? While each nation has a legal culture,²⁰ there exists both “a convergence and divergence of cultures” which “[pulls] against the concept of national culture.”²¹ In Canada, for example, there is both a convergence of provincial cultures, evidenced by the legislative uniformity in some areas of the law,²² and a divergence of cultures, evidenced by the specificity of certain provincial legal systems.²³ This duality makes Canadian legal culture hard to define. Another difficulty with the concept of national legal culture is the fact that there is a plurality of legal cultures, as complex as the society it is associated with.²⁴

Setting aside these difficulties, I will, in this paper, refer to culture as including the ideas, values and norms conveyed by the American and Canadian societies and their state institutions. I will argue that their culture influences the development of the class action (as a disputing institution) and is influenced by it. When feasible and relevant, I will also nuance national legal culture and provincial or state legal culture—distinguishing civil law culture from the common law culture.

III. THE RELATIONSHIP BETWEEN LAW AND CULTURE

A. *Is there a “Modern Legal Culture”?*

Law must reflect the currently accepted values, customs and habits of society to be deemed appropriate, acceptable, and legitimate, and to be obeyed by its citizens.²⁵ It must adapt to social and cultural changes, and must evolve and be reformed to reflect the contemporary, *modern* legal culture. Princeton

20. FRIEDMAN, *supra* note 17, at 209.

21. Jackson, *supra* note 19, at 57.

22. See, e.g., Uniform Law Conference of Canada Website, *available at* <http://www.ulcc.ca/en/home/> (and in particular, list of uniform legislation) (last visited September 26, 2009).

23. See, notably, the CIVIL CODE OF QUÉBEC, (S.Q., 1991, c. 64.) [“C.C.Q.”], which codifies the civil law in the province of Québec.

24. LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* 96, 213 (Harvard University Press 1990).

25. On this point, see: Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25:4 *LAW & SOC. INQUIRY* 983 (2006).

anthropology professor Lawrence Rosen has argued that law is inherent to culture, and culture to law:

Law is [a] cultural [domain]. Like the marketplace or the house of worship, the arrangement of space or the designation of familial roles, law may possess a distinctive history, terminology, and personnel. But even where specialization is intense, law does not exist in isolation. *To understand how a culture is put together and operates, therefore, one cannot fail to consider law; to consider law, one cannot fail to see it as part of culture.*²⁶ [emphasis added]

Most Western legal theorists interested in legal culture have presumed that law takes its source in society's culture, that it is a "mirror" of society that operates to maintain social order.²⁷ This so-called "mirror theory" provides that "[l]egal systems do not float in some cultural void, free of space and time and social context; necessarily, they reflect what is happening in their own societies. In the long run, they assume the shape of these societies, like a glove that molds itself to the shape of a person's hand."²⁸

The mirror theory has been challenged, however, notably by Alan Watson and his legal transplants theory.²⁹ According to Watson, the laws of one society are primarily borrowed from other societies; these laws are developed by transplantation of legal rules between legal systems, or by elaboration and application of existing legal ideas to other systems by analogy to new circumstances.³⁰ Hence, Watson essentially argues that law is insulated or autonomous from its society. Watson's theory was criticized by Otto Kahn-Freund, who argued that law is so deeply

26. LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION* 4-5 (Princeton University Press 2006). Rosen ends his book by stating that "as a marvelous entry to the study of that most central of human features, culture itself, and hence an open invitation, whatever one's ultimate interests, to think about what and who we are." *Id.* at 200.

27. BRIAN Z. TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* (Oxford University Press 2001).

28. Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 *STAN. J. INT'L L.* 65 (1996).

29. *See, e.g.*, ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed., University of Georgia Press 1993).

30. *Id.*

embedded in a society's life that it is not possible to effect a legal transplantation.³¹

Studying legal culture is crucial to a better understanding of law and of our legal institutions.³² Indeed, cultural context explains why certain legislative choices are made. It also helps interpret laws and regulations, and justifies precedent. Legal culture determines “when, why and where people use law, legal institutions, or legal process; and [why] they use other institutions or do nothing.”³³ It is essential to understanding how law works, and hence, crucial to the development of law reform:

. . . law reform is doomed to failure if it does not take legal culture into account . . . legal systems are products of society—more specifically, of legal culture; hence reform is a subtle and complex task. One has to take into account the *limits* imposed by culture; one has to re-examine whether the ‘failures’ of law are real failures, or whether we are neglecting to cut with instead of against the grain.³⁴

If a given society's values, ideas, and norms change, its legal system will also change. But is it merely law that moulds itself to culture, or can culture also mould itself and be influenced by law? There is most certainly a reciprocal influence between class action law and culture. Since culture is important to law and law to culture, and since culture evolves through time and place, there *is* such a thing as a *modern* legal culture or “legal culture of modernity.”³⁵ In this paper, I will focus on the *modern* cultural construction of legality, referring to legal developments and activity from the last few decades in North America.

31. Otto Kahn-Freund, *On Use and Misuse of Comparative Law*, 37 MOD. L. REV. 1 (1974). See also, Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 12 (1998).

32. Roger Cotterrell, *Law in Culture*, 17:1 RATIO JURIS 1 (2004) (arguing for the use of a “sociologically-informed concept of community” in legal theory); PAUL W. KAHN, *THE CULTURAL STUDY OF LAW* (University of Chicago Press 1999); Friedman, *supra* note 12, at 130.

33. LAWRENCE M. FRIEDMAN, *LAW AND SOCIETY: AN INTRODUCTION* 76 (Prentice Hall 1977).

34. *Id.* at 130.

35. *Id.* at 120.

B. Culture and Civil Procedure

Civil procedure is culturally constructed. Civil procedure law and its disputing institutions contain elements of tradition, common values and ideas that are attributable to identifiable cultures. Legal academics have demonstrated an interest in this relationship since the turn of the twentieth century. Austrian proceduralist Franz Klein argued in 1901, that “the squalid, arid, neglected phenomenon of civil procedure is . . . strictly connected with the great intellectual movements of peoples; and that its varied manifestations are among the most important documents of mankind’s culture.”³⁶

Decades later, in the early 1970’s, Mauro Cappelletti published a seminal article discussing the relationship between culture and civil procedure.³⁷ In it, he reflected on the intellectual and socio-political background of European civil procedure reforms, and underlined the importance for proceduralists of a cultural study of law.³⁸ A few years later, William Felstiner also wrote about the influences of social organization on dispute processing, and argued that dispute processing practices are a product of society’s “values, its psychological imperatives, its history and its economic, political

36. As quoted by Cappelletti, *supra* note 4, at 886.

37. *Id.* See also Mauro Cappelletti, *Vindicating the Public Interest Through the Courts: A Comparativist’s Contribution*, 25 *BUFF. L. REV.* 643 (1975); Mauro Cappelletti, *La protection d’intérêts collectifs et le groupe dans le procès civil*, 27 *R.I.D.C.* 571 (1975); Richard L. Abel, *A Comparative Theory of Dispute Institutions in Society*, *LAW & SOC’Y. REV.* 217 (1974). Cappelletti also later wrote a treatise, MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* (OUP 1989), in which he argued in favour of a “world-wide metamorphosis of the judicial process [in which] new types of procedures, and indeed new roles and responsibilities for judges, have emerged.” *Id.* at xx. This has meant, according to Cappelletti, that “procedural analysis must become ‘contextual’ analysis, for rules, institutions, and processes must be seen in their societal and political contexts.” *Id.*

38. Cappelletti, *supra* note 4, at 886 (“Procedure is *not* pure form. It is the meeting point of conflicts, of policies, of ideas . . . Procedure is, in fact, the faithful mirror of all of the major exigencies, problems and trials of our epoch—of the immense challenge of our time.”). Antoine Garapon also wrote about law’s relationship to culture in: GARAPON, *supra* note 4, at 149 (“la procédure est le conservatoire de l’esprit national, plus encore que le fond du droit.”); GARAPON & PAPADOPOULOS, *supra* note 4, at 17-37.

and social organization.”³⁹ In his important book entitled *The Faces of Justice and State Authority*,⁴⁰ Mirjan Damaška similarly argued that procedural systems reflect the “structure of government” and the “purpose to be served by the administration of justice.”⁴¹

In his recently published book on law and culture—*Law, Culture and Ritual*⁴²—Oscar Chase similarly argues that society’s choice of dispute resolution procedures results from the choices it makes according to its social structure, tradition and collective beliefs, according to its culture:

Dispute processes are in large part *a reflection of the culture* in which they are embedded; they are not an autonomous system that is predominantly the product of insulated specialists and experts. More, they are *institutions through which social and cultural life is maintained, challenged, and altered*, or as the same idea has been expressed, ‘*constituted*’ or ‘*constructed*.’ These institutional practices importantly influence a society and its culture—its values, metaphysics, social hierarchies and symbols—even as those practices themselves reflect the society around them.⁴³ [emphasis added]

Using the example of the Azande Society living in Central Africa, Chase argues that ways of resolving disputes both *reflect* the cultures in which they arose and *affect* these cultures. He argues that the Azandes’ belief system of witchcraft, oracles, and magic used in their dispute resolution practices is reflective of the main features of the Azande Society. In his view, the Azande

39. William L. F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC’Y REV. 63 (1974).

40. MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (Yale University Press 1986).

41. *Id.* at 1-15. See also, Mirjan R. Damaška *Rational and Irrational Proof Revisited*, 5 CARDOZO J. INT’L & COMP. L. 25 (1997).

42. CHASE, *supra* note 11. See also, on the relationship between law and culture: Oscar G. Chase, *American ‘Exceptionalism’ and Comparative Procedure*, 50 AM. J. COMP. L. 277 (2002); Chase, *supra* note 13; Oscar G. Chase, *Some Observations on the Cultural Dimension in Civil Procedure Reform*, 45 AM. J. COMP. L. 861 (1997).

43. CHASE, *supra* note 11, at 2.

disputing institutions and practices mirror the hierarchical and gender-biased nature of Azande culture.⁴⁴ He explains that:

[t]he processes the Azande used for resolving their disputes were a link in a circular chain from belief to authority to action and back to belief: the central role of the oracle as a fact finder supported their system of social stratification, their ideas about appropriate gender relations, and their metaphysics. This is the ‘lesson’ of the Azande.⁴⁵

In his book, Chase focuses on “official” outcome-determining processes, as opposed to settlement, which he characterizes as an “informal process.”⁴⁶ I, on the contrary, will discuss class action trial and judgment, as well as the class action’s most likely outcome: settlement. North American class action settlements are subject to court approval⁴⁷ and are, in my view, hardly “informal.”⁴⁸ Furthermore, class action litigation and settlement are equally important and relevant to culture. In a way similar to Chase’s main thesis, I will demonstrate the cultural construction of North American class actions as dispute resolution institutions.

IV. THE CULTURAL CONSTRUCTION OF CLASS ACTION LAW

A. The Class Action’s Nature Encourages the Transmission of Culture

The class action is a peculiar procedural mechanism that encourages, by its inherent structure and function, the communication of elements of culture. It is defined as:

. . . a legal procedure which enables the claims (or part of the claims) of a number of persons against the same

44. *Id.* at 22-29.

45. *Id.* at 29.

46. Chase justifies his choice as follows: “I focus on the ‘official’ outcome-determining processes precisely because their grounding in culture—and their constructive power—has been wrongly ignored or denied . . . Informal processes also reflect social hierarchy, norms, and metaphysics and no doubt capture different ingredients of culture than the formal processes . . .” *Id.* at 31.

47. *See, e.g.*, FED. R. CIV. P. 23(e)(1)(C), which establishes that a class action settlement must be “fair, reasonable, and adequate” to be approved judicially.

48. This procedure will be further discussed below, in IV.C.3.

defendant to be determined in the one suit. In a class action, one or more persons ('representative plaintiff') may sue on his or her own behalf and on behalf of a number of other persons ('the class') who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff ('common issues'). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcomes of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation.⁴⁹

This definition suggests a class action *structure* that is eminently *social*, in a way that encourages *sharing* elements of culture. Indeed, the class action involves several different actors: a class action representative, class action lawyers for the plaintiff(s) and defendant(s), class members, and one (or more) judge(s). These actors each have values, ideas, and beliefs they will implicitly or explicitly disclose during the course of informal discussions, argument, or judgment. In fact, each party will share not just its legal arguments and vision, but also, a set of norms. These norms will be apparent from the questions of law or fact shared by class members and the class representative. Ultimately, the judge will decide upon the values, ideas, beliefs, and norms that should be upheld.⁵⁰

49. RACHAEL MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS—A COMPARATIVE PERSPECTIVE* 3 (Hart Publishing 2004). *See also*, Harry Kalven Jr. & Maurice Rosenfeld, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

50. Many authors, however, have argued that class action litigation is dominated by class counsel: John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 896-900 (1987); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677-678 (1986); Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 NEB. L. REV. 646, 659-663 (1994). *See also*, Alon Klement, *Who Should Guard The Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV.

The class action was originally created—and later used—in England, as a result of the country’s social, economic, political structures, and relations “transition[ed] from feudal arrangements to a more mercantile framework.”⁵¹ Indeed, as University of Miami law Professor Francisco Valdes explains:

In the process of that macro-transition in English society, powerful institutions and actors, principally the clergy and the aristocracy, sought to exact from the local population—the commoners—the tithes and similar types of payments based on entrenched feudal traditions. The people resisted and the Lords, the powerful, and the clergy turned to the law. But of course, it was difficult, cumbersome, and expensive to go after every little amount due from every single little labourer or parishioner. So the powerful sought to go after the whole class of commoners who owed them something under the legal customs and traditional habits of feudalism. The courts permitted it, and thus established the foundations of the class action. . . .

The class action was invented to aid the powerful in maintaining the social and economic *status quo* vis-à-vis the disempowered.⁵²

Accordingly, the class action serves to allow several persons to take action as a group, changing individual disputes into group disputes, generating power relations,⁵³ and encouraging the *transmission* of culture. Indeed, it gives the class a chance to develop into “an independent force for change.”⁵⁴ This “force for

LITIG. 25, 27-28 (2002); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 41-44 (1991). Accordingly, the power of the class action would then be vehicled through class counsel’s arguments and actions.

51. Valdes, *supra* note 4, at 630.

52. *Id.*

53. STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* 1 (Yale University Press 1987) (“The very decision to recognize the claimants as a class—a temporary litigative entity—grants them a form of power.”).

54. Bryant G. Garth, *Power and Legal Artifice: The Federal Class Action*, 26:2 LAW & SOC’Y. REV. 237, 256 (1992). *See also*, Catherine Piché, *The*

change” will not only generate elements of culture, but it will allow for their communication and publication through precedent, and, when the class action invites publicity, the mass media.

B. The Modern History of the North American Class Action Evidences Close Ties with Culture

In this subsection, I will argue that each of the major stages of the more recent historical evolution of the North American class action evidences a close relationship with cultural developments in the U.S. and Canada.

The first stage of modern class action history begins with the birth of the modern-day class action in 1966, as Rule 23 of the U.S. *Federal Rules of Civil Procedure* was enacted.⁵⁵ Rule 23 was a significant milestone in the evolution of collective litigation because it provided guarantees of procedural fairness for defendants and absent class members, a system of notice to the latter class members, and opt-out procedures.⁵⁶ The motivations behind its enactment were varied. Certain legal scholars explained that its enactment responded to social and cultural upheavals of the 1960's:

. . . the race relations echo of that decade was always in the committee room. If there was [a] single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation. The one part of the rule which was never doubted was (b)(2) and without its high utility, in the spirit of the times, we might well have had no rule at all. The other factor is that 1964 was the apogee of the Great Society. President Johnson was elected with the most overwhelming vote ever, as of that time, achieved by anyone. A spirit of them versus us, of exploiters who must

Power of Class Actions, 2:1 CRITICAL ISSUES IN JUSTICE AND POLITICS 77 (2009).

55. See Catherine Piché, *supra* note 54, at 77.

56. H. Patrick Glenn, *The Dilemma of Class Action Reform*, 6 OXFORD J. LEGAL STUD. 262, 266 (1986).

not exploit the whole population, of a fairly simplistic good guy–bad guy outlook on the world, had its consequences.⁵⁷

Other legal scholars, such as Professor Judith Resnik, saw the new rule as having been enacted to respond to the legal community's desire to rid of the “confusing” tripartite class action classification as true, hybrid, or spurious.⁵⁸ While the Advisory Committee considered adopting a unitary standard of classification, it ultimately preserved the different forms of class actions.⁵⁹ For the first few years after its enactment, Rule 23 generated criticism and controversy, as companies' legal exposure grew and consumers became more litigious than ever with the availability of this new procedural tool.⁶⁰ Antitrust, consumer, environment, securities, and fair employment class actions were criticized, as they “resounded with Great Society concerns.”⁶¹

Whilst Americans abundantly criticized the class action device, the Canadian province of Québec sought, in 1978, to replicate Rule 23 by enacting class action legislation.⁶² Québec's legislation was

57. John P. Frank, “Response to 1996 Circulation of Proposed Rule 23 on Class Actions: Memorandum to My Friends on the Civil Rules Committee,” (December 20, 1996), in Administrative Office of the U.S. Courts, 2 *Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Rule 23*, 266 (1997), as cited in DEBORAH HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (RAND 2000), available at, http://www.rand.org/pubs/monograph_reports/MR969 (last visited September 26, 2009). See also, Valdes, *supra* note 4, at 640 (“ . . . the modern class action is an artifact of modernity itself, shaped by the forces of social, economic, and political modernization: the emergence and consolidation of “mass” societies.”).

58. Judith Resnik, *From ‘Cases’ To ‘Litigation’*, 54 LAW & CONTEMP. PROBS. 5, 8 (1991).

59. HENSLER ET AL., *supra* note 57, at n.16.

60. *Id.* at 15 et seq.

61. *Id.* at n. 36.

62. *Loi sur le recours collectif/An Act Respecting the Class Action*, LQ 1978, c. 8, enacting articles 999-1052, *Code of Civil Procedure*. For accounts of the history of the Canadian class action, see: Andrew Borrel, *The Evolving Evidentiary Standard for Certification in Canada*, 26:6 CLASS ACTION REPORTS 3 (2005); Garry D. Watson, *Class Actions: The Canadian Experience*, 11 DUKE COMP. & INT'L L. J. 269 (2001); W.A. Bogart, *Questioning Litigation's Role—Courts and Class Actions in Canada*, 62 IND. L. J. 665 (1986-87); Williams, *Consumer Class Actions in Canada—Some Proposals for Reform*, 13 OSGOODE HALL L. J. 1 (1975); John A. Kazanjian, *Class Actions in Canada*, 11 OSGOODE HALL L. J. 397 (1973).

a first in Canada. It contained extensive provisions addressing interlocutory rights of appeal, the forms of collective recovery, and the conduct of the lawsuit.⁶³ It also provided a preliminary screening of the case's merits—at the so-called “authorization” stage—and established a governmental agency for the distribution of public funds to potential class action representatives.⁶⁴

The advent of the class action in the Canadian province of Québec evidenced a similar concern for culture. The Québec legislation was enacted under the *Parti Québécois* government headed by René Lévesque, with policy objectives of promoting and favouring access to justice, and more efficiently enforcing social and remedial legislation. The legislation was a measure intended to advance a public interest agenda, along with labour reform and consumer protection statutes.⁶⁵ Member of the National Assembly Fernand Lalonde described it as advancing a “social purpose:”

On behalf of the Official Opposition, we are very satisfied with the tabling of Bill 39 respecting the class action. The bill has a *social purpose*, and is *destined to re-establish a balance between the isolated citizen and companies*, especially the enormous ones with which our society has become familiar. This bill will *provide the citizen with a tool destined to eliminate the imbalance which sometimes exists between the consumers and producers of goods . . .*⁶⁶ [emphasis added]

In the rest of Canada, class action reform followed in 1982, with the publication of the *Ontario Law Reform Commission Report on Class Actions*.⁶⁷ In this report, the Ontario Commission identified three objectives for future lawmakers to consider. First, class actions should ensure judicial economy, because without

63. Glenn, *supra* note 56, at 267. In Québec, interlocutory rights of appeal are limited.

64. *Id.* at 267.

65. Shaun Finn, *In a Class all its Own: The Advent of the Modern Class Action and its Changing Legal and Social Mission*, 2(2) CAN. CLASS ACTION REV. 333 (2005).

66. *Id.* at 352-353 (citing *Journal des débats, Troisième session-31ème Législature: audition des mémoires sur le projet de loi no. 39 (le 7 mars 1978) B-262*).

67. 1-3 ONTARIO LAW REFORM COMMISSION, REPORT ON CLASS ACTIONS (Ministry of the Attorney General 1982).

them, “most of [the] claims would be litigated individually, leading to duplicative and costly hearings, at least in situations where there are too many potential plaintiffs for joinder to be feasible.”⁶⁸ Second, class actions should facilitate access to justice. Third, class actions should enable behavioural modification or deterrence.⁶⁹ Ultimately, the Ontario Commission recommended that to meet these objectives, provinces adopt a class certification procedure similar to U.S. Rule 23.⁷⁰

The Report’s recommendations and statement of class action objectives is consistent with early legal culture. Indeed, the Canadian civil justice system is “premised on the maintenance of the rule of law, the independence of the judiciary and accessibility to the civil justice system.”⁷¹ It is a legal system that strives to remain not only accessible, but “effective, fair, and efficient.”⁷² The Ontario Report’s three class action objectives of access to justice, judicial economy and efficiency, and deterrence are consistent with the latter civil justice objectives and fundamental precepts of Canadian legal culture.

Another stage of Canadian class action history was marked by the 1983 Supreme Court of Canada decision in *Naken*.⁷³ This case slowed judicial acceptance and expansion of class actions, requiring that collective proceedings be filed only pursuant to properly enacted provincial legislation. By this judgment, the

68. *Id.* at 118-119.

69. *Id.* at 145-146 (“ . . . the potential of class actions to provide the incentives for increased compliance with the law, through the prevention of unjust enrichment or cost internalization, reinforces the ‘judicial economy’ and ‘access’ arguments in favour of the adoption of an expanded class action procedure in Ontario.”).

70. Bogart, *supra* note 62, at 692. What the Commission recommended, however, was that rather than a separate requirement that common questions predominate over the individual ones, courts consider predominance as just “one of the factors employed to gauge whether the class action is superior.” *Id.*

71. THE CANADIAN BAR ASSOCIATION, SYSTEMS OF CIVIL JUSTICE TASK FORCE REPORT 15 (August 1996).

72. *Id.* at 15, 26 (“These principles lie at the heart of civil justice and cannot be imperiled. The principles of equity and access are also central. The maxim ‘justice delayed is justice denied’ and assertions that ‘justice is only for the rich’ are warning signals. To avoid a dichotomy between ‘perfect’ justice and ‘accessible’ justice, we must recognize that there are different ways to achieve procedural fairness and incorporate this knowledge into our system.”).

73. *Naken v. General Motors of Canada* (1983), 144 D.L.R. (3d) 385 (S.C.C.).

Supreme Court responded to the then prevalent legal culture attributing a conservative role to the courts.⁷⁴ In the years following *Naken*, the class action device was profusely criticized, notably for being a “new form of the arrêt de règlement . . . and a ‘serious judicial usurpation of the functions of the legislature.’”⁷⁵ The enactment of the *Canadian Charter of Rights and Freedoms*,⁷⁶ however, gave more power to the courts, and brought hope that Canadian judges would be more receptive to class actions in the future.⁷⁷

In the mid-1990’s, a more enthusiastic stage of the modern North American class action history begun. In Canada, two provinces enacted class action legislation in response to a new social impetus favouring collective rights.⁷⁸ In the U.S., mass tort and personal injury class actions appeared in great numbers, as did settlement classes.⁷⁹ Despite their enthusiasm about the class action device, Americans also became mindful of its pitfalls. They grew concerned that it invited, notably, potential conflicts of

74. W.A. Bogart, *Naken, The Supreme Court and What Are Our Courts For?*, 9 CAN. BUS. L. J. 280 (1984).

75. H. Patrick Glenn, *Class Actions in Ontario and Quebec* 62:3 CAN. BAR REV. 247, 270-73 (1984). See also, H. Patrick Glenn, *Class Actions and the Theory of Tort and Delict*, 35 U. TORONTO L. J. 287 (1985) (arguing that class action is incompatible with tort and delict law); Glenn, *supra* note 56; Thomas Cromwell, *An Examination of the Ontario Law Reform Commission Report on Class Actions*, 15 OTTAWA L. REV. 587 (1983); W.A. Macdonald et al., *Ontario Class Action Reform: Business and Justice System Impacts—A Comment*, 9 CAN. BUS. L. J. 351 (1984). But see, Bogart, *supra* note 74, at 308 (“. . . I believe it is the class action . . . which will best answer the needs of group action at the end of the 20th century.”).

76. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.

77. Bogart et al., *supra* note 18, at 2-3.

78. Ontario Class Proceedings Act, 1992, S.O. 1992, c. 6 and British Columbia Class Proceedings Act, R.S.B.C. 1996, c. 50. See also, The Class Actions Act, S.S. 2001, c. C-12.01 (Saskatchewan); Class Actions Act, S.N.L. 2001, c. C-18.1 (Newfoundland and Labrador); Class Proceedings Act, S.A. 2003, c. C-16.6 (Alberta); Federal Court Rules, S.O.R./98-106 (Rules 334.1 et seq.). See also, The Class Proceedings Act, C.C.S.M. c. C130 (Manitoba). Today, class action procedures have been implemented by most Canadian provinces.

79. On this topic, see John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); and more generally, John C. Coffee, *Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000).

interest between plaintiff attorneys and class members, collusion between defendants and plaintiff attorneys, and unfair settlements which award lawyers thousands or millions of dollars in fees and the smallest amounts of money damages to plaintiffs. These concerns lead to a renewed interest in class action rule revision and civil justice reform.⁸⁰

At the end of the decade, the battle over the utility of class actions in the U.S. continued,⁸¹ reflecting in great part, a fundamental cultural divide between proponents of individual versus group rights.⁸² Indeed, “clashing views on the objective of Rule 23(b)(3) [were] at the heart of past and present controversy over revising the class action rule.”⁸³ Nevertheless, the policy behind the modern class action was confirmed by the Supreme Court as being to make “marketable” civil claims that otherwise would not realistically be brought on an individual basis.⁸⁴

The most recent stage of class action history begun in Canada, in early 2000, with a trilogy of class action Supreme Court cases.⁸⁵ In one of them, *Dutton*, the Supreme Court of Canada recognized the critical 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 . . . The class action offers a

80. HENSLER ET AL., *supra* note 57, at 22 et seq. Notably of interest is the 1995 *Castano* decision, in which a Louisiana district court certified a nationwide class action on behalf of smokers asking damages for addiction; *see* *Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995). *But see*, *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), which effectively overturned the trial court’s certification on interlocutory appeal.

81. HENSLER ET AL., *supra* note 57, at 35-37. *See also*, Proposed Amendments to the Federal Rules of Civil Procedure, 167 F.R.D. 523, 559 (1996).

82. HENSLER ET AL., *supra* note 57, at 49.

83. *Id.*

84. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

85. *Western Canadian Shopping Centres v. Dutton*, (2001) 2 S.C.R. 534, *Rumley v. British Columbia*, (2001) 3 S.C.R. 184 and *Hollick v. City of Toronto*, (2001) 3 S.C.R. 158.

means of efficiently resolving such disputes in a manner that is fair to all parties.⁸⁶

This favourable caselaw caused an increase in the number of class action filings in Canada, from 15 filings per year five years ago, to approximately 120-150 per year at present.⁸⁷ It also brought high certification rates throughout Canada. Between the years 2002 and 2007, approximately 57% of all cases were authorized in Québec, compared to, certification rates of 52%, 75% and 45% in Ontario, British Columbia, and in the Federal Court of Canada, respectively.⁸⁸

By comparison, U.S. controversy over the class action led to three major class action law reforms—the *Private Securities Litigation Reform Act* of 1995,⁸⁹ Rule 23 amendments of 2003,⁹⁰ and the *Class Action Fairness Act* of 2005,⁹¹ which sought to tighten procedural protections to prevent abuse of the class action mechanism. They also sought to regulate the selection of class counsel and limit their fees, encouraged interlocutory appeals, and limited settlement class actions and coupon settlements. These reforms were implemented in response to a high level of mistrust of lawyers—especially class action ones—and of collective procedural mechanisms.⁹² Indeed, the PSLRA was adopted to “go after the greatest abuse . . . lawyers who do not represent the

86. *Dutton*, at ¶ 26.

87. Bogart et al., *supra* note 18, at 16.

88. *Id.* at 25-26.

89. Pub. L. No. 104-67, 109 Stat. 737 (codified in 15 U.S.C.) (“PSLRA”). PSLRA raised the standard of pleading for securities lawsuits and changed the selection process of class representatives and class counsel.

90. FED. R. CIV. P. 23(c), (e), (g), (h) (as amended in 2003).

91. Pub. L. No. 109-2, 119 Stat. 4 (codified in 28 U.S.C.) (“CAFA”). CAFA significantly expanded federal subject matter jurisdiction over state law class actions. Indeed, it allows federal jurisdiction over class actions based on minimal diversity and an aggregate amount in controversy of five million dollars, and removal by any defendant, even an in-state defendant. *See, e.g.*, 28 U.S.C. § 1332 (d) (2), (6) (Supp. V. 2005) and § 1453 (b). The practical result of CAFA, accordingly, is to allow all large scale class actions to be filed or removed to federal court.

92. Howard M. Erichson, *Symposium: Fairness to Whom—Perspectives on the Class Action Fairness Act of 2005*, 156 U. PENN. L. REV. 1593, 1594 (2008).

general public but represent themselves.”⁹³ These reform efforts and steady concern for procedural abuse, however, have not affected the number of U.S. federal class action filings or removals, which have risen steadily over the last decade.⁹⁴

Accordingly, this most recent stage of class action history evidences, once more, a true concern for culture. Indeed, in our mass production, mass consumption economy, concerns for procedural and contractual fairness and for product safety are now adequately and efficiently addressed by collective redress for breaches in various areas of the law such as tort, consumer protection, or contract law.

C. The Class Action as a “Mirror of Societal Structure” and Culture

The class action was created in parallel to a decline in the individualist conceptions of trial and justice.⁹⁵ It is, and will likely remain, closely tied to its social and cultural setting.⁹⁶ W.A. Bogart argued a quarter of a century ago that the class action “[reflects] how society functions” and “[mirrors] societal

93. Statement to Congress of Senator d’Amato, quoted in Howard M. Erichson, *CAFA’s Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1603 (2008).

94. THOMAS E. WILLGING & EMERY G. LEE III, *THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: THIRD INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2* (2007). This Report explains that there was a 46% increase in federal court class actions filings or removals during six-month periods from mid-2001 through mid-2006.

95. Cappelletti, “La protection”, *supra* note 37, at 596.

96. See Yeazell, *supra* note 53, at 267 (“This chapter, like the entire study, argues that one cannot understand the nature of group litigation separate from the social setting that produces and the state that permits and regulates it.”); Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 895-896 (1977) (“... the interaction between group and law in the earliest reported instances of group litigation reminds us that the law’s position as a social artifact, and the courts’ function as agencies of social and economic control, preclude easy assumptions that formally similar procedural devices play similar roles in different social circumstances.”).

structure.”⁹⁷ He also argued that class actions respond to a collective vision of litigation because they:

. . . allow litigation to be brought in a form responsive to questions concerning the activities of entities whose conduct can scarcely avoid having mass ramifications. And seeing alleged wrongdoing by these aggregates in the light of the consequences for groups is vital in order to assess and to respond to such conduct. *To force litigation to be brought on an individual basis is to embrace a vision of the structure of society which—and in many important ways, regrettably—no longer exists. To force it into the traditional mold of litigation in the name of individualism may purport to celebrate formally the value of each one of us but, in reality, it prevents an effective means of confronting such aggregates with their capacity to pose a greater threat to that individuality.*

. . . [class actions] reflect a reality that sooner or later must be mirrored in litigation that affects so significantly the issues people bring to courts. Canada is a highly industrialized and regulated society which will repeatedly generate policies, issues, and consequences that the courts can only respond to adequately by approaching them with an understanding of how powerful entities function and affect, and at times injure, groups and individuals.⁹⁸ [emphasis added].

Relating the class action to the social and cultural environment in which it exists and operates is logical, considering the inherent structure and function of the class action.⁹⁹ But this relationship is also questionable in the North American context. Canada has a bi-juridical legal system in which common and civil law cohabitate and interact. Its provinces and territories each have their own specific legal system and culture. Quebec, however, has a mixed

97. Bogart, *supra* note 74, at 280-281. See also, Bogart et al., *supra* note 18, at 2 (where Bogart links class action reform to culture and politics); Bogart, *supra* note 62, at 697 (“[c]lass actions claim our attention because they raise questions concerning how society is structured and run—the manner in which the nation struggles with the problems that a highly industrialized and regulated country must face at the close of the twentieth century.”).

98. Bogart, *supra* note 62, at 699-700.

99. See IV.A.

jurisdiction, in which criminal law and several other federal matters are derived from the common law, while most other areas of the law are codified and of civil law facture. The United States has one state—Louisiana—and one territory—Puerto Rico—that are governed for a large part by civil law. In addition, many of its southwest states such as Texas, Arizona, New Mexico and Nevada were originally Mexican territory, and have inherited several unique features from the civil law, which applied when they were part of Mexico.

Accordingly, it is difficult to argue in favour of a unified, truly *Canadian* or *American* legal culture. This difficulty is accentuated by the fact that social, political, economical and cultural developments in the United States reciprocally influence those of Canada, in part because the two countries share a common border, language, and cultural heritage. In the class action context, U.S. legal developments also influence the development of Canadian law. And since the Canadian and American class action regimes are similar (though not identical), they are subject to a constant cross-fertilization of ideas.

Setting aside these difficulties, North American class action law developments in the last decade have been, and will likely continue to be, culturally constructed. This influence can be appreciated in light of the three following characteristics of North American contemporary culture: (1) access to justice; (2) managerial judging; and (3) the preference for settlement.

1. Access to Justice

This first cultural characteristic of access to justice is a principal objective of the North American civil justice system, and is reflected in North American class action developments. In 2006, then Chief Justice of Ontario Roy McMurtry explained that

[t]here is no doubt that the provision of civil justice is integral to a viable democratic society. As you know, our system of civil justice is premised on the maintenance of the rule of law, the independence of the judiciary and the openness of the courts, and it can be described as having two overarching objectives: (1) to *provide* Canadians with *a means by which they can resolve their disputes peacefully and in a timely way* before an independent and impartial

decision-maker; and (2) to *ensure* that this public dispute resolution “machinery” is accessible to all Canadians, both in terms of cost and complexity.¹⁰⁰ [emphasis added]

Accordingly, access to justice is the foundation of Canada’s civil society and a major concern of civil justice. It is an important element of Canadian culture. Indeed, “in a liberal democracy, all people should have an equal right to participate in every institution where law is debated, created, found, organized, administered, interpreted and applied.”¹⁰¹ Access to justice is considered to be not a goal, but a “process,” a “positive act of creating a more just society,” an “empowerment that citizens claim for themselves.”¹⁰² Consequently, it is also the “principal justice challenge” for the future.¹⁰³

Access to justice is, similarly, a fundamental right of primary concern in American civil justice. It is central to achieving democracy in civil processes. Access to justice is implicit in the principle of “equal justice under law:” “[t]he underlying assumption is that social justice is available through procedural justice. [But] those who receive their ‘day in court’ do not always feel that ‘justice has been done’ . . . Formal rights can be prohibitively expensive to enforce, successful plaintiffs can be informally blacklisted, and legislatures may overturn legal rulings that lack political support.”¹⁰⁴ Currently, U.S. civil processes fail to ensure that a lawyer is made available for each and every injured plaintiff, and that processes are fair and comprehensible to the average claimant.¹⁰⁵ In fact, while access to justice has been

100. R. Roy McMurtry, “Civil Justice Reform Conference: Phase II – Into the Future,” paper presented to the Canadian Forum on Civil Justice, December 7, 2006, available at <http://cfcj-fcjc.org/docs/2006/mcmurtry-en.pdf> (last visited September 26, 2009), at 4-5.

101. Roderick A. Macdonald, “Access to Justice in 2003—Scope, Scale, Ambitions”, paper presented to the Symposium on Access to Justice, May 2003, Law Society of Upper Canada, available at http://www.lsuc.on.ca/media/convjune03_access.pdf (last visited September 26, 2009), at 1.

102. *Id.* at 6-7.

103. McMurtry, *supra* note 100, at 3.

104. DEBORAH L. RHODE, ACCESS TO JUSTICE 5-6 (OUP 2004).

105. Deborah L. Rhode, *Access to Justice: Again, Still*, 73 FORDHAM L. REV. 1014 (2005); Deborah L. Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEG. ETHICS 369 (2003).

considered critical to Canadian policy debates and legal reform, it has been largely ignored in the United States.¹⁰⁶

In the class action context, access to justice is considered to be the most important prerequisite and benefit to the class action, and a principal objective of class action statutes.¹⁰⁷ In *Dutton*, the Supreme Court of Canada held 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. Sharing costs ensures that injuries are not left unremedied.¹⁰⁸
[emphasis added]

Similarly, prominent American legal scholars have explained that: “. . . when Rule 23 of the Federal Rules of Civil Procedure was amended, . . . the class action device was given the potential broadly to affect access to court. That appears to have been one of the goals of the 1966 amendments.”¹⁰⁹

Without the economy of scale that class actions afford, many individuals would otherwise be without recourse because their claim is too small, complex, or risky to be adjudicated individually.¹¹⁰ The Supreme Court of Canada *Naken* case,¹¹¹ for example, was one where the plaintiffs could not have sued other than collectively. Indeed, the cost of proving the validity of the claim of manufacturing or design defects in automobile products was too high to have the claim adjudicated individually, particularly since no personal injury had resulted.

106. Rhodes, *supra* note 105, at 1013 (“Few issues are more central to our legal system and more neglected in our legal policy debates than access to justice.”).

107. *See*, notably, *Hollick*, *supra* note 85, at ¶ 19. *See also*, ONTARIO LAW REFORM COMMISSION, *supra* note 67, at 139 (“effective access to justice is a precondition to the exercise of all other legal rights”).

108. *Dutton*, *supra* note 85, at ¶ 28.

109. Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 684 (1997).

110. *See, e.g., Developments—The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1806-1807 (2000).

111. *Naken*, *supra* note 73.

Judges and legal academics have confirmed that the use of the class action promotes and furthers access to justice.¹¹² Accordingly, since the class action is fundamentally influenced by one of the principal elements of North American legal culture—access to justice—it is also reflective of culture.

2. Managerial Judging

A second facet of class action law that evidences a concern for cultural context is the evolution of the role of the judge toward increased managerial judging. In the last decade, legal culture in North America—and elsewhere—has required that judges become active managers of increasingly more complex cases. Class action law in Canada and in the U.S. has responded to this cultural context by providing—and sometimes *mandating*—more active judicial management in group proceedings.

Traditionally, the judicial system provided that parties to a dispute controlled its progress, subject only to a loose control by the courts, the whole in conformity with the adversarial

112. Current Chief Justice of Ontario Warren K. Winkler recognized the access to justice function of class actions in a speech on April 30, 2008 (“Class proceedings have created the opportunity for minor lawsuits, which would be completely impractical if advanced on an individual basis, to be clustered together and carried forward by experienced, motivated lawyers. Many legitimate claims, which would never have been brought forward otherwise, have been recognized and addressed by the courts.”): Warren K. Winkler, “Access to Justice—Remarks”, paper presented at the Canadian Club of London, April 30, 2008, available at <http://www.ontariocourts.on.ca/coa/en/ps/speeches/accessjustice.htm> (last visited Sept. 26, 2009). See also Valdes, *supra* note 4, at 649 (“[t]hroughout the zigs and zags of time, the virtue of the class action was and is in the effort to provide access to justice—to deliver justice to those who don’t have access to justice. It is the virtue that motivates and justifies the modern class action specifically.”); PIERRE-CLAUDE LAFOND, LE RECOURS COLLECTIF, LE RÔLE DU JUGE ET SA CONCEPTION DE LA JUSTICE: IMPACT ET ÉVOLUTION 241 et seq. (Yvon Blais 2006) (“La relative indifférence de la magistrature à l’égard de l’accès des citoyens aux tribunaux que d’aucuns lui reprochaient a cédé progressivement sa place à une plus grande conscience de la problématique et à un souci de l’égalité effective de tous devant le prétoire.”); *Schweyer v. Laidlaw Carriers Inc.* (2000), 44 CPC (4th) 236 (SCJ), at ¶ 44 (where the Ontario Superior Court of Justice interpreted the Ontario CPA criterion of preferability to require that the determination of the common issues advance the proceeding in accordance with the Act’s objective of promoting access to justice.).

tradition.¹¹³ In recent years, however, this position has changed dramatically in Canadian and American jurisdictions, as new rules were enacted regarding case management, rules on pre-trial conferences, and other judicial activism measures. Judges have become increasingly involved with parties in chambers, supervising case preparation and management, helping shape the litigation, and encouraging settlement.¹¹⁴ They have become “mediators, negotiators, and planners—as well as adjudicators.”¹¹⁵

This contemporary judicial attitude is the result of a social and cultural trend characterized by Mauro Cappelletti as the “massification” of cases:

Our contemporary society . . . is frequently characterized as a “mass production–mass consumption” civilization. That characterization reflects, no doubt, a typical feature of modern economies in all parts of the world—“massification.” But this feature extends far beyond the economic sector; it characterizes social relationships, feelings and conflicts as well.¹¹⁶

As Cappelletti discusses, the new collective and social rights created as a result of this “massification” phenomenon require “active intervention by the state and other public entities.”¹¹⁷ Judicial case management falls into this type of intervention.

In the class action context, judges have revised their traditional role in litigation, becoming more actively involved in the prosecution of the class action, in part to protect absent class parties.¹¹⁸ Their new role has also been motivated by the

113. Hugh F. Landerkin, Q.C. & Andrew J. Pirie, *Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada?*, 82 CAN. BAR REV. 249 (2003); Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257 (1986); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

114. Resnik, *supra* note 113, at 377-379.

115. *Id.* at 379.

116. Cappelletti, *supra* note 37.

117. *Id.* at 646.

118. Glenn, *supra* note 75, at 268-269; ONTARIO LAW REFORM COMMISSION, *supra* note 67, at 445. In fact, the class action represents a new model of litigation that requires a change in the court's adjudicating role, because “[t]he nature of the right asserted based upon a mass harm, the representation of absentee members whose interests may not coincide in all respects and the need to protect those interests, the assessment and distribution

increasing size and complexity of class actions lawsuits—a similar “massification” of sorts of the class action, necessitating more “hands-on” management.¹¹⁹ As such, class action judges have become “active systems manager[s],”¹²⁰ who are no longer neutral, passive, and aloof, but are rather, principally involved in the litigation.¹²¹

Today, case management is provided for in legislation such as the U.S. *Federal Rule of Civil Procedure* 16(c)(12), which authorizes the judge to adopt “special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.” In Canada, Article 1045 of the Québec *Code of Civil Procedure* similarly gives judges broad judicial powers to hasten the progress of the class action or to simplify the proof, on the condition that they do not prejudice a party or the members. A Québec class action division was also created in 2006 to help manage cases. As for Canadian national class action cases, which require even greater management, courts have used their case management powers to coordinate class actions in different provinces that involve the same subject matter, with the explicit consent of the class action parties, lawyers, and judges involved.¹²²

of monetary relief in innovative ways as well as the fashioning of other relief, sometimes on the basis of competing representations within the class, and the procedural aspects of class actions such as the motion for certification, are all factors which can make the class action, both in appearance and performance, a clear departure from the traditional model of litigation.” See Bogart, *supra* note 74, at 303-304. See also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1291 (1976) (“I think it unlikely that the class action will ever be taught to behave in accordance with the precepts of the traditional model of adjudication.”).

119. ONTARIO LAW REFORM COMMISSION, *supra* note 67, at 446.

120. Glenn, *supra* note 75, at 269, quoting Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality and the ‘Class Action Problem*, 92 HARV. L. REV. 664, 667 (1979).

121. Bogart, *supra* note 74, at 302.

122. Bogart et al., *supra* note 18, at 21. See Ontario Court Practice Direction Number 8 for proceedings under the Class Proceedings Act, 1992, available at <http://www.ontariocourts.on.ca/scj/en/notices/pd/classproceedings.htm> (last visited September 26, 2009) (“In accordance with the statutory scheme, the judge hearing the pre-trial motions will case manage the proceeding.”).

In sum, the emergence of the contemporary requirement of class action management is culturally constructed because it was motivated by the social and cultural phenomenon of “massification” of litigation in North America and around the world generally.

3. *The Preference for Settlement*

A third facet of class action law that evidences a concern for culture is the preference for settlement, as opposed to adjudication by trial and judgment.

The recent decade in North America has seen a gradual decline in trial rates and a corresponding increase in the number of out of court settlements.¹²³ This trend results from a combination of different factors: the costs of litigating are high and prohibitive, litigation is increasingly complex and lengthy, judges implicitly encourage parties to settle as they are overwhelmed by crowded court dockets, and there are growing numbers of lawyers able to achieve negotiated settlements.¹²⁴ In Canada, for instance, there has indeed been such a decline in the number of yearly trials.¹²⁵

University of Wisconsin law professor Marc Galanter published several articles in which he discussed the disappearance of “[t]he promise of full-blown adjudication in a public forum, [or the] ‘day in court,’” in favour of “‘bargaining in the shadow of the

123. Marc Galanter & Mia Cahill, ‘*Most Cases Settle*’: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1387 (1994) (95% of cases in the U.S. federal system are resolved prior to trial). In Canada, see Donalee Moulton, “Vanishing Trials: Out-of-Court Settlements on the Rise,” THE LAWYERS WEEKLY, October 17, 2008, available at <http://www.lawyersweekly.ca/index.php?section=article&articleid=784> (last visited September 26, 2009).

124. Marc Galanter, *The Hundred Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1256, 1264 (2005). See also Judith Resnik, *Migrating, Morphing and Vanishing: The Empirical Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIR. STUD. 3 (2004).

125. See, e.g., conference papers from the Canadian Forum on Civil Justice, available at <http://cfcj-fcjc.org/publications/itf-en.php> (last visited September 26, 2009); Pierre Noreau, *La justice est-elle soluble dans la procédure?—repères sociologiques pour une réforme de la procédure civile*, 40 CAHIERS DE DROIT 33 (1999).

law.”¹²⁶ Galanter attributed the gradual decline in trial rates to a transformation in the judicial culture: “a great increase in judicial case management at the early stages of litigation, a substantial increase in nontrial adjudication before judges, and a substantial dose of outsourcing to ADR providers . . .”¹²⁷ He argued that the recent judicial ideology was about actively case managing and promoting settlements, and considered the primary role of courts to have grown to be “less enunciating and enforcing public norms and more facilitating resolution of disputes.”¹²⁸

In the class action context, statistics about the number of settlements, before or after certification, are scarce. Even when statistics exist and are available, their accuracy and reliability is limited, given the fact that settlements of non-certified class actions are privately negotiated and completed, and do not need the court’s approval to be made effective.¹²⁹ As such, the details of these private settlements are never scrutinized by the courts or the public.

Nevertheless, existing statistics provide that trials are rare and out of court settlements, increasingly prevalent.¹³⁰ In fact, it

126. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 13 (2006); Galanter, *supra* note 124, at 1264.

127. Galanter, *supra* note 124, at 1265-1266.

128. *Id.*

129. *See, e.g.*, FED. R. CIV. P. 23 (1)(e), which make clear that court approval is required for a settlement or voluntary dismissal only if the class action is certified. In Canada, the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Newfoundland and Labrador similarly allow the settlement of uncertified class actions without the approval of the court. Ontario and New Brunswick, however, require the judicial approval of all settlements—including those of uncertified class actions. *See, e.g.*, Section 29 (2) of the Ontario Class Proceedings Act.

130. W.K. Branch & J.C. Kleefeld, *Settling a Class Action (or How to Wrestle an Octopus)*, in CANADIAN INSTITUTE CONFERENCE ON LITIGATING TOXIC TORTS AND OTHER MASS WRONGS 2000 Tab XVI, 8-10 (Canadian Institute 2000); Willging et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, 1996, available at [http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/\\$File/rule23.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$File/rule23.pdf) (last visited September 26, 2009), at 60 (where the authors found that a substantial majority of certified class actions resulted in settlements. The percentage of certified class actions ending in settlement ranged from 62% to 100%, while settlement rates for cases not certified ranged from 20% to 30%). *See also* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 567 (1991); Sylvia R. Lazos,

appears that only a “tiny fraction” of all class actions (certified or not) go to trial, a rate consistent with ordinary litigation.¹³¹ Class adjudication occurs mostly at the early stages of litigation, before trial, either by way of summary judgment or motion to dismiss, or after settlement was approved at the fairness hearing.¹³² Moreover, when a settlement does occur, there is a general tendency for courts to approve it without substantive changes,¹³³ arguably in keeping with a certain inclination toward or preference for out of court settlements, as opposed to often lengthy and complex traditional court adjudication.

Abuse in Plaintiff Class Action Settlements: The Need for a Guardian during Pretrial Settlement Negotiations, 84 MICH. L. REV. 308, 308 (1985).

131. Nicholas M. Pace, *Class Actions in the United States of America*, (2007), report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007, available at http://www.law.stanford.edu/display/images/dynamic/events_media/USA_National_Report.pdf (last visited September 26, 2009), at 91 (“Evidence suggests that the rate of trial may be lower than what might be seen in non-class litigation involving similar claims and defenses. Evidence also suggests that outcomes other than trial or settlement are involved in a larger fraction of class actions than in non-class litigation. In only those cases with certified class actions, class settlements are by far the most common result.”); Bogart et al., *supra* note 18, at 21. Bogart cites in footnote 99 a Québec author, Pierre-Claude Lafond, who compiled statistics for his book, and argued that in Québec, “there remain very few final judgments in class action cases. The majority of class action cases end by out of court settlement. From 1979 to 2004, 151 actions ended by way of settlement, against 32 judgments favourable to the class. Therefore, more than three favourable outcomes out of four (82.5%) result in settlement. Moreover, the data evidences the fact that more cases are organized at the stage of authorization than at the stage of the lawsuit’s origin or foundation, by a ratio of 2 to 1 (98 against 53)” [translation]. See LAFOND, *supra* note 112, at 35. Also see generally Coffee, *Class Wars*, *supra* note 79.

132. See, e.g., Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIR. STUD. 459, 487 (2004).

133. See, e.g., Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 141 (1996) (In an empirical analysis of Rule 23 practiced in four American judicial districts, the authors found that “[a]pproximately 90% or more of the proposed settlements were approved without changes.”). In Canada, there exists no such authority to my knowledge. However, I can affirm, based on an extensive review of Canadian class action settlements conducted in the context of my doctoral thesis project, that Canadian courts do similarly tend to approve settlements without changes, and in fact do so quasi-automatically.

In both Canadian and American class action law, court approval is required to effect class action settlements. The three-part standard for such approval is the fairness, reasonableness, and adequacy of the proposed settlement as a whole.¹³⁴ This standard, however, does not properly help determine what to look for when scrutinizing class settlements and assessing their fairness—or unfairness. Hence, courts have developed several factors that they consider helpful and important in evaluating class settlement fairness.¹³⁵ These factors are worded somewhat differently in the various states and provinces, yet they also contain indeterminate and subjective concepts that do not offer any account of the process judges should follow to review such settlements, or any indicia of which settlements should be approved or denied. As such, the process by which settlement “fairness,” “reasonableness,” and “adequacy” of settlement is evaluated is very subjective, and depends on context—cultural context, notably.

Relating class action settlements to their cultural context is complex, however, because settlements have many variables that affect their process. They involve several actors with diverging

134. FED. R. CIV. P. 23(e)(1)(C) establishes that a class action settlement must be “fair, reasonable, and adequate” to be approved judicially. By contrast, in Canada, there is no equivalent statutory provision, such that courts have had to develop a similar standard for the judicial oversight of class action settlements: *Dabbs v. Sun Life Assurance* (1998) O.J. No. 1598 (Gen. Div.) at ¶ 11. *See also* *Killough v. Canadian Red Cross Society*, (2007) B.C.J. No. 1262 (B.C.S.C.); *Rideout v. Health Labrador Corp.*, (2007) N.J. No. 292 (Nwfd’l and Lab. S.C.) at ¶ 138 (adding an element of “good faith” to the test); *Sparvier v. Canada (Att. Gen.)*, (2006) S.J. No. 752 (Sask. C.Q.B.); *Pelletier c. Baxter Healthcare Corp.*, REJB 1998-05914 (Qc.Sup.Ct.) at 10; *Landry c. Syndicat du transport de Montréal*, (2006) Q.J. no. 3043 (S.C.) (QL) at ¶ 31.

135. American caselaw [Federal]: *In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316–24 (3d Cir. 1998); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463, 18 Fed.R.Serv. 2d 637 (2d Cir. 1974) (implied overruling on other grounds recognized by, *U.S. Football League v. National Football League*, 887 F.2d 408 (2d Cir. 1989)).

Canadian caselaw: *Dabbs*, at ¶ 13; *Jeffery v. Nortel Networks Corp.*, (2007) B.C.J. No. 90 (S.C.) at ¶ 18; *White v. Canada (Att. Gen.)*, (2006) B.C.J. No. 760 (S.C.); *Northwest v. Canada (Att. Gen.)*, (2006) A.J. No. 1612 (Alta. C.Q.B.) at ¶ 23 et seq. *See also*, MANUAL FOR COMPLEX LITIGATION, (Federal Judicial Center, 4th ed. 2004), available at [http://www.fjc.gov/public/pdf.nsf/lookup/mcl4.pdf/\\$file/mcl4.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/mcl4.pdf/$file/mcl4.pdf) (last visited September 26, 2009), at 316, ¶ 21.62 (which lists the factors relevant to assessing class action settlement fairness).

interests, ideas, opinions, and values. Moreover, the issue of settlement fairness differs in importance for the different actors and for the case at stake,¹³⁶ and is very difficult to define. As Rosen rightly argued, the meaning of concepts such as “fairness” will depend on “assumptions, reinforced across numerous domains, that characterize the culture of which law is a part:”

. . . context is crucial: When we hear a court speak of “the conscience of the community,” “the reasonable man,” or “the clear meaning of the statute,” when we watch judges grapple with parenthood as a natural or functional phenomenon, or . . . we know that *the meaning of these concepts will come not just from the experience of legal officials or some inner propulsion of the law but from those broader assumptions, reinforced across numerous domains, that characterize the culture of which law is a part.* And when we seek law outside of specialized institutions—when a kinsman mediates a dispute or members of a settlement use gossip or an informal gathering to articulate their vision of society—the terms by which they grasp their relationships and order them will necessarily be suffused by their implications in many interconnected domains.¹³⁷

Ultimately, fairness remains a “pragmatic ideal,” and the fairness of procedures relative, because it “turns on the social ends that they serve.”¹³⁸ In the same way, the fairness of class action procedure in the settlement context will depend on the social ends that class actions serve. For example, in *Epstein v. First Marathon Inc.*,¹³⁹ the Ontario Superior Court denied a class settlement because it arose from a strike suit.¹⁴⁰ The Court used its powers under the Ontario CPA to refuse to allow the proposed settlement, because it would have provided no benefit to the proposed

136. Carrie Menkel-Meadow, *Whose Dispute is it Anyway?: A Philosophical and Democratic Defence of Settlement (In Some Cases)*, 83 GEO L.J. 2663, 2666 (1995).

137. ROSEN, *supra* note 26, at 6-7.

138. Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 979 (1992).

139. *Epstein v. First Marathon Inc.* (2000), 2 B.L.R. (3d) 30 (Ont. S.C.).

140. A strike suit is a suit based on unmeritorious claims, often brought as a way to extort from the defendant a favourable or inflated settlement.

shareholder class and a substantial payment to class counsel. The Court held that the proposed settlement would make “a mockery” of the public policy upon which Ontario’s class action legislation is based and would be counter-productive to “the important policy objectives of the statute, . . . access to justice, judicial economy and behaviour modification.”¹⁴¹ The Court further emphasized its disfavour of strike suits by barring the plaintiff lawyers from receiving any money by way of the settlement.

Setting aside the *Epstein* case, very few class action settlements are refused in Canada, or asked to be modified for later approval. Most proposed settlements are accepted and approved “as is.” This tendency evidences a judicial preference for settlement, justified by Galanter’s argument of a transformation of the judicial culture in favour of fewer trials and more settlements.

V. THE INFLUENCE OF CLASS ACTIONS ON NORTH AMERICAN LEGAL CULTURE

Class actions typically involve important topics that have a significant impact on society. They address issues such as product liability for defective pharmaceutical products,¹⁴² consumer protection for gambling activities,¹⁴³ wrongful dismissals,¹⁴⁴ or securities fraud.¹⁴⁵ Where social harm is done to a large number of individuals, class actions are used to redress a large-scale public

141. *Epstein*, *supra* note 139, at ¶¶ 69-71.

142. Deborah Hoisington and Stefanie Puls, and Johnson and Johnson Inc., Janssen-Ortho Inc., Canderam Pharma Inc., ABC1 Company, et al., filed December 9, 2008 (British Columbia), *available at* http://www.cba.org/ClassActions/Class_2008/britishcolumbia/main/12-09-2008_Puls.aspx (last visited September 26, 2009).

143. Chartrand v. British Columbia Lottery Corporation, filed Nov. 16, 2008 (British Columbia); Trowell v. Atlantic Lottery Corporation Inc., filed November 25, 2008 (Nova Scotia), Manon Cartier and André Bégin v. Loto-Québec, filed November 24, 2008 (Québec), *available at* http://www.cba.org/ClassActions/Class_2008/britishcolumbia/main/11-26-2008_Chartrand.aspx (last visited September 26, 2009).

144. Lisa Harrison and Herman Pimentel and Augustus Myers v. Simmons Canada Inc., filed November 24, 2008 (Ontario), *available at* http://www.cba.org/ClassActions/Class_2008/ontario/main/11-24-2008_Simmons.aspx (last visited September 26, 2009).

145. Ménard c. Matteo et al., filed November, 2008 (Québec), *available at* http://www.cba.org/ClassActions/Class_2008/quebec/main/11-07-2008_Matteo.aspx (last visited September 26, 2009).

wrong. Society benefits from them because they promote the efficient use of judicial resources and help ensure greater compliance with laws and regulations, by making wrongdoers accountable for what they did, and encouraging behavioural modification.

But do class actions also affect or influence culture? Does class action reform effect changes in the way people live their lives; does it lead to cultural change?¹⁴⁶ While a definite conclusion on these questions would ideally need to be supported by exhaustive qualitative data on the changing culture of litigation practices in North America, I believe that the answer is “yes.” Even without such data, I will argue below that evidence of this culture change can be found in, notably, a) the judicial institutions and the role of judges, and b) the legal profession. In subsection c), I will illustrate my argument that class actions influence culture by discussing the infamous Canadian national Residential Schools Settlement.

A. The Judicial Institutions and the Role of Judges

The emergence and increasing number of class action filings—indicative of the popularity of the class action device—has influenced the organization and philosophy of judicial institutions, and has changed the role of judges involved in class action litigation. Indeed, the class action device has required that courts be better organized, to manage more complex proceedings. Notably, these courts have created class action divisions or chambers, and have started using specific codes to refer to class proceedings in computerized court databases. They have also felt the need to hire additional staff to manage the large amount of paperwork generated by the class action device. In the Canadian province of Québec, for instance, the *Fonds d'aide aux recours collectifs* was created to help finance class action suits in first

146. See, e.g., Lynn Mather, *Conclusion: The Mobilizing Potential of Class Actions*, 57 IND. L.J. 451 (1982), citing articles discussing attempts to reform—through class action litigation—services provided by public schools (Rosenberg & Philips, *The Institutionalization of Conflict in the Reform of Schools: A Case Study of Court Implementation of the PARC Decree*, 57 IND. L. J. 425 (1982), and public hospitals (Paul-Shaheen & Perlstadt, *Class Action Suits and Social Change: The Organization and Impact of the Hill-Burton Cases*, 57 IND. L.J. 385 (1982)).

instance or on appeal, and to publish information about class action filings.

In fact, the class action has required, by its complexity and physical volume, not just greater court organization, but better case management. Furthermore, and as discussed in part above,¹⁴⁷ the emergence and prevalence of the class action has influenced the role of judges in class action litigation, and along with it, their philosophy in handling such cases.

For example, in the civil law system of Quebec, the advent of the class action has forced class action judges to move from a typically individualistic conception of justice, and of the class action, to a more collective one. Indeed, the civil adjudicative process has traditionally been marked by a liberal political philosophy,¹⁴⁸ in which the individual is free to sue or not sue, to defend himself or not, and during the course of litigation, to choose which terms and which procedural devices are ideal to argue his case and present the facts and law.¹⁴⁹ As such, Quebec judges involved in class action litigation originally supported this purely individualistic conception of collective justice.¹⁵⁰ These judges considered the class action to be a series of individual actions, an aggregate of individual claims which will be proven by the class representative.¹⁵¹ In recent years, however, they have begun setting aside the individualistic conception of the class action in favour of a more collective one, recognizing the collective dimension of the individual prejudice and the collective effect of the breach.¹⁵² Accordingly, the advent and evolution of the class action has, in that province, influenced legal culture because it has changed the judges' conception of civil adjudication.

Furthermore, in the United States, common law Canada, and in some European countries such as Belgium, Germany, and France,

147. See IV.C.2.

148. Glenn, *supra* note 75, at 264.

149. *Id.*

150. LAFOND, *supra* note 112, at 219. *See also*, CAPPELLETTI, *supra* note 37 (where he argues that “[e]ven the most sacred principles . . . must . . . be reconsidered in view of the changed needs of contemporary societies. . . . [A]n individualistic vision of procedural due process should give way to, or be integrated with, a social or collective concept of due process.”).

151. *See, e.g.*, Gosselin v. Québec (Proc. Gén.), (2002) 4 R.C.S. 429, 476-477.

152. LAFOND, *supra* note 112, at 229-230.

the class action has brought a “profound metamorphosis” in traditional judicial processes and philosophy.¹⁵³ It has caused:

. . . *A real explosion of the traditional concepts, rules and structures of the judicial process . . .* Standing to sue has been granted to ‘private attorney generals’ or ‘ideological plaintiffs,’ and such plaintiffs—hether individuals or organizations—have been regarded as the ‘adequate representatives’ of numbers and classes of people, most of whom might not even know that a ‘representative action’ is being brought ‘on their behalf.’

. . .
judges [must—and have—become] the protectors not only of the traditional individual rights, but also of the new diffuse, collective and fragmented rights and interests which are so characteristics of our mass civilization. . . . inevitably new powers and responsibility [have fallen] upon the judiciary.¹⁵⁴ [emphasis added]

B. The Legal Profession

The class action has also brought changes in the culture of the legal profession. The prevalence of class action litigation and the higher settlement rates have changed the way lawyers interact with clients. These lawyers have become “entrepreneurs,”¹⁵⁵ seeking class action representatives actively, almost aggressively. They continuously search for breaches in tort or contract that will make a collective suit opportune, interview potential class action representatives somewhat affected by the breaches, and file the lawsuit as quickly as possible.

These entrepreneurial lawyers have also changed the way they interact with clients in both collective and unitary litigation. Lawyers now broach settlement very early on in the litigation. They also consider alternative dispute resolution favourably. One reason for this culture shift is, possibly, the emphasis in Canadian

153. Mauro Cappelletti, *The Law-Making Power of the Judge and Its Limits: A Comparative Analysis*, 8 MONASH U. L. REV. 15, 36 (1981).

154. *Id.* at 36-37.

155. This change in attitude has been the subject of many articles about the “entrepreneurialism” of class action lawyers. See, e.g., Coffee, *The Regulation of Entrepreneurial Litigation*, *supra* note 50.

law schools on alternative dispute resolution and on informal judicial outcomes (such as settlement) in civil litigation.¹⁵⁶ Another reason for the cultural shift is the obvious potential for an earlier payment in attorney fees.

C. One Example of the Class Action Influence on Culture: The Residential Schools Settlement

I have argued above that class actions serve to influence or affect Canadian culture. The recent Indian Residential Schools national class action and settlement serve to illustrate this argument.¹⁵⁷ In this national class action, former students of recognized residential schools in Canada and their family members sued the Government of Canada and various church-related entities for harms and abuses that were committed against Aboriginal children. The Indian residential schools at stake were schools supervised by the Federal Government, under policies that resulted in the removal of Aboriginal children from their families and communities, their assimilation through practices designed to extinguish their Aboriginal character, and upon graduation, their integration into a non-Aboriginal society. In 2006, a Canada-wide settlement agreement was concluded regarding this class action, seeking to address the mental, spiritual, and physical harm done to the former students as a result of the practices of the residential schools.

This national class action and its settlement were deeply influenced by culture. Indeed, the Aboriginal students and their families—identified as the “Survivor Class,” estimated to number almost 79,000 persons—shared commonly held values, ideas, and norms that they brought forward by advancing class action claims. The settlement the students concluded considered the lasting and profound cultural effects of the residential schools legacy, and sought to bring closure and compensate the harm suffered by the Aboriginal community at large.

156. See, e.g., the undergraduate law curriculum offered at McGill University, available at http://www.mcgill.ca/files/law-studies/Course_offerings_2008-2009.pdf (last visited September 26, 2009).

157. For information about this class action and the various provincial and territorial approval orders regarding the national settlement, see Residential Schools Settlement, available at <http://www.residentialschoolsettlement.ca/> (last visited September 26, 2009).

The class action and its settlement also sought to influence and probably influenced Canadian culture. Part of the settlement provided for the establishment of a Truth and Reconciliation Commission, with a mandate to make a public and permanent record of the legacy of the schools, in conjunction with taking a significant portion of the settlement fund for healing and commemoration programs. It led to a public apology to the Aboriginal people by Prime Minister Harper on June 11, 2008.¹⁵⁸ Hence, although there is no proven evidence yet of the effect of this settlement on Canadian citizens, the gigantic scope and specific, culturally-founded conditions of this national settlement most certainly affected—and will likely continue to affect—the ideas, beliefs, values, and norms of these citizens.

VI. THE METHODOLOGY TO STUDY CLASS ACTION LAW

Civil procedure is an extraordinarily fertile terrain for the cultural analysis of law and to learn about law's place in culture. The analysis of class action objectives, effects, and trends affords a clearer understanding of legal culture, and vice versa. But how can we best analyze these objectives, effects, and trends to ultimately support suggestions for reform in class action law? What is the most efficacious methodology to obtain trustworthy data about the resolution of class action disputes by trial and/or settlement?

In this paper, I have argued that class actions are procedural vehicles of great importance to our society. They affect individuals, businesses, and society at large. They affect developments in the substantive law, and in politics, and the economy. Hence, finding the best methodology to study them is crucial, especially in a context where procedural reform is envisaged. Indeed, since the legal system's effectiveness is in great part dependant on citizens' abidance to law and on their acceptance of the rules, efforts must be made to make this system coincide with contemporary social values and needs—and with modern legal culture.

Legal theory, mostly in the form of doctrine, must be given significant weight in civil procedure reform. Quantitative studies

158. See, e.g., public apology by Prime Minister Harper (June 11, 2008), available at <http://www.cbc.ca/canada/story/2008/06/11/aboriginal-apology.html> (last visited September 26, 2009).

based on the judicial outcomes of reported court cases and statistics based on these outcomes are also useful. There are, however, many issues in civil procedure that can be more adequately addressed, discussed and eventually resolved with the use of empirical research.¹⁵⁹ For instance, one way to assess whether the deterrence objective is met in a class proceeding is by empirically testing whether the defendant's behaviour has changed since the lawsuit was filed. Has the defendant changed its internal environmental policies, to prevent further toxic waste, for example? In addition, the effectiveness of the class action—notably, as a means of getting long-term benefits for particular groups¹⁶⁰—can be evaluated with the use of empirical research. This type of research could, for instance, look into whether workers are, in fact, treated more fairly and equally by their company in the years following judgment in an employment discrimination class action case.

One example of a study that brilliantly integrated both theoretical and empirical approaches to civil procedure in the class action law context is Bryant Garth's analysis of concluded federal class actions from the Northern District of California.¹⁶¹ In it, Garth sought to assess critically the “‘social change’ impact of the class action.”¹⁶² Using case studies and interviews with class counsel and representatives, Garth organized the class actions he examined in three categories: Category A - Organizational efforts

159. Bryant G. Garth, *Introduction: Toward a Sociology of the Class Action*, 57 *IND. L. J.* 371, 371-72 (1982) (noting that qualitative research “needs to be supplemented by more ‘qualitative’ empirical studies that can ‘open . . . to public view the back regions and activities of processing institutions’.”).

160. *Id.* at 380.

161. Garth, *supra* note 54. For further examples of empirical studies of class action litigation, *see, e.g.*, James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 *U. PA. L. REV.* 903 (1996) (where the authors reviewed a sample of initial public offerings that generated class action litigation); Willging et al., *supra* note 133; Janet C. Alexander, *supra* note 130 (where the author studied the size of settlements in computer and computer-related securities class actions relative to the strength of the case); Bryant G. Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 *S. CAL. L. REV.* 353 (1987) (where the authors address the ideological concept of “private attorney general,” using a combination of theory with empirical grounding and data to explore and highlight ideological assumptions and concerns.).

162. Garth, *supra* note 54, at 238.

with incidental clientele (including cases about overpayments of unemployment compensation and disability payment terminations); Category B - Entrepreneurial lawyer with passive client (including cases about retail price fixing and price fixing to distributors); and Category C - Energetic and active plaintiffs (including Hispanic complaints against an employment test, employment discrimination against Blacks in retail sales, sex discrimination in employment promotions, etc.). He concluded that the class action is a “politically empowered legal artifice” and that empirical research is relevant to the study of class action litigation because it examines,

the impacts of the full range of empowering and nonempowering features of class action litigation . . . investigates particular revelations from discovery, the denial or granting of various motions in the case, the judges’ seeming attitude toward settlement or the merits, the shifting of legal theory or class representatives, or simply the effect of delay and inactivity; and it [investigates] how ground-level events affect the lawsuit.¹⁶³

In another interesting empirical study about class actions, New York University Professor Geoffrey P. Miller examined the veracity of the cultural stereotype that class actions are more popular in the Gulf States of Texas and Louisiana; that these two states are “favorite havens for plaintiffs’ attorneys and purgatory for the defense.”¹⁶⁴ In his study, Miller wondered whether this description is true, whether there is indeed something different about class action practice in these two states, and if there are differences, what explains them. The empirical evidence Miller reviewed derived from research conducted in various *Westlaw* databases, which essentially inquired as to the frequency of the term “class action” in the applicable data set.¹⁶⁵ Before factoring in elements such as demographics, economic activity, and income

163. *Id.* at 269.

164. Geoffrey P. Miller, *Class Actions in the Gulf States: Empirical Analysis of a Cultural Stereotype*, 74 TUL. L. REV. 1681 (2000). For a discussion of the class actions that were recently been started in Louisiana after Hurricane Katrina, see Olivier Moréteau, *Policing the Compensation of Victims of Catastrophes: Combining Solidarity and Self-Responsibility*, 54 LOY. L. REV. 65 (2008).

165. Miller, *supra* note 164, at 1688.

levels, Miller found that the class action explosion in the Gulf States could be explained by the data reviewed.¹⁶⁶ But when the three factors were taken into consideration, his conclusion was more mitigated. He found that:

. . . when we control for population, a radical split occurs. Louisiana's rate per capita is far above the national average, while Texas's rate, even in recent years of increased class action litigation, is still below the national rate. This result remains robust when we control for personal income; indeed, the position of Louisiana relative to other states becomes even more anomalous. Something very different is obviously occurring in these two states.¹⁶⁷

Interestingly, while Miller did not provide reasons for the patterns observed in Louisiana and Texas, his empirical analysis does not just explain developments in class action practice in these two states, but it serves to reinforce the link I have advocated herein between class action law and culture. Indeed, Miller's study supports the cultural stereotype that Louisiana is a class action "haven." Furthermore, his study is informed by the two-pronged research methodology I have supported, which contains both theoretical and empirical data.

VII. CONCLUSION

In this paper, I have argued that law is inherent to culture and culture to law. I have extended this argument to the civil procedure and class action context. My cultural construction of class action law has embraced two ideas: that the North American class action is a mirror of North American culture—in light of three of its principal characteristics of access to justice, managerial judging, and a preference for settlements—and that the class action influences culture—as evidenced by changes in the legal institutions and legal profession. Finally, I have argued in favour of a two-pronged analysis of class action law, which includes theoretical and empirical components.

166. *Id.* at 1699.

167. *Id.* at 1706.

Going back to the *Hocking* case,¹⁶⁸ discussed in this paper's introduction, serves to once again, reinforce my principal argument that law and culture reciprocally influence each other. Indeed, in this case, the Quebec Court of Appeal was able to reaffirm a stricter standard of notice in class action law, and hence influence perceptions, opinions, ideas, and legal norms relative to class action law notice practices in Quebec and Ontario, and perhaps even throughout the country.

Legal academics have suggested that legal systems are increasingly characterized by a certain apparent convergence that makes them evolve in parallel directions.¹⁶⁹ In my view, these systems are also culturally constructed and thus distinguishable based on their specific legal cultures. Are these two arguments reconcilable? In the class action law context, there is a certain amount of convergence between systems, as previously discussed. But the convergence is limited by the particular legal system's cultural specificities. For instance, Europeans are still reluctant to make class proceedings widely acceptable, in part because their notions of the role of law and the client are fundamentally inconsistent with North American class action culture.¹⁷⁰

In conclusion, class action law systems will likely continue evolving at a steady pace. They will also remain deeply influenced by and attached to legal culture. In that way, they are like fast-growing grain crops that must be planted, *cultivated*, and fertilized consistently with specific agricultural customs and traditions, for the most fruitful harvest.

168. *Hocking*, *supra* note 1.

169. Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, Social Science Research Network, NYU Law and Economics Research Paper No. 08-46, 3 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1296843 (last visited September 26, 2009); Friedman, *supra* note 28, at 72.

170. See Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217, 289-290 (1992). See also, Linda Silberman, *The Vicissitudes of the American Class Action—With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201 (1999); Burbank & Silberman, *supra* note 109.