Proliferation of Redress Procedures

Final Report of the Research Project
Presented to Industry Canada's
Office of Consumer Affairs

union des consommateurs

June 2013

Report published by:
union des consommateurs

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Acknowledgements
Union des consommateurs extends warm thanks to all the consumer associations, in Quebec and abroad, that participated in the consultation. We also wish to thank the Associate Chief Justice of the Court of Quebec, as well as the Office de la protection du consommateur, for their participation in the consultation regarding the summary document. Their contribution was key to producing the present report.

ISBN 978-2-923405-55-1

Union des consommateurs is a member of Consumers International (CI), a federation of 220 members from 115 countries.

The masculine is used generically in this report.

Union des consommateurs *received funding under Industry Canada's Contributions Program for Non-profit Consumer and Voluntary Organizations. The views expressed in this report are not necessarily those of Industry Canada or the Government of Canada.*

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Union des consommateurs, *Strength through Networking*

Union des consommateurs is a non-profit organization whose membership is comprised of several ACEFs (*Associations coopératives d'économie familiale*), *l'Association des consommateurs pour la qualité dans la construction* (ACQC), as well as individual members.

Union des consommateurs' mission is to represent and defend the rights of consumers, with particular emphasis on the interests of low-income households. Union des consommateurs' activities are based on values cherished by its members: solidarity, equity and social justice, as well as the objective of enhancing consumers' living conditions in economic, social, political and environmental terms.

Union des consommateurs' structure enables it to maintain a broad vision of consumer issues even as it develops in-depth expertise in certain programming sectors, particularly via its research efforts on the emerging issues confronting consumers. Its activities, which are nation-wide in scope, are enriched and legitimated by its field work and the deep roots of its member associations in the community.

Union des consommateurs acts mainly at the national level, by representing the interests of consumers before political, regulatory or legal authorities or in public forums. Its priority issues, in terms of research, action and advocacy, include the following: family budgets and indebtedness, energy, telephone services, radio broadcasting, cable television and the Internet, public health, food and biotechnologies, financial products and services, business practices, and social and fiscal policy.

Finally, in the context of market globalization, Union des consommateurs works in collaboration with several consumer groups in English Canada and abroad. It is a member of *Consumers International* (CI), a United Nations recognized organization.

Introduction

> *Ultimately, while the formal justice system may not deliver prefect justice in every instance, it offers the hope of realizing some aspiration of piecemeal and even systemic justice through the entrenchment of rights and effective remedial enforcement.*
>
> Faisal Bhabha[1]

Access to justice seems to be a perpetual problem in most legal spheres, and the positive effect of measures adopted to counter this problem always seems ephemeral. According to some authors, across Canada, this problem is most prevalent in family law, labour law and consumer law[2]. The adoption of new legislation and the establishment of mechanisms for improving access to justice do not seem to have yielded the expected results. Occasionally, the results are even contradictory and reveal conflicts between different initiatives and objectives regarding access to justice. Generally, if access to justice were optimal and all wronged consumers had redress procedures, the courts would be spectacularly clogged; indeed, as we have observed in several studies we have conducted[3], with modern mass production, the use of adhesion contracts, and unbridled consumption, consumers experience a great many consumer problems, and the number of consumers affected is much greater than previously. This is also the case for the rights and redress procedures made available to them.

Access to justice is a much debated subject, whether to acclaim the adoption of new measures, assess or critique their effectiveness, or report persisting problems in Canada. It remains that access to justice is a pillar of our legal system. This justifies a relentless search for solutions to have consumer rights respected and fully exercised.

The problems of access to justice are well known: a lack of knowledge about rights, clogged courts, minimal economic incentives that do not justify the time and money invested in a court remedy, long delays, etc. The solutions put forward are as numerous as the problems reported: establishing Small Claims Courts, adopting measures allowing class actions, specific measures such as the power of injunction granted to consumer rights organizations by the *Consumer Protection Act*[4] in Quebec, etc. Nevertheless, it appears that Canadian consumer law continues to rest on old legal and procedural concepts, and that the premises of its exercise, as well as

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[1] **BHABHA, F.** "Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions" in 33 Queen's L.J. 139, 2007, p. 145. [Online] available on the website of the Social Science Research Network http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1912520 (page consulted on June 10, 2013).

[2] **DUGGAN A. and I. RAMSAY.** *Front-End Strategies for Improving Consumer Access to Justice. In* Michael Trebilcock, Anthony Duggan and Lorne Sossin (eds*), Midlle Income access to Justice*, *University of Toronto Press,* October 2011.

[3] **LABELLE, Y.** *Consumer Arbitration: A Fair and Effective Process?*, Union des consommateurs, Montreal, Canada, June 2009, 130 pages. [Online] http://uniondesconsommateurs.ca/docu/protec_conso/arbitrageE.pdf;
CARREAU, S. *Consumers and Access to Justice: One-Stop Shopping for Consumers*, Union des consommateurs, Canada, June 2011, 113 pages. [Online] http://uniondesconsommateurs.ca/docu/protec_conso/02-Tribunal-consommation-e2.pdf;
CUMING, D. *L'accès à la justice : Comment y parvenir?*, Union des consommateurs, Montreal, Canada, June 2004, 88 pages. [Online] http://uniondesconsommateurs.ca/docu/protec_conso/acces_justice.pdf (documents consulted on June 10, 2013).

[4] *Consumer Protection Act*, R.S.Q., c. P-40.1, sec. 316.

the corresponding measures adopted to improve access to justice, are therefore not appropriate for the problems encountered nowadays by Canadian consumers.

Given the persistent shortcomings of measures intended to establish a certain balance between consumers and industry through better access to justice, we may question the effectiveness not only of redress procedures available to wronged consumers, but also of judgments rendered to uphold the law as well as consumers' individual and collective interests.

We asked ourselves if any jurisdictions, rather than add new redress procedures and measures while access to justice remains deficient, had considered or adopted initiatives to improve the effectiveness of existing redress procedures, for example by broadening the effect of judgments. Our previous studies had indeed suggested that some legislatures had, to the benefit of consumer law, infringed on certain established legal principles, in order to improve consumer access to justice. For example, the legislatures had infringed, mainly with regard to unfair terms, on the principle of the relative effect of judgments and on the principle that is generally the basis for the right to bring actions.

Those measures were attempts to improve the effectiveness of consumer redress procedures and defend the collective interest of consumers. But have they actually improved access to justice and made justice more affordable and effective? What are the pros and cons of those measures? Would they be possible and useful in Quebec? In order to make justice effective and affordable, would such measures be viable solutions? Could they be considered as means to improve the administration of justice and remove certain barriers to consumer access?

Without presuming that those measures would be a panacea, our study will examine measures to broaden the effect of judgments or the right to bring actions.

First we will draw a portrait of consumer redress procedures and briefly examine their effectiveness. We will also list the possible benefits of those redress procedures and will analyse the barriers to those expected benefits. Afterward, we will take a look at legislative and other measures adopted in Quebec and abroad to broaden the scope of those redress procedures, whether in their use or their effects. After a detailed analysis of the applicability of those measures in Quebec law, we will suggest measures or practices for better adapting legal remedies to consumer law, so that consumers, individually or collectively, may fully benefit from their recognized rights and have effective means to exercise them, thanks to a sounder administration of justice.

In the study's first chapter, we will briefly examine the concept of access to justice, notably the definition of the word "justice," its ideological conception and what it should actually be. Based on a review of the literature, we will also describe the barriers to adequate access to justice.

In the second chapter, we will analyse measures taken, particularly in the province of Quebec, to improve consumer access to justice. We will discuss the Small Claims Court, class actions, and the right of action that was granted to consumer associations by a recent amendment to the *Consumer Protection Act,* in 2010. The objectives of those measures will be considered, as well as the issues they involve.

The following chapters constitute the heart of our research. In chapter three, we will examine measures for improving access to justice that have been adopted in foreign jurisdictions, and that may infringe on certain recognized legal principles such as the relative effect of judgments and the necessity of direct legal interest to bring an action – principles generally applied in

foreign jurisdictions as well as Quebec. We will discuss those measures' objectives, operating mode, expected and actual effects, effectiveness, and pros and cons once implemented. Chapter four will focus on the effects of those measures in relation to certain legal principles.

We gathered the comments of consumer law experts and of other major actors in the field, to whom we submitted a summary document outlining foreign measures for broadening the effects of judgments and the interest to take legal action in consumer disputes. We asked the respondents for their views on the opportunity to adopt similar measures in Quebec and on the eventual effectiveness of such measures. We will present those comments in the fifth chapter, which studies the relevance of applying in Quebec the foreign measures identified.

In conclusion, we will summarize our study's main findings on the possibility of adopting in Quebec those types of foreign measures in order to improve consumer access to justice, and we will present our recommendations.

1. Access to Justice in Canada: The Legal System's Inadequacy with regard to Consumer Law

1.1 Barriers to Adequate Access to Justice

The concepts of justice and, more specifically, of access to justice, which rest on ancient premises, may nowadays be understood and implemented too restrictively. Society has changed and those concepts no longer appear to meet the legal requirements of the consumer society and the multiple legal disputes in this new environment.

Whereas the concept of justice is directly related to that of equity, access to justice depends on the means of access to justice or equity. Those means are effective courts, enforced laws, and effective and fair procedures. As stated by Professor Shelley McGill of Wilfrid Laurier University, the concept of access to justice has evolved "*into a broad interdisciplinary concept, not confined to legal rights, remedies and institutions. Current models and theories transcend law and non-law realms […] it seems clear that access to justice lies not exclusively in state sponsored legal institutions but with society generally*[5]." Indeed, the concept of access to justice is no longer defined solely by access to the courts. More and more authors think that consumers have access to justice if they have an opportunity to settle their complaints at low cost. This different concept of access is also significantly related to that of justice. Access to justice should not be reduced to access to a dispute settlement if the settlement mechanism to which access is offered involves insufficient guarantees of equity and respect for consumer rights, both in terms of content and procedure.

While access to justice cannot be limited to physical access to the courts, a dispute resolution mechanism should ensure respect for rights recognized notably in consumer protection laws – through deterrence as well as legal redress procedures, in addition to other benefits of effective means of access to justice: swiftness, minimal expenses, simplified procedures, etc. Of course, the process must offer a strong guarantee of equity, given the flagrant power imbalance favouring merchants in relation to consumers. In several or our previous studies, we have found and deplored unfortunate deficiencies in all these respects[6].

The access to "justice" we consider it essential to guarantee can obviously not be reduced to an institution, law, procedure, doctrine, etc.[7] But it also cannot be limited to an effective law, an accessible court or simplified procedures.

More and more, the concept of access to justice as broader and more complex – not solely focused on individual access to the courts, to alternative dispute resolution mechanisms, to laws[8] and to simplified procedures – is gaining ground. If we want to improve access to justice, we must adopt a broader interpretation. The latter should take into account the peculiarities and

[5] **MCGILL, Shelley**. "Small Claims Court Identity Crisis: A Review of Recent Reform Measures" in *C.B.L.J*. 49(2), 2010, Canada, p. 215.
[6] See the studies cited in note 3.
[7] **CARREAU, S.** *Consommateurs et accès à la justice, op. cit., note 3,* p. 10.
[8] **HUGHES, P.** *Law Commissions and Access to Justice: What Justice Should We Be Talking About?* 46 Osgoode Hall Law Journal, Toronto, Canada, 2008, 34 pages, p. 780.
[Online] http://www.ohlj.ca/english/documents/0446_4HughesPP1_090525.pdf (document consulted on June 10, 2013).

needs of different groups of Canadian society and find resources to meet their different needs[9]. Indeed, the concept of access to justice, and the implementation of means to improve it, should correspond to a changed perception of Canadian society, so that access to justice is seen as a means to advance social justice, in the public interest.

As for access to the courts, we note that the problems of access are essentially the same across Canada, and well known to the public[10]: long delays, costs in time and money, high legal fees, complex procedures and proceedings, consumers' lack of knowledge and experience of the laws and the operation of the legal system, formal and solemn proceedings that intimidate the litigant, and the public's distrust of the legal system. To "traditional" access to justice barriers, both objective and subjective, are added systemic, psychological, sociocultural, etc. barriers. Given the types of access to justice barriers that have been analysed by the literature, we will list those types and describe the causes of the legal system's inadequacy in consumer disputes.

The access to justice barriers listed apply to the civil justice system as a whole, as soon as a significant imbalance exists between the parties to a dispute. In consumer disputes, the impact is exacerbated[11] by the above mentioned factors – particularly by the relatively low monetary value of the disputes generally, by the magnitude of the power imbalance between the parties, and by the multiplication of similar if not identical cases a merchant may already have confronted, thus reinforcing his knowledge of a dispute's relevant components as well as his skills and confidence. In consumer disputes, consumers also face specific access to justice barriers, at several stages[12]. Those barriers include: consumers' frequent, and merchants' occasional, ignorance of consumer protection laws; difficult implementation of certain measures provided by those laws[13]; difficulty executing the judgments of courts on which consumers rely; unequal resources, whether in knowledge of the legal system and the laws, or in financial resources; purchases made in foreign jurisdictions; etc.

As in all Canadian provinces and territories, access to justice is a constant concern in Ontario for the various stakeholders – community organizations, governments, companies and merchants, consumer associations, etc.[14] The issue of access to justice by different groups of

[9] **ONTARIO CIVIL LEGAL NEEDS PROJECT STEERING COMMITTEE**, *Listening to Ontarians*, Ontario civil legal needs project steering committee, Toronto, Canada, May 2010, 86 pages, p. 4. [Online] http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf (document consulted on June 10, 2013).

[10] See on this subject: **LAFOND, Pierre-Claude** "Le consommateur et le procès – Rapport général," in Les Cahiers de Droit, Vol. 49, No 1, Laval University Faculty of Law, Ste-Foy, Canada, March 2008, pages 131-157, p. 135, which summarizes the observations made on the subject by the 13 journalists reporting on the journées Henri Capitant. [Online] available on the Erudit website at http://id.erudit.org/iderudit/019797ar (document consulted on June 10, 2013).

[11] *Ibid*, p. 133.
MacDONALD, R. A. "Special Section to Celebrate Twenty Years Of Publishing: Access to Justice And Law Reform # 2," Windsor yearbook of access to justice, Vol. 19, Faculty of Law of McGill University, Montreal, Canada, July 29, 2001, pages 317-326, p. 317. [Online] available on the website of the Social Science Research Network http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1440979 (document consulted on June 10, 2013).

[12] **MALBON, J.** "Access to Justice for Small Amount Claims in the Consumer Marketplace: Lessons from Australia" in *Middle Income Access to Civil Justice Colloquium*, Faculty of Law of Monash University, Toronto, Canada, May 12, 2012, 24 pages, p. 4. [Online] available on the website of the Social Science Research Network http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2056647 (document consulted on June 10, 2013).

[13] See for example the difficulties in implementing legal warranty plans, as reported in our study entitled *Adequacy of Legal Warranty Plans in Canada*, Union des consommateurs, Montreal, Canada, June 2012, 88 pages. [Online] http://uniondesconsommateurs.ca/docu/protec_conso/acces_justice.pdf (document consulted on June 10, 2013).

[14] **MALBON, J.** "Access to Justice for Small Amount Claims," *op. cit.*, note 12, p. 2.

Ontarian society has been studied from all angles. One example is the report of the *Ontario Civil Legal Needs Project Steering Committee* (hereinafter OCLN), published in 2010, on the needs of low and middle income Ontarians in matters of civil law[15]. In 2011 the *Middle Income Access to Justice Colloquium* was held, organized by the University of Toronto, on access to justice problems faced by the province's middle class, and on possible solutions[16]. The access to justice problems identified in Ontario are the same as elsewhere in Canada: costs, delays, poor knowledge of the steps to take within the legal system and of available resources, the legal system's complexity, the fact that litigants are intimidated by the legal system, etc.[17]

There are various approaches to access to justice, and there have been several attempts to classify the obstacles facing citizens[18]. Those approaches focus at times on the law and access to the courts, at times on substantial injustices, and at times on an economic approach, as in the "*law and economics*" approach, which considers redress procedures as economic actions that must be cost-effective[19]. In the light of those approaches, it is possible to classify the various access to justice obstacles. We will adopt the classification developed by Roderick A. MacDonald[20].

a) Material Obstacles

Material obstacles, also called physical, include difficult access to courts and to other legal institutions (legal aid offices, administrative courts, etc.): for example, geographic location may make court access difficult for litigants or legal professionals. The centralization of courthouses in the large cities of provinces and territories is undeniably logical, but it adds to the difficulties of citizens living in rural communities or less populated towns, who may have to travel far to avail themselves of their rights and redress procedures[21]. Another problem is posed by the "traditional" opening hours of courts, which sit Monday to Friday from 8:30 a.m. to 4:30 p.m. – during the working hours of most litigants. This access problem posed by the opening hours is recognized, and solutions have been considered in some provinces. As indicated by the *Nova Scotia Law Reform Commission*, the Nova Scotia Small Claims Court usually sits in the evening

[15] **ONTARIO CIVIL LEGAL NEEDS PROJECT STEERING COMMITTEE***, Listening to Ontarians*, May 2010, *op. cit.* note 9.
[16] **TREBILCOCK, M. et al**. *Middle Income Access to Justice*, University of Toronto Press, Scholarly Publishing Division, Toronto, Canada, 2012, 122 pages.
[Online] http://www.law.utoronto.ca/documents/conferences2/AccessToJustice_LiteratureReview.pdf (document consulted on June 10, 2013).
[17] **ONTARIO CIVIL LEGAL NEEDS PROJECT STEERING COMMITTEE***, Listening to Ontarians*, op. cit., pp. 39-42.
[18] **BOULARBAH, H.** "Réponses pour la Belgique au questionnaire relatif au thème No. 4 : le consommateur et le procès," Journées internationales colombiennes de l'Association Henri Capitant des Amis de la culture Juridique française, Bogota/ Carthagena, September 24-28, 2007, March 13, 2007, 21 pages, p. 2. [Online] http://www.henricapitant.org/sites/default/files/Belgique-3.pdf (document consulted on June 10, 2013). www.henricapitant.be/documents/PV_AG_13_03_07.doc; **MacDONALD, R.A.** "L'accès à la justice et le consommateur : une marque maison?," in P.-C. Lafond (dir.), *L'accès des consommateurs à la justice*, Les Éditions Yvon Blais, Cowansville, Canada, 2010, pp. 9 and 10.; **DUGGAN, A.** "Consumer access to Justice in Common Law Countries: a Survey of the Issues from a Law and Economics Perspective," in RICKETT C. and TELFER, T. *International Perspectives on Consumers' Access to Justice*, Cambridge, United Kingdom, 2003, 29 pages, pp. 46 to 67. [Online] http://catdir.loc.gov/catdir/samples/cam033/2002031456.pdf (document consulted on June 10, 2013).
[19] **CARREAU, S.** *Consommateurs et accès à la justice*, *op. cit.,* note 3, p. 14.
[20] **MacDONALD, R. A.** "L'accès à la justice et le consommateur," *op. cit.,* note 18, pp. 8-10.
[21] **ONTARIO BAR ASSOCIATION.** *Getting It Right, The Report of the Ontario Bar Association Justice Stakeholder Summit*, Toronto, Canada, 2006, 40 pages, p. 8. [Online]
http://www.oba.org/en/pdf/Justice%20Summit_sml.pdf (document consulted on June 10, 2013).

to facilitate access, and this is much appreciated by citizens[22]. However, it does not please some lawyers and officers of the Court, who say that those schedules do not correspond with their working hours and that witnesses may also object to spending an evening in court[23].

b) Objective Obstacles

Objective obstacles are those intrinsic to the legal system. They involve the costs of bringing an action, and the delays and complexity of procedures. Although, when Small Claims Courts were introduced across Canada, one of the main objectives was to give citizens access to justice at lesser cost, whatever their financial means, this ideal is not a fait accompli in the Canadian justice system as a whole. Legal fees have been reduced in Small Claims Divisions – lower stamp costs, prohibiting lawyer representation in some jurisdictions – but the situation is different for disputes not belonging to Small Claims Divisions. Low and middle income citizens say they do not take legal steps – consulting a legal counsel or going to court – because they know the costs would be so high[24], so access to justice remains greatly reduced by cost issues. Although cases brought before the Small Claims Division entail lesser costs, it remains that losing a day of work, paying to consult a lawyer to prepare a case, travel expenses and expert costs can deter taxpayers.

As for the period between initiating and closing a case – a recurrent problem –, it still constitutes one of the factors dissuading taxpayers from going to court. In 2009, the Associate Chief Justice of the Court of Quebec told a Quebec newspaper that the waiting periods for a hearing date at the Small Claims Division varied "between 21 days in Îles-de-la-Madeleine and two years in Campbell's Bay in the Ottawa Valley. But the waiting period is less than one year in 41 of the 52 courthouses in Quebec, including in Montreal, Quebec City and Sherbrooke[25]." In Quebec, the law prescribes that all judgments must be rendered at the latest four months after the hearing[26].

c) Subjective Obstacles

The parties to a dispute may perceive that certain aspects of the legal system pose obstacles for them. One of the key points of the report published by the *OCLN Committee* is that 80% of Ontarians think the legal system works better for the rich[27]. In addition, natural persons are not always best served by our legal system as currently constituted. Although Small Claims Divisions are often called "the people's court," this does not necessarily prove to be true. Small claims divisions are often criticized for favouring companies, which have been using them more

[22] **PATRY, Marc W., Veronica STINSON, & Steven M. SMITH**, *Evaluation of the Nova Scotia Small Claims Court*, Nova Scotia Law Reform Commission, Saint Mary's University, Halifax, Nova Scotia, Canada, March 2009, 114 pages, p. 89. [Online] http://www.lawreform.ns.ca/Downloads/SmallClaimsFinaReportFINAL.pdf (document consulted on June 10, 2013).
[23] *Ibid.*, on p. 54.
[24] *Listening to Ontarians*, *op. cit.,* note 9, pp. 39 and fol.
[25] **GRAMMOND, S.** *Une poursuite aux petites créances, ça marche!*, in La Presse, Montreal, Canada, November 28, 2009. [Online] http://affaires.lapresse.ca/finances-personnelles/bons-comptes/200911/27/01-925856-une-poursuite-aux-petites-creances-ca-marche.php (page consulted on December 6, 2012).
[26] **JUSTICE QUÉBEC.** Page Les petites créances, Justice Québec website, government of Québec, Québec City, Canada, April 9, 2013, [Online] http://www.justice.gouv.qc.ca/francais/publications/generale/creance.htm (page consulted on June 10, 2013).
[27] *Listening to Ontarians*, *op. cit.,* note 9, p. 9.

and more as a debt collection tool[28]. The balance that Small Claims Divisions were intended to establish is absent: by being more likely to go to court repeatedly, companies have, in addition to greater resources, the advantage of having better knowledge of the workings of courts. This phenomenon is well documented: one party's (the company or merchant) advantage of repeatedly going to court is commonly known as the "*repeat-player effect*[29]," as opposed to the "*one-shot litigant,*" the consumer, who generally will go to court only once or twice in his lifetime. This disadvantage may explain why citizens say they are intimidated by the legal system and do not have a very positive image of it.

Consumers' lack of knowledge constitutes another subjective obstacle. It is a general lack of knowledge of their rights, procedures and legal concepts. This lack of knowledge adds to the feeling of intimidation felt by consumers when facing legal procedures and only further deters them from using the legal system.

d) Sociocultural Obstacles

In a broader vision of access to justice, sociocultural factors likely to pose an obstacle to access to justice are also taken into account. The idea that access to justice and measures taken to that end cannot be identical for all sections of society is becoming more prevalent in analyses of access to justice. "Women, and particularly women living alone with children, as well as racial minorities, native people, immigrants, refugees, allophones, adolescents and seniors are less likely to request legal aid in defence of their rights or even to sue in Small Claims Court[30]." The results of the OCLN poll conducted in Ontario are similar:

> *The focus groups identified specific communities and groups that face barriers in the civil legal system, which accords with the description of vulnerable groups above: Francophones, people whose first language is not English or French, members of equality-seeking groups (particularly persons with disabilities), members of racialized communities, with limited literacy, people living in remote or rural communities particularly in the North), seniors and women*[31].

e) Obstacles Related to Physical and Mental Health Disorders

Persons living with a physical disability or with mental disorders are often sidelined from the legal system. Professor MacDonald lists several groups suffering from mental or physical disorders who are marginalized by the legal system: persons suffering from a chronic occupational illness, persons who are simply in poor health, those who have illnesses stigmatized by society, persons institutionalized in penitentiaries, hospitals, schools, and people suffering from illnesses with visible symptoms[32]. The Ontario judiciary has focused on access to

[28] **MCGILL, Shelley.** "Small Claims Court Identity Crisis: A Review of Recent Reform Measures," *op. cit.,* note 5, p. 229.
[29] **GALANTER, M. et al.** "Why the "haves" came out ahead: Speculations on the limits of the Legal Change," *Law & Society Review*, Vol. 9, No. 1, fall 1974, Dartmouth, Canada, pp. 165 to 230. [Online] available on the website of Law for Life http://www.lawforlife.org.uk/data/files/whythehavescomeoutahead-33.pdf (page consulted on June 10, 2013).
[30] **MacDONALD, R.A.** "L'accès à la justice et le consommateur," *op. cit.,* note 18, pages 9 and 10.
[31] **ONTARIO CIVIL LEGAL NEEDS PROJECT STEERING COMMITTEE**. *Listening to Ontarians*, *op. cit.* note 9, p. 43.
[32] **MacDONALD, R.A.** "L'accès à la justice et le consommateur," *op. cit.*, note 18, p. 10.

justice barriers related to physical and mental disorders. In 2005, on the initiative of Ontario's Chief Justice, the Honourable R. Roy McMurty, the Courts Disabilities Committee was created. That committee, with the mandate "to develop recommendations to make Ontario's court system more accessible for persons with mental, physical or sensory disabilities[33]," submitted its report in 2006.

To improve access to justice for persons with mental or physical disabilities, the Committee recommended that:

1. A public commitment to achieve a fully accessible court system be established.
2. A permanent Ontario Courts' Disability Accessibility Committee be established to oversee progress towards a fully accessible court system.
3. Specific court services officials be designated as responsible for responding to accessibility and accommodation needs of persons with disabilities in the court system within each courthouse.
4. Specific procedures be established to plan for court facilities to have a barrier-free built environment and to meet recurring accessibility needs in court.
5. Judges, lawyers and court services officials be provided with education on providing disability accessibility and accommodation.
6. The public be effectively informed of the availability of disability accessibility and accommodation services[34].

f) Access to Justice Barriers in Consumer Disputes Specifically

Over the last forty years, measures adopted for improving access to justice have followed one another: the establishment of Small Claims Courts, class action procedures, higher limits to the monetary value of disputes admissible in the Small Claims Division[35], as well as the supervision of law clerks in Ontario so that they may give legal advice[36], and thus improve consumer access to justice[37].

As mentioned above, the effect of "universal" barriers to access to justice is amplified in consumer disputes, given the specific characteristics of those cases, particularly the low monetary value often at stake in this type of disputes, which does not justify the investments in time and money, the "*repeat player effect*" to the merchant's advantage, the disparities between the parties in terms of resources and knowledge, etc. However, as pointed out by Professor MacDonald:

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[33] **COURTS DISABILITIES COMMITTEE**. *Making Ontario's Courts Fully Accessible to Persons with Disabilities [Report of the Courts Disabilities Committee]*, Toronto, Canada, December 2006. [Online] http://www.ontariocourts.on.ca/accessible_courts/en/report_courts_disabilities.htm#_ftnref1m (page consulted on December 7, 2012).

[34] *Ibid*.

[35] In Ontario, recently, the limit of the financial value of eligible disputes rose from $10,000 to $25,000 as of January 1, 2010. *Ontario Regulation 439/08* amending *Ontario Regulation 626/00.* For its part, Quebec is preparing to raise to $15,000 the current limit of $7,000 (which was $3,000 prior to 2002)-Sec. 536, *Bill 28, Act to Establish a New Code of Civil Procedure*, 2013.

[36] *Act to Promote Access to Justice, 2006*, S.O., c. 21.

[37] **MINISTRY OF THE ATTORNEY GENERAL.** *Paralegal Regulation Protecting Ontario Consumers*, Toronto, Canada, March 30, 2009. [Online] http://www.attorneygeneral.jus.gov.on.ca/english/news/2009/20090330-para-nr.asp (page consulted on December 11, 2012).

> [L']accès à la justice pour les consommateurs n'est pas la même chose que l'accès à la justice tout court. Si nous concevons l'accès à la justice pour les consommateurs de cette manière, nous risquons simplement de leur offrir une justice de style "marque maison". [...] même si, juridiquement, les consommateurs constituent un groupe homogène exclu de la même manière des institutions de justice, sociologiquement ils constituent une catégorie de justiciables hétérogènes[38].

General strategies of access to justice do not appear to correct the difficulties manifested in consumer disputes. In the following chapter, we will summarize a few procedures adopted in Quebec to improve consumer access to justice, and will examine the objectives, the pros and cons, as well as the specific issues thus raised and the factors limiting the procedures' effectiveness.

[38] **MacDONALD, R. A.** "L'accès à la justice et le consommateur," *op. cit.*, note 18, p. 15.

2. Measures Adopted in Quebec to Improve Access to Justice: General Measures and Measures Specific to Consumers

Measures adopted to generally improve access to justice or reduce legal costs do not always yield the expected results. Some analysts think this is because such measures, such as the creation of a Small Claims Division, at times have conflicting goals – a concern to restrain government investment vs. lowering the costs borne by litigants[39]. The author Shelley McGill clearly explains the divergent mandates of Small Claims Divisions: swift and effective justice vs. economic efficiency. Other measures adopted in Quebec include class actions and recognition that qualified consumer associations meeting certain criteria have an interest to apply for an injunction against a merchant. Those two measures also raise much criticism.

The present chapter draws a portrait of those measures adopted in Quebec to improve access to justice. Their objectives will be examined, as well as their perceived pros and cons. This section will be limited to the Quebec experience, which we think reflects the Canadian situation as a whole.

2.1 Small Claims Division: A Failure

The Small Claims Division, a court often called the "people's court," was established in Quebec in 1971[40] "in order to provide redress procedures for small monetary claims, thus improving access to justice[41]." The idea was to establish a court giving citizens with small claims a swift, simple, effective and inexpensive access to justice[42]. Unfortunately, this goal was not attained, whether in Quebec or in the rest of Canada. Although in theory that court appears suitable for consumer disputes, the reality is otherwise[43].

That attempt to improve access to justice for citizens with small claims was based on major changes to the usual procedures used in regular courts of law, and on the imposition of certain benchmarks and other limits. For example, only natural persons, as well as (since 1993) artificial persons related by a work contract to no more than 5 natural persons may file a claim there[44]. With the same goal of effecting swift access to justice by avoiding high legal fees, lawyer representation is not allowed in Quebec's Small Claims Division[45].

[39] See to that effect **MCGILL, Shelley.** "Small Claims Court Identity Crisis," *op. cit.*, note 5.
[40] *Loi favorisant l'accès à la justice*, S.Q. 1971, c. 86, which came into effect on September 1, 1972.
[41] **LACOURSIÈRE, M.** "*Le consommateur et l'accès à la justice*," in Les Cahiers du droit, Vol. 49, No. 1, Laval University Faculty of Law, Ste-Foy, Canada, March 2008, pages 97 to 130, p. 105. [Online] available on the Érudit website at http://id.erudit.org/iderudit/019796ar (page consulted on June 10, 2013). Our translation.
[42] **LAFOND, P.-C.** "*L'exemple québécois de la Cour des petites créances : "cour du peuple" ou tribunal de recouvrement ?*," in Les Cahiers du droit, Vol 37, No. 1, Laval University Faculty of Law, Ste-Foy, Canada, 1996, pages 63 to 92, pp. 66-71. [Online] available on the Érudit website at http://id.erudit.org/iderudit/043379ar (page consulted on June 10, 2013).
[43] *Ibid*, p. 66.
[44] *Code of Civil Procedure,* R.S.Q., c. C-25, sec. 953, par. 3 (hereinafter C.C.P.).
[45] Sec. 959, *C.C.P.* This rule contains an exception: since 1984, the judge may, on permission of the Chief Justice of the Court of Quebec, allow legal representation when a case raises a complex legal issue.

Professor Lafond explains in greater detail the reasons for this prohibition:

> Le deuxième trait distinctif fondamental qui caractérise la Cour québécoise concerne la prohibition de la représentation par un avocat. Seule province du Canada à exclure les procureurs de ce tribunal, le Québec agit de la sorte dans le but évident d'enrayer le coût souvent trop élevé des honoraires professionnels, d'éliminer l'argumentation entre avocats et d'écourter les délais, imitant en cela certains États américains. Pareille mesure est fondée sur la croyance que ce n'est qu'en interdisant cette représentation qu'un système judiciaire spécialisé dans le traitement des petites créances a des chances de fonctionner avec succès. Cette prohibition s'applique indifféremment aux deux parties en litige; en effet, permettre à l'une des parties d'être représentée par un avocat procurerait le sentiment à l'autre d'être obligée d'en faire autant, ce qui perpétuerait le déséquilibre entre les parties[46].
> (References omitted)

Claims filed before the Small Claims Division cannot exceed $7,000, plus taxes[47]. The same limit applies to claims pertaining to the rescission, termination or abrogation of a contract[48]. Moreover, the procedure is very simplified compared to the one applied in regular courts of law[49]. The Small Claims Division judge has an inquisitorial role and must assist the parties.

> 977. The judge instructs the parties summarily as to the applicable rules of evidence and the procedure that appears appropriate. On the invitation of the judge, the parties state their allegations and call their witnesses.
>
> The judge examines the parties and the witnesses and gives them equitable and impartial assistance so as to render effective the substantive law and ensure that it is carried out.

However, this court, intended to be a “people’s court,” has been much criticized. Apart from access to justice barriers, which this court has not removed in the main, we found several other deficiencies demonstrating that it is not at all suitable for consumer disputes. Already in 1996, Professor Pierre-Claude Lafond classified those deficiencies[50], and we will discuss here his still-relevant classification. Among the Small Claims Division’s deficiencies in consumer disputes are: jurisdictional limitations, material access, delays and difficulties of execution, the redress procedure’s individual nature, and the complexity of the burden of proof.

As mentioned above, the Small Claims Division’s jurisdiction, as defined in sections 953 and following of the *Code of Civil Procedure*, is limited to claims not exceeding $7,000 and to requests for rescission, termination or abrogation of contracts of similar value. So other possible redress procedures are excluded from that court’s jurisdiction. And yet, the *Consumer Protection Act* (CPA) provides a series of redress procedures that do not necessarily yield judgments pertaining to monetary payment or to the rescission, termination or abrogation of a contract. The range of redress procedures provided in the CPA is indeed very broad: contract abrogation, but also the unenforceability of certain terms, suppression of credit charges and

[46] **LAFOND, P.-C.** “*L’exemple québécois de la Cour des petites créances*,” *op. cit.,* note 42, p. 70.
[47] Sec. 953a), *C.C.P.*
[48] Sec. 954, *C.C.P.* It should be noted that the following are excluded from the Small Claims Division: claims for an injunction, declaratory judgments, residential leases, class actions, and applications for alimony (art. 954, *C.C.P.*).
[49] Sec. 960-972, *C.C.P.*
[50] **LAFOND, P.-C.** “*L’exemple québécois de la Cour des petites créances*,” *op. cit.,* note 42, pp. 77 and fol.

restitution of those already paid[51], enforcement of an obligation, authorization to have reparations made at the expense of the merchant or manufacturer, reduction of obligations, and punitive damages[52]. The CPA also allows for requesting that the court amend the payment terms of a credit agreement[53]. In short, as stated by Professor Lafond, "the scope of redress procedures needed by consumers to assert their rights adequately cannot be reduced to the range of actions admissible in this Division[54]."

Material access to Small Claims Courts also seems problematic. One of the first aspects of adequate access to justice is the proximity of courts from citizens' place of residence. Another access problem is that Small Claims Divisions are open only during regular working hours, i.e., Monday to Friday from 8:30 a.m. to 4:30 p.m. The prospect of losing a paid work day can deter consumers from going to court, particularly when the dispute amount is minimal. But that schedule is a clear advantage for companies, which have business hours similar to those of Small Claims Divisions and would go to court as part of doing business.

In recent years, several common law provinces have attempted pilot projects whereby Small Claims Divisions would sit during evenings or weekends. For instance, in British Columbia the Robinson Court's Small Claims Division sits in the evening[55]. It should be noted that a study of that pilot project reveals a higher satisfaction level for court sessions held in the daytime, so that maintaining traditional hours is recommended as the basic model of Small Claims Courts[56].

Another frequent criticism of the Small Claims Division is that judgments are no longer executed by the court registrar. Since September 1995, *Bill 39* has submitted the execution of Small Claims Court judgments to the general civil procedures system[57], whereas that task used to be the court registrar's responsibility. This change has several implications for the consumer, by adding an obstacle to access to justice. The consumer, who, as mentioned above, generally has very limited knowledge of his rights and the wheels of justice, including procedures, ends up with a judgment he may well not know what to do with if the opposing party does not execute it voluntarily. In that event, the consumer has to find and approach a professional to have the judgment executed. The establishment of Small Claims Divisions was intended to avoid those undertakings, which necessarily entail additional costs[58]. The low amount prescribed by a judgment may well dissuade the consumer from ensuring execution. This additional difficulty posed by the execution of judgments perpetuates the power imbalance between consumers and merchants, since the latter do not face the same barriers and have the necessary resources to ensure that a judgment in their favour is executed. There are also consequences for the overall effectiveness of the Small Claims Division. If merchants know that consumers who are cheated and win their case will hesitate or have difficulty in obtaining a judgment's execution, they will be less inclined to take the Small Claims Division seriously or consider it a serious deterrent, while consumers will be less inclined to have recourse to it.

[51] *Consumer Protection Act*, R.S.Q., c. P-40.1, Art. 271 [hereinafter the CPA].
[52] Sec. 272, CPA.
[53] Sec. 107-109, CPA.
[54] **LAFOND, P.-C.** "*L'exemple québécois de la Cour des petites créances*," *op. cit.,* note 42, p. 74. Our translation.
[55] **FOCUS CONSULTANTS**. *Evaluation of the small claims Court Pilot Project*, August 2009, p. Viii.
[56] *Ibid*., p. xii.
[57] *Act to amend the Code of Civil Procedure and the Act respecting the Régie du logement*, S.Q. 1995, c. 39, sec. 21.
[58] Although expenses incurred by execution of the judgment may be recovered from the debtor, the consumer must first pay those execution expenses, with no guarantee of reimbursement.

Professor Lafond identifies a fourth factor making the Small Claims Division unsuitable for consumer disputes: the individual character of the legal system prevailing at the Small Claims Court[59]. Claims filed before the Small Claims Division can only be individual, and a judgment rendered in such a case has only a relative effect between the parties to a dispute. The judgment can thus have no effect on third-party consumers who would have a similar dispute with the same merchant[60]. Moreover, the court hierarchy means that Small Claims Court judgments clearly have less weight than those of other proceedings; the case law of that court therefore does not provide solid legal precedents, whether in support of doctrine or to extend the effects of its judgments, for example through class actions. Moreover, that court's decisions, with their low notoriety, have little influence. Indeed, consumers do not know that the court has ruled in favour of a consumer regarding a widespread problem, so they are not induced to assert similar rights against the same merchant or another one using the same practices. In addition, consumers have little or no experience of legal proceedings, and generally have neither the knowledge nor the resources to conduct case law research.

It may be objected that the majority of decisions rendered by the Small Claims Division are now published on the websites jugements.qc.ca and Canlii.org. We think that those publications are not equivalent to consumer access. In fact, those tools are little known to consumers. And, should the latter access them, they would still need to be able to conduct sound research of the databanks, and then make a reasoned analysis of the decisions identified. Although those decisions are rendered by a court intended to be accessible, their reading requires a minimal level of knowledge and familiarity to make a good analysis and understanding of them possible. Even if the consumer can find relevant decisions, he may not be able to define the position of the Small Claims Division on a consumer issue and make skillful use of the information in his own case. Is this not another barrier confronting the consumer? Moreover, analyses of Small Claims Division decisions are rare, thus making the consumer's task even more difficult.

Out of concern for the economics of justice, we may question the soundness of an approach that consists of expending legal resources for redress procedures that would be similar, thus failing to meet one of that court's main objectives – effective justice at low cost, notably for government. Professor Lafond gives the example of a file led by the Automobile Protection Association (APA), regarding the illegal change of a car's manufacturing year, which had generated a large number of consumer complaints. The APA encouraged consumers to sue the manufacturer and provided support (case law, access to an expert, documentation, etc.). Faced with the multitude of claims filed at the Small Claims Division, the manufacturer proposed a comprehensive settlement of consumer demands[61]. It remains that collectivizing such a redress procedure before the Small Claims Court, in order to reach a fuller settlement benefiting all the victims, possibly at lower cost, would have avoided the proliferation of redress procedures; but class actions fall under the Superior Court's exclusive jurisdiction[62]. As indicated by Professor Lafond, "the current small claims system deprives consumers of a judgment's collective scope and fails in this respect to give full and true access to justice[63]."

[59] **LAFOND, P.-C.** "*L'exemple québécois de la Cour des petites créances*," *op. cit.,* note 42, p. 78.
[60] Sec. 985, *C.C.P.*, art. 2848, *Civil Code of Québec*.
[61] **LAFOND, P.-C.** "*L'exemple québécois de la Cour des petites créances*," *op. cit.,* note 42, p. 79.
[62] Sec. 1000, *C.C.P.*
[63] **LAFOND, P.-C.** "*L'exemple québécois de la Cour des petites créances*," *op. cit.,* note 42, p. 79. Our translation.

Finally, Professor Lafond criticizes the Small Claims Division for the complexity of its burden of proof, which is the same as in regular courts of law[64]. Although sections 980 and 981 of the *Code of Civil Procedure* makes the rules of evidence more flexible, by admitting, with precise parameters, a written statement as testimony, and despite the sitting judge's inquisitorial role, the Small Claims Division remains bound by the same rules of evidence as regular courts of law[65].

We can easily imagine, for example, the difficulties a consumer experiences when compelled to provide the necessary evidence for the legal warranty to apply to an item that presents problems prematurely. Under section 38 of the *Consumer Protection Act*:

> *38. Goods forming the object of a contract must be durable in normal use for a reasonable length of time, having regard to their price, the terms of the contract and the conditions of their use.*

The usual rules of evidence would at least require, in that case, not only proof that the item was the object of a contract, but also proof that it is no longer suitable for "normal use," proof of what constitutes "normal use" for that item, proof of the deficiency's premature nature according to the "reasonable length of time" for an item of that type and price category, and proof of the expected conditions of use and of those to which the item has been subjected. Certain elements of that evidence definitely require the intervention of an expert, whom the consumer may require to testify and may have to question. Unless the consumer has consulted a lawyer beforehand to have the latter prepare his entire case or at least give him instructions on expert questioning, this task can prove very arduous and daunting, if not prohibitive, to the consumer. Moreover, on this issue of evidence, the imbalance of knowledge and resources between the consumer representing himself alone and the merchant is particularly stark, given that most consumers rarely go to court, whereas the merchant may benefit from the "*repeat player effect.*" The consumer has only one example, and only his own personal knowledge and experience, of the product or contract that is the object of the dispute. But the merchant often has personnel with a certain knowledge and experience not only of the object of the dispute, but also of the workings of the legal system, which he may have faced in the past.

One of the objectives of establishing the Small Claims Division was to create a court theoretically tailored to meet consumers' needs. But the reality seems very different. In addition to the difficulties we described above, that "people's court" rather appears suitable for a completely different type of claimants. In 1991, the MacDonald task force expressed concern that the Small Claims Division would simply become an additional collection instrument for merchants and professionals if companies were allowed to act as claimants before it[66].

[64] *Ibid.*, pp. 79 and fol.
[65] Sec. 977, *C.C.P.*
[66] **MacDONALD, Roderick A.** *Jalons pour une plus grande accessibilité à la justice*, Working Group on Access to Justice, ministère de la Justice, Sainte-Foy, Canada, 1991, 531 pages, p. 248.

In reality, the Small Claims Division seems more suitable for businesses, which appear as claimants more often than consumers before that court[67]:

> *La principale source de déception liée à la Cour des petites créances concerne la qualité de ses usagers. Toutes les études empiriques, sans exception, menées tant au Canada qu'aux United States, révèlent que ce type de tribunal sert surtout les intérêts du milieu des affaires et attire peu de consommateurs. Malgré les différences entre les divers modèles, la similitude des résultats est frappante. En effet, les utilisateurs agissant en demande sont composés en majeure partie de petits commerçants, de professionnels et d'agences de recouvrement. Pis encore, les consommateurs se retrouvent défendeurs dans une proportion variant entre 80 % et 97 % des cas! La justesse de la qualification de "cour du peuple" est gravement mise en doute en pareil contexte.*
>
> *Cette conclusion se confirme au Québec. La cour québécoise se trouve elle aussi surutilisée par une clientèle commerciale et professionnelle. Une enquête récente menée par le professeur Macdonald révèle que 59 % des poursuites concernent le recouvrement de créances, dont presque la moitié (26 %) sont relatives à des honoraires professionnels. À peine 22 % des réclamations se rattachent à des problèmes de consommation de biens ou de services*[68]*.*

Given the practical failure of the Small Claims Court, originally intended to improve consumer access to justice, has the class action procedure – also intended to improve access to justice for all – had a more than theoretical effect?

2.2 Class Actions: Pooling Consumers' Individual Interests

The class action procedure has been established to improve access to justice for all citizens, including consumers. It recognizes the right of effective access to justice[69] by pooling individual cases that share basic features. With this goal of improving access to justice, the Supreme Court of Canada recognizes that "The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties[70]."

The first Canadian province to adopt a class action law was Quebec, in 1978[71]. Not until 1992 did a common law province, Ontario, adopt a similar law[72]. Since then, the other provinces and territories have followed, except Prince Edward Island, which to this day has no legal framework for class actions. The usefulness of class actions is well proven. Over the last forty years, they have been a most effective tool for consumers, when a large number of them were engaged in a dispute with the same merchant. This redress procedure, initiated by a third party, gives a large number of people access to justice, at almost no cost to consumers.

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[67] **LACOURSIÈRE, M.** "*Le consommateur et l'accès à la justice*," *op. cit.,* note 41, p. 108.
ROZON, L. "L'accès à la justice et la réforme de la Cour des petites créances," in Les Cahiers du droit, Vol 40, No. 1, Laval University Faculty of Law, Québec City, Canada, March 1999, pages 243 to 259, pp. 249-255.
[Online] available on the Érudit website at http://www.erudit.org/revue/cd/1999/v40/n1/043541ar.pdf (page consulted on June 10, 2013).
[68] **LAFOND, P.-C.** "*L'exemple québécois de la Cour des petites créances*," *op. cit.,* note 42, p. 82.
[69] **L'HEUREUX, N.** *Effective Consumer Access to Justice: Class Action*, Journal of Consumer Policy, Vol. 15, No. 4, Laval University Faculty of Law, Ste-Foy, Québec City, Canada, December 1, 1992, pages 445 to 462, p. 459.
[70] *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46, par. 26.
[71] *Act Respecting the Class Action*, R.S.Q., c. R-2.1.
[72] *Loi de 1992 sur les recours collectifs*, S.O. 1992, c. 6.

In Canada, the class action procedure is not available only in consumer cases. Despite that, those cases constitute the majority of class actions in this country. A Canada-wide poll conducted in 2009 by Professor Jasminka Kalajdzic of the University of Windsor reveals that, of 332 class actions in spring 2009 in Canada, 219 (i.e., 66%) pertained to consumer issues[73]. Already in 2001, Professor Pierre-Claude Lafond made a similar calculation for Quebec: he estimated that 40% of class actions brought in Quebec pertained to consumer disputes[74]. This trend has persisted. The large number of class actions brought in Quebec may be attributed to several factors. The first that comes to mind is that the class action procedure has existed long enough for consumers to be well aware of its existence and of their right to use it. Moreover, the high costs of individual access to justice make class actions a preferred tool for consumers. Indeed, in class actions brought in Quebec, the members of the group do not directly bear any related fees. The latter are most often defrayed by the Fonds d'aide aux recours collectifs or by the firm in charge of the case. This funding may be one of the factors in the increasing number of class actions filed before Quebec courts.

In 2011-2012, 56 applications for authorization to institute class actions, all sectors taken together, were filed before the Superior Court of Québec (compared to 10 filed in 1990-1991[75]). Over the same period, the Superior Court authorized 20 class actions[76]. In an interview with the *La Presse* newspaper, the Fonds d'aide aux recours collectifs reported similar numbers for the current year, ending in March 2013: 44 applications for authorization to institute class actions were filed with the Fonds during that period[77].

The Code of Civil Procedure allows consumer associations (notably) to represent the members of the group concerned in a class action. Those associations also view this procedure as a most useful tool for compensating all consumers who may have been wronged by a merchant's reprehensible practice or other violation of the law, without those consumers having individually to face the barriers that otherwise would limit their access to justice. In addition to pooling a set of individual redress procedures, this procedure is also appreciated by the associations as a tool for defending the collective interest of consumers. In fact, the class action establishes more adequately a certain balance of power – the merchant is no longer confronted by a number of isolated consumers, who likely will not take the necessary steps to assert their rights, but rather to an impressive group of all consumers who may have been wronged by a practice. Given the

[73] **KALAJDZIC, J.** "Consumer (In)Justice: Reflections on Canadian Consumer Class Actions," Canadian Business Law Journal, Vol. 50, Faculty of Law of the University of Windsor, Windsor, Canada, December 1, 2010, 20 pages, page 361. [Online] available on the website of the Social Science Research Network http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1660520 (page consulted on June 10, 2013).

[74] **LAFOND, P.-C.** "*Le recours collectif québécois des années 2000 et les consommateurs : deux poids, quatre mesures*" in Développements récents sur les recours collectifs, Service de la formation permanente du Barreau du Québec, Barreau du Québec. Éditions Yvon Blais, Cowansville, Canada, April 1, 2001, 270 pages, p. 39.

[75] **FONDS D'AIDE AUX RECOURS COLLECTIFS***, Rapport annuel 2011-2012*, ministère de la Justice, Government of Québec, Montreal, Canada, 2012. p.15.

[76] It should be noted that the fact of 20 applications for leave having been authorized by the Superior Court in 2011-2012 does not mean that 36 have been rejected. Given the periods between the filing of an application for leave and the decision on that application, it is highly likely that a good number of those 20 accepted applications were filed in previous fiscal years. According to the Annual Report of the Fonds d'aide, the following took place in 2011-2012: 4 discontinuances, 22 out-of-court settlements, 17 rejected applications for leave, 1 remedy allowed on its merits and 1 dismissed on its merits. These data pertain to applications filed before the Superior Court and not to applications for assistance submitted to the Fonds d'aide aux recours collectifs. In fact, in its 2011-2012 Annual Report, the Fonds reports 59 applications for assistance for the year, all accepted.

[77] **BOURQUE, A.** *Les recours collectifs à la hausse au Québec*, in La Presse, Montreal, Canada, November 28, 2012. [Online] http://affaires.lapresse.ca/portfolio/droit-des-affaires/201211/28/01-4598434-les-recours-collectifs-a-la-hausse-au-quebec.php (page consulted on February 1, 2013). Based on remedies reported by law firms practicing in the field of class actions in Canada.

seriousness of such a case – if only by the financial risk involved –, the fear of legal redress may have a deterrent effect. Accordingly, we have seen companies abandon the idea of taking initiatives threatened by a class action, or rapidly correct disputed practices. As the Supreme Court pointed out in the *Dutton* ruling:

> *Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery*[78].

This procedure has the effect of removing one of the main barriers to consumer access to justice: the cost of a lawsuit. Legal fees related to a dispute, as well as expert costs notably, can thus be borne by the Fonds d'aide aux recours collectifs, the organization created to fund such redress procedures. Class actions also eliminate, for members of the group, other barriers – subjective ones such as the psychological constraints a person may experience when going to court on his own.

As we will see, those financial and psychological barriers are not completely removed for the applicant or the group's representative. Fortunately, the possibility for a consumer association to act as a representative removes a considerable burden from the consumer member of the group whom the association will name in support of the class action. Consumer associations' resources – mainly their knowledge and expertise, and their greater familiarity with legal procedures –, as well as the financial resources made available to them by the Fonds d'aide regarding costs directly related to a class action, help establish a balance otherwise to the merchant's advantage. The very nature of the associations authorized to act as representatives guarantees that they can follow up on a case over an extended period, since their interest in the case is related to their mission of defending the rights and collective interests at stake. The situation is otherwise for the consumer named by the consumer association. His availability throughout the process will require a certain sacrifice, again because his direct interest in the case is limited to the amount of his own claim; this already constitutes an obstacle likely to deter him from bringing an individual action, which is considerably less intimidating than the heavy machinery of a class action. Therefore, while this redress procedure does remove other barriers, it should be kept in mind that not all the barriers disappear, even when an association acts as representative.

Professor Kalajdzic summarizes well, on the basis of case law, the benefits of class actions regarding access to justice:

> *Three variations of the access to justice theme thus emerge from the case law. The first and most predominant idea is that barriers to "access" are primarily economic. To similar effect, there is a conflation of "justice" with "litigation"; access to justice is perceived largely as access to a court procedure. That is, so long as the plaintiffs are given the opportunity to litigate their dispute, access to justice has been achieved even if it is only procedural in nature. The procedural advantages of class proceedings over ordinary litigation, including the availability of case management and discovery rights (which are not available in simplified procedures or Small Claims Court actions) are said to further access to justice. Second, and far less often, access to justice is perceived in non-economic terms, as overcoming psychological and social barriers to obtaining redress.*

[78] *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46, par. 550.

> *Third, the courts periodically articulate a social dimension — that class actions are vehicles for vindicating the public interest*[79].
> (References omitted)

However useful, the class action procedure has its shortcomings. As mentioned above, although it is designed partly to improve consumer access to justice, it is not tailored for consumer disputes, as is only too apparent in some circumstances. Many authors have identified a series of shortcomings when a class action is considered or used in a consumer dispute. The following is a non-exhaustive list of those drawbacks and shortcomings.

a) Waiting periods

One of the barriers not removed by class actions is that of waiting periods. Absent an out-of-court settlement quickly reached between the parties, a class action procedure is not only quite cumbersome, but may also prove very long (application for authorization, filing the action, evidence, objections, questioning, incidental claims, hearing, and final judgment). For example, the application for authorization in the case of the dossier du Conseil Québec sur le tabac et la santé v. the tobacco industry[80] was filed on September 10, 1998. It took over six years for the action to be authorized, on February 21, 2005. It took another seven years for hearings to begin, on March 12, 2012 – 13 years and a half after the application for authorization was filed. As we can see, the authorization process, which should be a simple screening step for determining if the case may proceed by class action, can itself take several years. Once authorized, the class action will proceed at the pace of a major civil action. The choice of a two-step-process has inadvertently resulted in raising another barrier to access to justice.

b) Forced Multiplication of Redress Procedures

Another goal of class actions is to avoid the proliferation of redress procedures, for societal reasons and in terms of the economics of justice. Accordingly, Quebec has seen sectoral actions, brought against a group of merchants who shared the same disputed practice or engaged in some illegality according to the plaintiffs. On October 18, 2006, the Appeal Court of Québec rendered a decision ending, for all practical purposes, all attempts at sectoral redress procedures[81]. The application for authorization to institute a class action against the company Agropur and 12 other dairy processing companies accused them of selling products with a fat content not corresponding to that displayed on the containers. The plaintiff sought damages of over $44 million, along with punitive or exemplary damages in the same amount. The Superior Court rejected the application for authorization, on the grounds that the plaintiff did not have the necessary legal interest to act against companies with which he had not contracted – he had in fact acquired the dairy products of only one of the defendants. The authorization criterion provided in section 1003(b) of the *Code of Civil Procedure*, i.e., that the facts alleged seem to

[79] **KALAJDZIC, J.** "Access to a Just Result: Revisiting Settlement Standards and *Cy Pres* Distributions," The Canadian Class Action Review, Vol. 6, No. 1, Faculty of Law of the University of Windsor, Windsor, Canada, April 1, 2010, 37 pages, p. 220 [Online] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1630513 (page consulted on June 10, 2013).

[80] *Conseil Québec sur le tabac et la santé and Jean-Yves Blais v. JTI-Macdonald Corp. and Imperial Tobacco Canada Ltd. and Rothmans, Benson & Hedges Inc*, 500-06-000076-980, *Cécilia Létourneau v. JTI-Macdonald Corp. and Imperial Tobacco Canada Ltd. and Rothmans, Benson & Hedges Inc.*, 500-06-000070-983.

[81] *Bouchard v. Agropur Coopérative et al.*, AZ-50395496, October 18, 2006, confirming J.E. 2005-413 (C.S.).

justify the conclusions sought, was not met, so authorization was refused. The Appeal Court confirmed that the complaining party must, to have its action authorized, establish a cause of action with each party targeted by its claim. Despite the complaining party's request that the necessary interest should be evaluated according to the group members and not the representative, the Appeal Court deemed that the class action procedure, before authorization is granted to proceed through a class action, exists only on an individual basis, and that this individual action must, to meet the conditions of section 1003 of the *Code of Civil Procedure,* have a colour of right. The Appeal Court also indicated that the rest of the class action procedure is purely hypothetical and that the complaining party cannot base itself on the interest of one member of the group it does not yet represent in order to demonstrate the necessary legal interest to file an application against all the other defendants.

As we noted in a previous study, we think that this decision "unfortunately hinders the large-scale curative effect that class actions might have[82]." If many merchants engage in an identical practice, the class action, which is a public interest measure[83], loses some feathers and does not make it possible to make the market more equitable for all consumers if only one of those merchants is sued and must end the practice, and if only his own customers are compensated. We see here the limits of the application for class action authorization, according to the strict interpretation of section 55 of the *Code of Civil Procedure*, which requires that the person filing a claim have a direct, innate and personal interest.

Nevertheless, certain decisions rendered infringe on this principle. A claimant (before the Appeal Court rendered its decision in the Agropur case) was recognized to have a right to act against defendants with whom he had no legal link in a case where it was established that all group members were bound by a contract that, apart from the identity of the contracting company, was identical[84]. In a case where a conspiracy is alleged against multiple defendants, the court recognized that the plaintiff had the necessary interest to act against multiple defendants on the basis of the defendants' common fault and joint and several liability[85]. The Appeal Court also recognized that multiple defendants could be sued by a plaintiff not having a direct legal link with each defendant in a case where the complaint against those defendants was due to a violation of a legal obligation binding all the defendants. In such a case, despite the absence of a legal link with each defendant, any person who proves that he is a member of the group and affected by the redress procedure may obtain recognition of his necessary legal interest to take action[86].

Those limits imposed on sectoral redress procedures actually require a proliferation of redress procedures, each one brought by a consumer having a legal link with the defendant. Or those limits require a single redress procedure grouping a set of members each having a legal link with any one of the defendants. This second option also raises problems. In the context of an authorization, will the court have to analyse the authorization criteria provided in section 1003 of the *Code of Civil Procedure* for each of the members present, thus making the class action process even more cumbersome? Will the group have to be split up if some members present

[82] **UNION DES CONSOMMATEURS**. *Mettre un frein aux clauses abusives dans les contrats de consommation*, UC, Montreal, Canada, 2011, 113 pages, p. 32.
[83] Dell Computer Corp. v. Union des consommateurs, [2007] 2 S.C.R. 801, par. 106.
[84] *Option consommateurs v. Assurances générales des Caisses Desjardins Inc.*, [2001] R.J.Q. 2308, [2001] R.R.A. 830, [2001] J.Q. No. 3759 (C.S.).
[85] *Conseil Québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, J.E. 2007-940, [2007] J.Q. No. 1143 (C.S.).
[86] *Regroupement des CHSLD Christ-Roy (Centre hospitalier de soins de longue durée) v. Comité provincial des malades*, [2007] R.J.Q. 1753, J.E. 2007-1595, [2007] J.Q. No. 8303 (C.A.).

different or even contradictory arguments? Or will those contradictions lead to rejection of the single authorization? Will a group that may be disparate on certain issues also require a multiplication of the group's representatives? Will all members agree to be represented by the same firm? If so, what will happen if one member wants to change counsel? How will strategies be developed for all group members if many individual members have mandated one or more counsels?

Setting aside sectoral redress procedures also raises ethical issues for counsels and consumer associations. A widespread illegal practice committed by multiple merchants would henceforth require that a consumer having a legal link with each of those merchants be named as plaintiff. In practice, a lawyer or consumer association, after being approached by a consumer submitting his problem to them, and after finding that the practice is widespread in a sector, would thus have to chase after other consumers who were victimized by the same practice, but who have a legal link with each merchant likely to have committed it. Apart from the complexity of such a search, it would resemble an ambulance chaser's activity, which the public and the legal community views very negatively, and which, undertaken by the lawyer, could give the profession a profit-seeking and commercial character – a practice prohibited in section 3.08.03 of the *Code of Ethics of Advocates*[87].

Under section 1048 of the Code of Civil Procedure (C.C.P.), a legal person under private law, a corporation or an association, so long as it numbers less than 50 employees, may request the status of representative, if it can establish that it is able to ensure the group members' adequate representation (1003 d), which, however, mentions only the *member* requesting that status). The C.C.P. therefore recognizes, to a certain extent, that those third parties not members of the group have sufficient interest to take action in the form of a class action, in order to represent without a mandate the absent members. Until now, the courts have agreed in concluding that the right to take action and the legal interest to do so, as conferred by the C.C.P., must be interpreted as directly resulting from and intrinsically linked to those of the group member who is also a member of the organization and whom the latter names (this is one of the conditions provided by section 1048: *1048 a) one of its members designated by it is a member of the group on behalf of which it intends to bring a class action*). So long as those interpretations are maintained, it will likely remain difficult to bypass this requirement of a legal link with each defendant. It may be time to take into account that the mission of consumer associations – to defend the rights and collective interest of consumers – might suffice to recognize that they have a direct, innate and personal interest against a set of merchants infringing on consumers' rights or collective interest. The Code of Civil Procedure, and then the *Consumer Protection Act*, as we will see, have timidly opened the door to that recognition, which some foreign authorities have granted more broadly. Without the courts recognizing consumer associations' direct interest in class actions against multiple defendants, it will likely be lawmakers' responsibility to affirm it clearly.

[87] Sec. 3.08.03, *Code of Ethics of Advocates,* c. B-1, r-3.

c) Compensation of Group Members

Professor Jasminka Kalajdzic estimates that there exists a direct link between access to justice and attaining a fair result:

> *Class actions must be about more than giving people an opportunity to litigate. The mechanism must also be designed and implemented in a way that promotes fairness — indeed, justice — in terms of process and result. […]*
>
> *[A] substantively fair result must also define access to justice. For example, settlements should not under-compensate class members, and claims processes must be designed in a way that ensures the greatest take-up rate possible in the circumstances*[88]*.*

Her writings point out an aspect of class actions that could pose a barrier to actual access to justice for consumers: to what extent should a class action's settlement (by agreement or judgment) be considered fair if it does not compensate group members directly? Professor Kalajdzic refers here to certain applications of the *cy près* doctrine in consumer class actions[89].

This doctrine, originating from testamentary law, provides that, when it is impossible to apply a provision to the letter, the intention must be applied as closely as possible. Applied to class actions, this doctrine justifies indirect compensations, so long as the initial objective is attained. Indeed, the Code of Civil Procedure stipulates that the judge has the power, "if of opinion that the liquidation of individual claims or the distribution of an amount to each of the members is impossible or too expensive" (1034 C.C.P.), to dispose otherwise of the amounts recovered (1036 C.C.P.).

Professor Kalajdzic thinks that this way of proceeding may yield important undesirable effects[90]. She specifies that the situations mentioned above (the legislation and case law in the rest of Canada have the same effect), i.e., impossible or impractical direct distribution, perfectly justify the application of the *cy près* doctrine, which allows for one of the objectives of class actions to be met:

> *In these two scenarios, cy près distributions are consistent with access to justice: they ensure that defendants disgorge ill-gotten gains or pay damages for wrongful conduct and in this way are called to account for their misconduct, even if these payments do not correspondingly compensate class members. (...)*
>
> *While the use of cy près to punish defendants is not universally accepted as an appropriate use of the remedial mechanism, behaviour modification is a legitimate goal of class proceedings in Canada, and the punitive function performed by fixed cy près is thus not necessarily objectionable*[91]*.*

[88] **KALAJDZIC, J.,** "Access to a Just Result," *op. cit.,* note 79, p. 221.
[89] **KALAJDZIC, J.,** "Consumer (In)Justice," *op. cit.,* note 73, pp. 368-374.
[90] *Ibid*., pp. 369-370.
[91] **KALAJDZIC, J.,** "Access to a Just Result," *op. cit.,* note 79, p. 237.

She adds:

> *For these courts, monies distributed cy près, which literally means "as near as," should be applied for a purpose that is as near as possible to the purpose of the lawsuit. The objective is, as mentioned above, to provide benefits to the actual class members, even if indirectly. [...]*
>
> *To fulfill the compensatory purpose of class actions, therefore, there needs to be at least some nexus between the recipients of the cy près scheme and the class members themselves. [...]*
>
> *Reliance on the deterrence argument alone, however, effectively transforms cy près awards into payment of a fine, and class counsel into a true private attorney-general.*
>
> *Does it matter whether the cy près distribution serves only a deterrence function or that it benefits the very class members who were harmed by the defendant's conduct? The distinction between these two normative views is critical for access to justice. While settlements that approach full compensation for class members' losses also serve a deterrence function, the reverse is not necessarily true*[92]*.*

In cases where *cy près* would be appropriate, J. Kalajdzic insists on the importance of the court carefully ensuring that the amounts to be paid by the defendant actually benefit the group members. Payment of those amounts to organizations without any link with the class action or with the group's members should be avoided at all costs: in no case does it favour access to justice[93].

Although the Ontario law, on which her study is mainly based, is relatively clear, by stating "the court is empowered to order all or part of an aggregate award that has not been distributed "in any manner that may *reasonably be expected to benefit class members*," if the court is "satisfied that a reasonable number of class members who would not otherwise receive monetary relief *would benefit from the order*[94]," the author notes that those rules are not always applied as strictly as they should be.

It should be noted that this obligation to ensure that the amounts benefit the group members does not seem to be expressed as imperatively by the Quebec law, C.C.P. section 1036:

> *1036. The court disposes of the balance in the manner it determines, taking particular account of the interest of the members, after giving the parties and any other person it designates an opportunity to be heard.*
> (Our emphasis)

While reaching a fair result must be considered a crucial aspect of access to justice, as we believe, it also seems important that indirect compensation be attached "as closely" as possible to the members' interest, whether that interest is viewed individually or collectively.

[92] **KALAJDZIC, J.,** "Access to a Just Result," *op. cit.,* note 79, pp. 246-247.
[93] **KALAJDZIC, J.,** "Consumer (In)Justice," *op. cit.*, note 73, pp. 368-369, and "Access to a Just Result," *op. cit.,* note 79.
[94] **KALAJDZIC, J.,** "Access to a Just Result," *op. cit.,* note 79, p. 245.

d) Compensation of the Representative

As mentioned above, the representative's role can be demanding, whether played by a group member or an association. And yet, the courts hesitate to compensate the representative if he is also a member of the group. The risk of a conflict of interest is patent if an out-of-court settlement is reached by the parties – has the representative, who likely is entitled to his share of the compensation prescribed for members, agreed to a sellout of the absent members, while knowing that his role as a representative would give him a personal advantage?

Canadian case law on this question does not appear settled. This is noted by the British Columbia Court of Appeal, in *Parsons v. Coast Capital Savings Credit Union*[95]. The settlement of almost $5 million reached in this case, which pertained to bank overdraft interest that the plaintiff qualified as usurious under the *Criminal Code*, provided $10,000 in compensation to the group's representative. The Court of Appeal handled the case after the trial judge refused to approve payment of that compensation. After a study of Canadian and American case law on the subject, the Court of Appeal concluded that the first judge had erred in law by imposing, as conditions for approving the compensation, that the representative's services be important and far surpass what is normally required of a representative. The Court of Appeal estimated that the issue rested on a divergence between a potential conflict of interest and the principle that service to others is compensable. Noting the inconsistency of Canadian case law on the issue, the Court established a series of criteria and aspects that must be taken into account and observed in order to ensure that a representative's compensation avoid the risks of a conflict of interest. Deeming that the representative's contribution had been necessary and had resulted in the group's financial success, the Court estimated that the amount of $3,500 would only be purely compensatory and thus acceptable.

The Court therefore recognized that the representative's tasks may be essential to the class action's success, and should not be paid for by the absent members, who yet benefit from those tasks. Would the possibility of those tasks not being compensated be likely to constitute a barrier to consumer class actions?

As mentioned above, the role of representative is often played, in consumer disputes, by consumer rights organizations. This possibility offered by the law lowers somewhat the barrier constituted by a class action's burden on a single consumer's shoulders. A few of the tasks performed by the association acting as a representative are: searching for group members, planning strategy, managing consumer requests for information, media presentations, verification of procedures, participating in negotiations, if applicable, appearing in court… What about financial compensation to those associations for their work on the case? While the risk of a conflict of interest is less patent when the role of representative is played by such an organization, it remains that those organizations' limited resources also constitute an obstacle to their involvement in class actions.

The issue of compensating those associations is not simple and their work is not always compensated. As part of a USD$2.2 billion settlement (Canada/United States), the association instigating the class action against *Nortel*[96] requested a compensatory amount of USD$150,000 to cover the expenses it incurred for the case and to support the maintenance and development

[95] *Parsons v. Coast Capital Savings Credit Union*, 2010 BCCA 311.
[96] *Association de protection des épargnants et investisseurs du Québec v. Corporation Nortel Networks*, CSQ, 500-06-000126-017, on January 21, 2007.

of its activities on behalf of the public generally and small investors more specifically. The Court, recognizing that the procedures undertaken by the association favoured the disputed amounts' recovery and the members' compensation, also noted that the Code of Civil Procedure does not grant a representative the right to be remunerated and is also silent on the Court's power on the issue (par. 140 and fol.). The Court concluded that:

> *141. […] Le Tribunal est par conséquent d'avis qu'il n'a pas cette discrétion. Il n'appartient pas au Tribunal de favoriser ou de financer le maintien et le développement des activités de l'A.P.E.I.Q. en lui allouant une somme forfaitaire à même celles qui sont destinées aux membres du groupe.*
>
> *[…]*
>
> *143. L'allocation d'un montant forfaitaire de 150 000 $ USD à l'A.P.E.I.Q. ne paraît pas être exclusivement dans l'intérêt des membres qu'elle a eu l'autorisation de représenter. Le montant forfaitaire réclamé est injustifié et les déboursés encourus ne peuvent être assimilés à des frais judiciaires.*

An association acting as representative in a class action may or may not obtain an amount in compensation of the work, depending on whether the case is decided on the merits or in an out-of-court settlement between the parties. Indeed, when, as part of a transaction between the parties to settle the case out of court and end the class action, compensation is prescribed for the organization acting as representative, the courts easily approve the entire settlement, whereas refusal of part of the settlement would mean refusal to approve the entire settlement. But if the case proceeds on the merits, the Court, according to the case law established in the *Nortel* case, would not have the discretion to order such compensation.

The situation is very curious: the representative cannot be compensated for longer, more demanding work required by a decision on the merits, but the representative may be compensated if a settlement is reached before trial. Some may see there a source of potential conflict of interest.

Funding of the participation of associations by the Fonds d'aide aux recours collectifs might well constitute an ideal solution, by enabling an association's participation as representative not to be restricted by the association's available resources, and by thus removing fears of a potential conflict of interest. But in fact, consumer associations receive no financial assistance from the Fonds d'aide aux recours collectifs for time spent on a case and for work done during the procedures in which they participate[97].

The Office de la protection du consommateur (OPC) advocates this solution in a memorandum presented as part of consultations on the draft bill introducing the new Code of Civil Procedure[98]. In line with what was announced in the draft bill, *Bill 28 to establish the new Code of Civil Procedure* provides in section 593 that the court could grant the representative compensation that, as with court costs and legal fees, would be debited from the collective

[97] **LAFOND, P.-C.** *Le recours collectif comme voie d'accès à la justice pour les consommateurs*, Éditions Thémis, Montreal, Canada, 1996, p. 6.

[98] **OFFICE DE LA PROTECTION DU CONSOMMATEUR**, *Mémoire sur l'avant-projet de loi instituant le nouveau Code de procédure civile*, January 2012, 19 pages, pp. 15 and fol. [Online] http://www.opc.gouv.qc.ca/fileadmin/media/documents/a-propos/publication/memoire-code-procedure-civile.pdf (page consulted on June 3, 2013).

recovery amount or before payment of individual claims. The OPC thinks this section would allow "compensation, at cost, for the time spent by personnel in performing tasks as representative[99]." The text is not absolutely clear on this subject, so such compensation should probably be expressed more explicitly. According to the proposed text, those amounts would be debited from the recovery amount; the OPC mentions that the law should be improved to provide that if the representative loses the case, it or he could still obtain compensation from the Fonds d'aide aux recours collectifs[100]. We fully agree with this position.

e) Payment of Fees

Although since 1982, in Quebec, a plaintiff who loses his case no longer has to pay legal fees[101], he still risks having to pay legal costs, his lawyer's legal and extralegal fees or, if the Fonds d'aide has intervened, any amounts exceeding those granted by it[102]. In addition, the class action can proceed only if it passes a screening test, i.e., obtains judicial authorization determining whether the proposed redress procedure has a colour of right, and thus is not frivolous. So the process should encourage plaintiffs' participation by guaranteeing that they do not run financial risks much greater than those of an individual action.

2.3 Consumer Organizations' Power of Injunction

In 2010, at the request of consumer rights organizations, Quebec lawmakers added to the *Consumer Protection Act* (CPA) a specific right of action. The provision is as follows:

> *316. If a person has engaged or engages in a practice prohibited under Title II or a merchant has included or includes in a contract a stipulation prohibited by this Act or a regulation, or has included or includes a stipulation inapplicable in Québec that is referred to in section 19.1 without complying with that section, the president may apply to the court for an injunction ordering the person to cease engaging in the practice or ordering the merchant to cease including such a stipulation in a contract, or to comply with section 19.1.*
>
> *A consumer advocacy body that has been constituted as a legal person for at least one year may apply for an injunction under this section and is deemed to have the interest required for that purpose. The court may not decide on the application for injunction filed by such a body unless a notice, attached to the motion to institute proceedings or the application for an interlocutory injunction, as the case may be, is notified to the president.*
>
> *If an injunction granted under this section is not complied with, a motion for contempt of court may be brought by the president or the body referred to in the second paragraph.*

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[99] **OFFICE DE LA PROTECTION DU CONSOMMATEUR**, *Mémoire sur l'avant-projet de loi instituant le nouveau Code de procédure civile*, *op. cit.,* note 98, p. 17. Our translation.
[100] *Ibid*.
[101] This measure was abolished by the *Act to amend the Labour Code, the Code of Civil Procedure and other legislation, S.Q.* 1982, c. 37, sec. 24, which added a section 1050.1 to the *Code of Civil Procedure*.
[102] **LAFOND, P.-C.** *Le recours collectif comme voie d'accès*, *op. cit.,* note 95, pp. 484-490.

Under this provision, associations with the mission of protecting consumers are considered to have the required interest to apply for an injunction within the parameters provided in section 316. This is the first time, in a consumer protection law, that an interest to act is conferred expressly to consumer associations.

It should be noted that this right of action extends the right of the president of the Office de la protection du consommateur (OPC) and not of consumers; indeed, consumers cannot apply for injunction conclusions under sections 271 or 273 of the Act, and they may avail themselves of redress procedures provided by the Act only to the extent that they have contracted with the merchant whom they intend to accuse. As stated in section 2 of the Act, "This Act applies to every contract for goods or services entered into between a consumer and a merchant in the course of his business."

However, this power of action granted to consumer rights organizations is far from what those organizations demanded[103], i.e., a general power to act in consumers' collective interest that would be modelled after the action for an injunction provided by European Directive 98/27/EC, which allows that a court be requested to order an end, in consumers' collective interest, to any illicit practice[104].

Our organization also proposed that the Act provide that "damages may be imposed in reparation of prejudice caused to the collective interest of consumers[105]," in order to ensure the deterrent character of such a redress procedure.

Although the recognition of consumer associations' interest by section 316 of the *Consumer Protection Act* is a step in the right direction, we fear that the redress procedure, under the Act, will not have the expected effects. Already in 2009, we criticized lawmakers for their timid approach and the excessively narrow scope of this redress procedure, in addition to not allowing associations to request damages for prejudice to the collective interest of consumers. Those damages could notably cover the costs incurred by associations in initiating and conducting such redress procedures (as allowed, for instance, by France's *Code de la consommation* in applying the European Union Directive)[106].

Moreover, there is a major difference between the European redress procedure and that found in CPA section 316. For example, the French redress procedure allows for attacking a wide range of unfair terms – the *Décret no 2009-302 du 18 mars 2009* contains a list of 12 "black" terms that are prohibited, as well as a list of 10 "grey" terms presumed unfair – and for obtaining a judgment declaring that a contractual term is unfair, under article L132-1 of the *Code de la consommation.* By contrast, Quebec's redress procedure, which allows for attacking a

[103] See, notably:
DUCHESNE G. and Y. LABELLE, *Les associations de consommateurs et la défense de l'intérêt collectif des consommateurs : réflexions sur l'introduction d'un nouveau recours en droit québécois*, in "L'accès des consommateurs à la justice," under the direction of Pierre-Claude Lafond, Éditions Yvon Blais, Cowansville, Canada, 2010, pp. 49-67.
[104] *Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interest*.
[105] *Ibid*, pp. 65-66. Our translation.
[106] **UNION DES CONSOMMATEURS**, *Mémoire sur le projet de loi n^{o} 60*. UC, Montreal, Canada, October 19, 2009, 17 pages, p. 14. [Online] http://uniondesconsommateurs.ca/docu/protec_conso/UCLoi60091020.pdf (document consulted on February 13, 2013).
It should be pointed out that the injunction proceeding has been used very rarely by the President of the Office de la protection du consommateur du Québec, although he has had this power since 1978.

"prohibited term," appears to aim only at terms already expressly prohibited, thus limiting the procedure's scope, because the CPA does not provide a general definition or prohibition of unfair terms.

Whereas a president who wants to initiate actions under 316 has considerable means to do so, Union des consommateurs had pointed out at the time that consumer associations' limited financial resources constitute a barrier to using the proposed redress procedure, and we had suggested that a mechanism be established to ensure funding of actions initiated by qualified consumer associations[107]. Our fears have been validated; our research indicates that no consumer association has ever used this redress procedure in Quebec.

2.4 Conclusion

A broadened vision of justice must take into account not only swift and adequate access to judicial institutions, but also aspects as varied as: understandable procedures, measures likely to ensure compliance and execution of the judgment, as well as respect for the parties' rights and for applicable principles of natural justice, to ensure the system's fairness.

While the concept of access to justice must not be limited to access to the judicial process, it certainly must include it. It is necessary to lower to the extent possible the barriers that, in consumer affairs, arise between a wronged consumer and the means for obtaining equitable reparation. In addition, measures for improving access to justice must take all barriers into account, not only economic ones, and must absolutely give full effect to measures with a social dimension that affect consumers' collective interest or the public interest.

Among the measures adopted in Quebec to improve access to justice, the class action seems to have had a major positive effect, by allowing the individual interests of consumers to be pooled, at almost no cost to the latter. As we have seen, this redress procedure still requires essential adjustments if is to meet its objectives effectively.

The Small Claims Division may well be the biggest disappointment, given how promising it seemed in 1971. Experience has unfortunately revealed it to be unsuitable for consumer disputes.

Although consumer redress procedures have always motivated and justified the establishment of the Small Claims Division as well as the class action procedure, it is surprising how unsuitable those initiatives are to the realities of this type of dispute. The traditional barriers to access to justice often remain very present, whereas those initiatives aimed precisely at eradicating them: cumbersome and complex procedures, lack of knowledge and resources, users' perception, the disputes' low monetary value, etc. Consumer disputes by definition affect a large number of consumers and, at times, a number of merchants with similar practices, so that the measures put in place do not sufficiently broaden the effect of procedures or judgments.

As for the *Consumer Protection Act*'s recognition of consumer associations' interest, in allowing them to apply for injunctions against merchants, it appears that, without adequate financial support granted to consumer associations that would want it, this measure will remain absolutely without effect.

[107] *Ibid*, p. 15.

The measures we have analysed have not ended the difficulties of consumer access to justice. No single measure would seem to be a panacea. But it is surprising how little the various initiatives have improved consumer access to justice. Is that because they are not suitable for consumer disputes or issues, or (with regard to the CPA's recognition of the associations' right of action) because they do not take certain realities into account?

It should be recalled that in 1991, the task force on access to justice that was led by Professor MacDonald, and that advocated a specific and differentiated justice, recommended that the peculiarities of this legal field be clearly stated and taken into account and that a consumer court be created[108].

As several authors suggest, "*the achievement of access to justice for consumers proves to be a challenging and sometimes elusive task*[109]." The deficiencies of existing solutions seem to confirm that.

Faced with those difficulties in correcting problems of access to justice, we undertook to assess certain measures adopted in foreign jurisdictions to improve consumer access to justice and deal with some of the deficiencies presented by measures adopted here. Indeed, given that our justice system does not seem adapted to consumer disputes or capable of applying existing redress procedures adequately, we thought it relevant to search for means to improve the effectiveness of redress procedures already in place and, by the same token, improve consumer access to justice.

Accordingly, in the next chapter we will examine some of the approaches taken in foreign jurisdictions to improve consumer access to justice. More specifically, we will consider measures that broaden the scope of certain judgments or recognize that certain entities have a broad interest in consumer disputes, in order to avoid the proliferation of redress procedures.

[108] **MacDONALD, R.A.** "L'accès à la justice et le consommateur : une marque maison?," *op. cit.,* note 18, p. 18.
[109] **RICKETT C. and T. TELFER.** *International Perspectives on Consumers' Access to Justice*, Cambridge University Press, Cambridge, United Kingdom, 2003, 29 pages, p. 2.
[Online] http://catdir.loc.gov/catdir/samples/cam033/2002031456.pdf (document consulted on February 13, 2013).

3. Consumer Access to Justice Abroad

Consumer access to justice is always a current issue, in conferences, workshops, or statements made by governments and consumer associations. In fact, the theme adopted on March 15, 2013 by *Consumer International* for World Consumer Rights Day was: *Consumer Justice Now!*[110]

Different jurisdictions adopt distinct approaches and visions of consumer protection and of the means to ensure consumer access to justice. Whereas some see an issue of social justice and basic rights[111], others advocate a more conservative market-oriented laissez-faire approach whereby government intervenes only in grave circumstances likely to considerably affect consumer confidence in the market, the market economy or its stability.

Across the world, the types of measures taken to improve access to justice specifically for consumers vary enormously, and the measures advocated are also varied in their approach, their scale, etc. Among large-scale measures adopted in foreign jurisdictions, we find consumer dispute arbitration mechanisms[112], class actions[113], and even courts specializing in consumer disputes[114]. Those measures are often in line with objectives and principles we find in international and regional treaties[115]. As we will see, some foreign countries have also adopted measures of a very different kind – notably, measures that broaden the effect of redress procedures or judgments, and measures recognizing that certain entities have a broad right of action[116]. In the next chapter, we will identify this type of measures adopted in foreign jurisdictions. We will discuss the arguments put forward in support of those measures, their operation, effects and effectiveness, as well as their pros and cons. If possible, we will focus on the expected effects of such measures on access to justice and on the assessment of those measures since their adoption[117].

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[110] **CONSUMER INTERNATIONAL,** page *World Consumer Rights Day 2013 : Consumer Justice Now!,* CI, London, United Kingdom, no date. [Online] http://www.consumersinternational.org/our-work/wcrd/wcrd-2013#.UW2inkotVuY (page consulted on March 20, 2013).

[111] This is the case in Brazil, for example, where consumer rights are enshrined in the Constitution.

[112] A catalogue of those measures is found in **LABELLE, Y.** *L'arbitrage des litiges de consommation*. *op. cit.*, note 3, pp. 51-59.

[113] For class actions in the United States, see: *Rules of Civil Procedures, 28 U.S.C. Appendix*. Moreover, the American states have also adopted procedural rules for class actions.

[114] For an overview of those proceedings, see **CARREAU, S.** *Consommateurs et accès à la justice op. cit.,* note 3, pp. 40-86.

[115] A first example of this push for consumer access to justice is the *Commission Green Book of 16 November 1993*.

[116] For an overview of those measures, see **DUCHESNE, G. and Y. LABELLE,** *Les associations de consommateurs et la défense de l'intérêt collectif des consommateurs. op. cit.,* note 98;
See also *Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interest*. [Online] available on the Europa website at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=fr&type_doc=Directive&an_doc=1998&nu_doc=27 (page consulted on June 10, 2013).

[117] Previous researches led us to discover some other measures that could succeed in limiting the multiplication of recourses by consumers; in Louisiana (United States), for example, a merchant who has signed with the regulatory authority a voluntary commitment to stop using an unfair clause could file a claim for an injunction against a competitor using the same clause (§ 51:1409, Unfair Trade Practices and Consumer Protection Law, Louisiana Revised Statutes). That kind of measure, which has more to do with competition than consumer protection, still implies a multiplication of recourses (a distinct recourse against each targeted competitor); still, by permitting a merchant to take care of levelling the field, this kind of measure brings a somewhat better protection for consumers, as we mentioned elsewhere. However, this type of measure does not fit into the framework of the present study. See: UNION DES CONSOMMATEURS. *Mettre un frein aux clauses abusives, op. cit.*, note 82.

3.1 European Union

a) Consumer Access to Justice

We find in the European Union many measures to improve consumer access to justice. The special importance of this type of justice to European Union lawmakers should be taken into account in an overview of its member countries' initiatives.

In addition to Directives providing specific measures – among the first was *Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises* –, the first major undertaking to improve access to justice on the European territory was the *Commission Green Paper of 16 November 1993 on access of consumers to justice and the settlement of consumer disputes in the single market*[118]. As suggested by its title, the Green Paper's objective was to allow access to justice and the handling of cross-border disputes for all European Community consumers. That first enforceable text on the subject summarized the legal and extralegal procedures established in each Member State to handle consumer disputes. The Green Paper also discussed measures adopted to protect consumers' collective interests through consumer associations, as well as pilot projects carried out in Member States.

In addition, the document identified the specific difficulties raised by cross-border consumer disputes, and the possible difficulties of applying existing measures in Member States to cross-border consumer disputes. To guarantee European Community consumers access to adequate dispute resolution mechanisms, the European Commission issued the following recommendations regarding actions for injunctions brought by consumer associations: (i) establishment of a Community "regulator" applying a Community procedure, (ii) harmonization of national provisions, and (iii) mutual recognition of national provisions[119]. The Commission also recommended that legal aid to initiate such redress procedures, in the form of financial assistance, be granted to consumer organizations of modest financial means[120].

Again in order to improve access to justice with regard to cross-border consumer disputes, the European Commission recommended that a dispute follow-up mechanism be established, formed by judges and independent experts, with the mandate to remove consumers' practical difficulties and propose a list of issues to be addressed in priority[121]. Finally, the Commission proposed the creation of a Code of Conduct that would cover, among other things, all the extralegal procedures to reduce the imbalance between the cost of cross-border procedures and the monetary value of the disputes[122].

[118] Commission Green Book of 16 November 1993 on access of consumers to justice and the settlement of consumer disputes in the single market, COM (93) 576 final of 16 November 1993, 112 pages. [Online] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1993:0576:FIN:EN:PDF (page consulted on June 10, 2013).
[119] **EUROPEAN UNION.** *Consumer access to justice (Green Paper)*. [Online] available on the Europa website at http://europa.eu/legislation_summaries/other/l32023_en.htm (page consulted on March 5, 2013).
[120] *Ibid*.
[121] *Ibid*.
[122] *Ibid*.

Following up on the *Green Paper on access of consumers to justice and the settlement of consumer disputes*, the European Commission adopted in 1996 the *Action plan on consumer access to justice and the settlement of consumer disputes in the internal market*[123], which confirmed the "urgent need for Community action in regard to the settlement of consumer disputes[124]" and thus to consumer access to justice. The Commission recognized the magnitude of the problem of consumer access to justice, given the difficulties posed by cross-border disputes for Member States acting in isolation, the transposition of Community law to internal law, and the geographic limits constituted by borders[125]. The *Action plan* first proposed out-of-court settlements and proposed a blueprint for the voluntary establishment of extralegal procedures to handle cross-border disputes. To facilitate the settlement of consumer disputes, the *Action plan* also proposed the introduction of a complaint form to be used by consumers involved in a cross-border dispute to enable them to reach an out-of-court settlement. Should this settlement attempt fail, the form would serve as an official complaint and facilitate the consumer's access to a court with the jurisdiction to settle his dispute. Moreover, the *Action plan* proposed the publication of a Legal Aid Guide intended for low-income consumers involved in cross-border disputes. Finally, the *Action plan* proposed minimal criteria for guaranteeing the impartiality of dispute resolution organizations, as well as the effectiveness and transparency of procedures adopted by those organizations[126].

The European Union has thus deployed substantial means for improving consumer access to justice, as demonstrated by the adoption of the Green Paper in 1993 and of the Action Plan in 1996. So it is surprising to find how difficult it is today to retrace those first two enforceable texts in their entirety or to discover what follow-up they received.

Fortunately, the European Union's efforts to improve access to justice have not been limited to those two interventions. The multiple Directives adopted over the years by the European Union regarding consumer protection have indeed served as models in many jurisdictions, and of course have been incorporated in the legal systems of Member States, thus making the European Union one of the territories where consumers are best protected. Among the measures adopted are some that go to the heart of the present project. Those measures, at the risk of infringing on certain basic legal principles, have aimed at broadening the effect of certain procedures or judgments in order to ensure better access to justice in its broadest sense.

[123] **EUROPEAN COMMISSION**. *Action plan on consumer access to justice and the settlement of consumer disputes in the internal market*, COM [96] 13 final of 4 February 1996.
[124] **EUROPEAN COMMISSION.** *Communication from the Commission on the out-of-court settlement of consumer disputes*, (COM(1998)198). [Online] available on the Europa website at http://ec.europa.eu/consumers/redress_cons/docs/index_en.htm (page consulted on March 5, 2013).
[125] *Ibid*.
[126] *Ibid*.

b) European Directives Broadening the Effect of Certain Measures

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts: actions for injunctions

Given the many disparities between the laws of Member States; the latter's responsibility to ensure that contracts concluded with consumers do not contain unfair terms; and the likely consequences of unfair terms on the interior market, the European Union adopted *Directive 93/13/EEC*[127].

One of the measures provided in this Directive has a clear effect on consumer access to justice. It broadens consumers' right to litigate and the effect of judgments. The directive provides an obligation of result for Member States, which must put in place "adequate and effective means to prevent the use of unfair contract terms[128]." Among the Directive's measures for eliminating unfair terms in consumer contracts are "provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms[129]." This is obviously the redress procedure that section 316 of Quebec's *Consumer Protection Act* is modelled after. According to certain established criteria, consumer associations, although they have not entered into a consumer contract with the merchant(s) concerned, are thus recognized to have sufficient interest to bring actions against the latter in order to have unfair terms removed from the contract[130]. This measure broadens the usual rules requiring a direct legal link, a personal interest, to bring a civil action.

The Member States were required to integrate in their respective national laws the obligations of Directive 93/13/EEC, at the latest on December 31, 1994[131]. As provided in article 9 of Directive 93/13/EEC, the European Commission drafted in 1998 a report on the Directive's implementation[132]. Regarding article 7, on establishing that an action for an injunction can be brought by a consumer association against a merchant for using unfair contractual terms, the report reveals that "all countries have opted for the legal procedure[133]" whereas the Directive allowed to choose between a legal procedure and an administrative one. The reason for this unanimous choice is that the current national substantive law of Member States provides that "only the courts are empowered to prohibit the use of unfair contractual terms[134]."

Among the limits to the effectiveness of this new measure, the European Commission's report points out that the length of procedures and the slowness of national legal systems result in

[127] *Directive 93/13/EEC of 5 April 1993* (OJ L 95 of 21 April 1993).
[128] **EUROPEAN COMMISSION**. *Directive 93/13/EEC*, article 7.1, *The integration of Directive 93/13 into the national legal systems*, p. 16. *[Online]* available on the Europa website at http://ec.europa.eu/consumers/cons_int/safe_shop/unf_cont_terms/event29_01.pdf (page consulted on March 29, 2013).
[129] *Directive 93/13/EEC*, art. 7.2.
[130] To know more about the regulation of unfair clauses in Europe, see: **UNION DES CONSOMMATEURS.** *Ending Abusive Clauses in Consumer Contracts*, *op. cit.*, note 82.
[131] *Directive 93/13/EEC*, art. 10.1.
[132] **EUROPEAN COMMISSION.** *The integration of Directive 93/13 into the national legal systems*, *op. cit.*, note 122, p. 10.
[133] *Ibid*.
[134] *Ibid*.

problematic contractual terms continuing to have effects long after they are prohibited[135]; so the Commission advocates that Member States introduce procedures to ensure the swift elimination of unfair terms[136].

While the Directive broadens the right of action, the Commission's report focuses on "the consequences of the effect in relation to the *res judicata* not only between the parties but also as regards the term in question[137]." The principle of the *res judicata* effect, whereby a court decision affects only the parties to a dispute and the points made by the decision, has undesirable consequences in the case of Directive 93/13/EEC. The judgment declaring a term unfair and ordering its elimination will have effect only on the professional who is party to the dispute; he alone will thus be obliged to remove from his contracts the term declared illegal. Given that the Directive's objective is to eradicate unfair terms from consumer contracts, the goal is not attained if all industry members except one – the one to whom the judgment was addressed – can continue using the term. Nor is the goal attained if the decision declaring a term unfair has effect only on the wording of that term, and not on the nature or the effects of that type of term. A term with the same effect could therefore be adopted without contravening the judgment rendered, which ordered removal of the disputed term.

We will examine in more detail the difficulties posed when the principle of the *res judicata* effect is applied to Directive 93/13/EEC, as well as the solutions that have been proposed.

i) Court decision enforceable only on the professional who is party to the dispute

Given the wording of Directive 93/13/EEC and the transposition made of it by Member States in their internal laws, and given the application of the principle of the *res judicata* effect, "a court decision declaring a term to be unfair is binding only on the professional who is party to the dispute[138]."

Accordingly, only the professional who is party to the dispute must comply with the decision rendered; other professionals using one or more identical terms are free to continue doing so. A proliferation of redress procedures will be required not only to eradicate unfair terms and their disappearance from consumer contracts and the market, but also to apply the principle of the *res judicata* effect. This is because an identical action must be brought any number of times, depending on the number of merchants using the same term, in order to completely eliminate that term from a given sector. Such a proliferation of redress procedures would obviously multiply the costs – to the claimants and the justice system itself – as well as the delays.

The European Commission also notes that this distorts competition between professionals, depending on whether or not they are obliged to stop using a given term[139]. For the sake of the Directive's effectiveness and the economics of justice, the Commission's report proposes a solution: Member States should provide, in their internal laws and in accordance with the latter,

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[135] **COMMISSION OF THE EUROPEAN COMMUNITIES (CEC).** *Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, COM(2000) 248 final, Brussels, Belgium, April 27, 2000, 64 pages, p. 22. [Online] http://ec.europa.eu/consumers/cons_int/safe_shop/unf_cont_terms/uct03_en.pdf (page consulted on April 25, 2013).
[136] *Ibid*.
[137] **CEC.** *Report from the Commission (93/13/EEC), op. cit., note 129*, p. 22.
[138] *Ibid*.
[139] *Ibid*.

a procedure requiring a second judgment, broadening the first judgment's conclusions to all professionals in the sector concerned, while respecting the professionals' right of defence[140]. This is also an invitation to Member States not to apply, in those specific cases, the principle of the *res judicata* effect.

ii) Limited effect of the declaration on the wording of unfair terms

Another undesirable effect of applying the principle of the *res judicata* effect in the context of Directive 93/13/EEC is that a decision declaring a given term to be unfair will judge only the wording of the disputed term, and not its effects, so that the judgement is limited to the term as presented before the court and which the latter examines to evaluate its legality. The professional will thus be free to replace the incriminated term with another one that, worded differently, will reproduce the unfair character of the previous one and have the same effect on consumers and the market. In that event, redress procedures will again have to proliferate so that any new wording of the term with an unfair effect is evaluated.

In its report on the Directive's integration, the European Commission opines that "It would make more sense if the effects of a judgment were wider and not just limited to the wording of the terms, in order to avoid further litigation[141]."

To offset the drawbacks posed by the principle of the *res judicata* effect, Spain has innovated by establishing a register system grouping all contractual terms deemed unfair by the courts[142]. That register removes the consequences of the principle of the *res judicata* effect, by attacking the principle's application on three fronts: (i) The register confirms and publicizes the traditional *inter partes* effect, i.e., the judgment's effect between the parties to the dispute; (ii) Decisions entered in the register also have an *erga omnes* effect. They will thus be enforceable on everyone, and all professionals must stop using contractual terms declared unfair; (iii) Finally, decisions entered in the register have an *ultra partes* effect "to the extent that anybody can invoke the unfairness of these terms before other Spanish courts and instances[143]."

The Directive's broadening only of the right to bring an action, by allowing certain recognized entities to go to court in order to eliminate unfair terms from the market, has thus proved insufficient. Indeed, the European Commission indicates in its report that it remains dissatisfied with the results of the application of Directive 93/13/EEC. It remains to be seen whether the new broadening efforts it proposes will be imposed on Member States by a Directive, and how Member States will set aside the principle of the *res judicata* effect of judgments rendered on unfair terms.

[140] *Ibid*.
[141] **CEC.** *Report from the Commission (93/13/EEC), op. cit., note 129*, p. 24.
[142] *Transposition Law No. 7/1998 of 13 April 1998*.
[143] **CEC.** *Report from the Commission (93/13/EEC), op. cit., note 129*, p. 24

Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests and Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests

i) Directive 98/27/EC: A right of action extended to entities qualified for cross-border actions for injunctions

The adoption of this type of measures infringing on certain legal principles was not limited to Directive 93/13/EEC and to unfair terms. In 1998, the European Union adopted *Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests*[144]. Directive 98/27/EC had a much broader application than Directive 93/13/EEC, which pertained only to unfair terms. That new Directive imposed on Member States the adoption of new procedures to allow actions for injunctions when certain types of legislative measures transposed to national legislatures are violated[145].

The Directive established a new action for an injunction – a procedure for stopping or prohibiting an infraction harming consumers' collective interest. In its second preambular paragraph, the Directive specifies that "collective interests mean interests which do not include the cumulation of interests of individuals who have been harmed by an infringement."

That 1998 Directive confers no new right to individual consumers, but rather aims at implementing new means of action conferred to qualified entities – consumer associations or public consumer-protection organizations – in order to prohibit illegal practices according to applicable national provisions. So in consumers' collective interest, the Directive broadens the right of action of consumer associations that are neither consumers nor parties to a contract and that have suffered no individual prejudice. The Directive also provides that an action for an injunction may be brought as part of an emergency procedure.

Accordingly, the Directive notably aims at stopping the practices of merchants or professionals whose actions and activities may harm consumers' collective interests either within a Member State or cross-Community[146]. The Directive also aims at ensuring the effectiveness of class actions, particularly by providing that a class action may be brought in the jurisdiction where the company is located, even if the qualified entity bringing the action is located in another Member State[147]. Among possible conclusions is the decision's publication, a corrective declaration to eliminate the infraction's effects, and payment of a given amount to the public treasury if the judgment is not executed within a prescribed deadline[148].

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[144] *Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interest*, (OJ L 166 of 11 June 1998). [Online] available on the Europa website at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&type_doc=Directive&an_doc=1998&nu_doc=27&lg=EN (page consulted on June 10, 2013).
[145] *Ibid*, Annex.
[146] **EUROPEAN UNION**. *Actions for injunctions*. [Online] available on the Europa website at http://europa.eu/legislation_summaries/consumers/protection_of_consumers/l32024_en.htm (page consulted on April 29, 2013).
[147] *Ibid*.
[148] *Directive 98/27/EC*, *op. cit.,* note 138, art. 2, par.1.

Despite that broadening of the right of action to certain qualified entities, the European Commission notes in its 2008 report a series of shortcomings that greatly handicap that Directive's application[149]. Among those shortcomings raising barriers to cross-border actions are costs[150], such as the administrative costs of case preparation, court costs, expert costs, legal costs and translation costs. The consumer associations consulted for the European Commission's report also emphasize the uncertainty and financial risk posed by the rule prevailing in some Member States that the losing party assume the procedural costs and the other party's legal costs[151]. It is easy to imagine the financial difficulties that may result from application of such a measure for consumer associations.

Other barriers to the Directive's application are procedures' length and complexity. The Directive gives Member States much latitude in: choosing the type of procedures – legal or administrative; the possibility of imposing what is commonly known as a prior consultation, i.e., approaching the accused merchant or the government consumer protection organization before bringing an action for an injunction; the type of qualified entity or the qualifications of persons benefiting from a broader right of action; etc.[152] This leads in practice to many variations between the laws of Member States.

Directive 98//27/EC is also criticized for its silence on highly important aspects that would have facilitated its application. For example, it does not address which legislation will apply when an action for an injunction is brought in the Member State where the company is located, with regard to an infraction committed in the claimant association's different Member State. Nor does the Directive mention statutes of limitation.

Like the previous one, this Directive also does not correct problems resulting from the principle of the *res judicata* effect. The collective interest intended to be protected by this Directive will likely be served only if redress procedures proliferate, since decisions rendered under the Directive are enforceable only within the usual limits and bind only the parties involved. The Commission reports that some Member States have adopted measures to broaden the application of judgments[153]. Although we will discuss below some of those measures in greater detail, here are a few of them, listed in the Commission's report. In Poland, Warsaw Court decisions that declare a term to be unfair will have an *erga omnes* effect once published. The decision will thus apply to any consumer contract that contains a similar term. Likewise, in Hungary, a judge who deems a term unfair has the power to declare the term void in all contracts signed by the convicted company. In Austria, the company that is a party to an action declaring a term to be unfair cannot invoke that term against other consumers. Finally, in Germany and Slovenia, consumers who are not parties to an action, but who have signed a contract containing a term declared to be unfair, may invoke that judgment to prevent application of that term.

[149] **COMMISSION OF THE EUROPEAN COMMUNITIES**. *Report from the Commission to the European Parliament and the Council concerning the application of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest*, Brussels, Belgium, November 18, 2008, COM(2008) 756 final, 17 pages, p. 7. [Online] available on the Europa website at http://ec.europa.eu/consumers/enforcement/docs/report_inj_2012_en.pdf (document consulted on June 10, 2013).
[150] *Ibid*.
[151] *Ibid*.
[152] *Ibid.*, p. 9.
[153] *Ibid.*, p. 8.

Decisions rendered under this Directive also have limited territorial scope. The consumer associations we consulted have reported to the European Commission that limiting the judgment's scope to the territory of the Member State where the action was brought has the effect that some companies convicted of using unfair terms continue doing so with impunity in another Member State, whereas others simply relocate to another Member State. It will be possible to clean up their practices only by bringing new actions for injunctions – obviously a long, repetitive, and costly process[154].

The obstacles to adequate implementation of actions prescribed by Directive 98/27/EC are many. The Commission admits that this Directive has not yielded the expected results[155], despite the European Union's clear intention to facilitate the implementation of cross-border actions for injunctions in order to ensure full application of consumer protection measures.

ii) Directive 2009/22/EC: a realignment attempt

Following the many and substantial amendments made to Directive 98/27/EC[156], Directive 2009/22/EC proceeded to codify it. The scope and content of Directive 2009/22/EC are essentially the same as those of the codified Directive, with a few abrogations. Unfortunately, none of the shortcomings deplored by consumer associations during consultations held by the European Commission to produce the Report of 18 November 2008 on the application of Directive 98/27/EC have been corrected.

iii) Conclusion

Despite certain shortcomings reported in the application of Directives in effect in the European Union, the latter demonstrates a determination to protect consumers and their collective interests by promulgating measures setting aside or broadening certain legal principles whose application hinders the scope and actual effectiveness of consumer law. However, it appears that the still-timid approach adopted in the Directives has the effect of preventing those objectives from being fully met. For this reason, the European Commission has come to advocate the adoption of measures broadening the effect of decisions rendered. This is to improve the effectiveness of redress procedures provided by the Directives, notably by avoiding the need for a proliferation of redress procedures against the same company, or against companies using similar terms or practices, or from one Member State to another. Some Member States have already adopted additional measures, out of concern for the economics of justice, the effectiveness of consumer protection laws, and consumer access to justice. We will now examine those measures.

[154] *Ibid*., p. 9
[155] *Ibid*., p. 10.
[156] Between 1999 and 2006, Directive 98/27/EC was amended 5 times, as shown in Annex II Part A of *Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interest* (OJEC No. L.110 of 1 May 2009), first recital.

3.2 France

France has long been a leader and model in matters of consumer protection. So not surprisingly, that jurisdiction has the largest number of measures broadening rights of action than those traditionally admitted by legal principles. The *Code de la consommation* (the Code), in articles L. 421-1 to L. 421-7, provides a series of measures in that vein: three distinct rights of action allowing certified consumer associations to file specific applications in the event of prejudice to consumers' collective interest.

a) Civil Action

Article L421-1 of the Code allows the first action resulting from a broadened right of action. A certified association may bring an action authorized to a civil party for facts causing any prejudice, direct or indirect, to consumers' collective interest. But this right of action has a serious limitation: for the action to be authorized, the fact generating liability must also constitute a penal offence, such as deceit or fraud. Despite the article's laudable goals, this requirement enormously limits its scope.

A second right of action recognized by the Code allows certified consumer associations to seek, in a civil lawsuit, an end to unlawful practices or the suppression of unfair terms contained in consumer contracts[157]. The judge hearing the case then has the power to order the accused professional to end his unlawful practices or remove the terms deemed unfair from his consumer contracts[158]. This right of action belongs to the context of civil actions provided in article L421-1, so the same limitations apply to it: here too, the fact generating liability must constitute a penal offence.

b) Action for an Injunction against an Unlawful Practice

Article L421-6 of the *Code de la consommation* allows certified consumer associations to have any unlawful practice stopped or prohibited. This is a transposition of the provisions in article 1 of *Directive 2009/22/EC of the European Parliament*, which we discussed above. The judge hearing the case may prohibit unfair or unlawful terms in the consumer contract[159].

Although the actions allowed in article L421-1 and L421-6 appear similar at first, the latter does not require the fact generating liability to be a penal offence. The collective prevention effect of L421-6 is great, because a decision affects the entire current and future clientele of the professional ordered to stop an unlawful practice or withdraw an unfair term from any contract he offers consumers. Author Jean-Pascal Chazal reports that unfortunately this measure has only limited success, because consumer associations, with their modest means, rarely invoke it[160]. The author also identifies certain decisions limiting an action's scope, such as the Court of

[157] *Code de la consommation,* Art. L421-2.
[158] *Code de la consommation,* Arts. L. 421-3 to L. 421-5. The unfair clause is defined in Article L. 132-1 of the *Code de la consommation*.
[159] *Code de la consommation,* Art. L.421-6, par. 2.
[160] **CHAZAL, J.-P.** *Vulnérabilité et droit de la consommation*, Colloque sur la vulnérabilité et le droit, Université P. Mendès-France, Grenoble II, Grenoble, France, March 23, 2000, 19 pages, p. 14. [Online] available on the website of Science.Po at http://master.sciences-po.fr/droit/sites/master.sciences-

Appeal's decision that this type of action would not apply to a pre-formulated contract offered by a professional's representative to his clientele[161].

Still, the author points out, we should not generalize about the courts. Other court decisions have been more favourable to this type of actions, by stating that consumer associations have the right to request that the court order, in the context of a civil action, redress – such as damages – for direct or indirect prejudice caused to consumers' collective interest[162].

c) Right to Legal Intervention

Article L421-7 of the *Code de la consommation* broadens another right of action:

> *Les associations mentionnées à l'article L. 421-1 peuvent intervenir devant les juridictions civiles et demander notamment l'application des mesures prévues à l'article L. 421-2, lorsque la demande initiale a pour objet la réparation d'un préjudice subi par un ou plusieurs consommateurs à raison de faits non constitutifs d'une infraction pénale.*

Consumer associations may thus, in a civil action brought by one or more consumers seeking redress for prejudice suffered, intervene to have an unlawful practice stopped or to have unfair terms removed, even if the facts generating liability are not penal offences.

Those various rights of action conferred to consumer associations yield net benefits in terms of consumer protection, on a collective basis. Physical suppression, from consumer contracts, of terms deemed unfair, particularly, has both a curative and a preventive effect: no consumer will be submitted any longer to the term – it will simply not be found any longer in the contract.

The usefulness of such actions seems undeniable. As mentioned above, one of the greatest barriers to consumer access to justice is the low monetary value of disputes, which is a serious disincentive to investing the time and money (and stress) required for going to court to assert one's rights. This type of actions, brought in consumers' collective interest, by associations not blocked to the same extent by the barriers facing consumers, indeed helps clean the market of unlawful practices and unfair terms. Of course, to that end, those actions must be possible and have full effect.

Those actions allow consumer associations bringing them to be awarded damages for prejudice caused to consumers' collective interest. This measure removes one of the barriers to bringing those actions. But this type of actions does not allow consumers who have suffered prejudice to be compensated on an individual basis. Faced with this shortcoming, consumer associations and several other stakeholders have applied sustained pressure for procedures to be adopted in France to allow collective actions similar to class actions in Quebec. Moreover, on May 2, 2013, the French Minister Delegate with responsibility for Social and Cooperative Economy and Consumer Affairs presented to the Cabinet a new bill to allow wronged consumers to bring class

po.fr.droit/files/users/aude.epstein/Vuln%C3%A9rabilit%C3%A9%20et%20droit%20de%20la%20consommation.pdf (document consulted on June 10, 2013).

[161] Civ. 1ère 4 mai 1999, JCP 1999 II 10205 note Paisant; JCP E 1999, page 1827, note Jamin; Defrénois 1999, page 1004, note D. Mazeaud.

[162] **CHAZAL, P.** *Vulnérabilité et droit de la consommation*, *op. cit.,* note 152, p. 14.

actions. This *action de groupe* will be applicable only under the *Code de la consommation* and in matters of competition and will have to be brought by qualified consumer associations[163].

3.3 Portugal: Right of Action and Broader Concept of Qualified Entities

Well before Directive 93/13/EEC took effect against unfair terms, Portugal recognized that certain qualified entities not having the necessary interest had a right of action applicable to certain redress procedures[164]. *Décret-Loi 446/1985,* adopted on October 25, 1985, offered protection against unfair contract terms that was applicable both to commercial contracts between two companies and to consumer contracts, although the latter inclusion came later[165], but application of the Portuguese law was limited to pre-formulated terms found in adhesion contracts with widespread use. That law already included a right of action conferred on certain qualified entities, notably individual consumers whether or not they had sustained damage, consumer associations, the counsel representing the Public Ministry, and the *Institut des consommateurs*[166]. The *Decree-Law* also defined four categories of prohibited terms: it contained a series of general application clauses and another series solely for consumer contracts – each series containing a black list (prohibited terms) and a grey list (potentially problematic terms).

During the transposition of Directive 93/13/EEC, the Portuguese government made a series of amendments to its law for purposes of compliance. In particular, the list of categories was modified by the addition of new clauses and by the extension of certain procedural provisions. Portuguese law already had a right of action with a much broader definition of entities qualified to bring an action for injunction than provided in Directive 98/27/EC, so the transposition of that Directive required no amendment[167]. Thus, individual consumers, wronged or not, continue to benefit from a right of action in consumers' collective interest in order to have an infraction stopped or prohibited.

3.4 Poland and Hungary: Application of the *Erga Omnes* Effect

Again as part of the transposition of Directive 93/13/EEC to provide a framework for unfair terms in internal law, Poland and Hungary have adopted measures broadening the effect of judgments rendered against unfair terms, in accordance with the recommendations issued by the European Commission in its report on the transposition of Directive 93/13/EEC.

In Poland, article 479 of the *Rules of Civil Procedure* provides publication, in the Economic and Court Journal, of decisions rendered that would prohibit the use of unfair terms. This publication gives a decision an *erga omnes* effect; it is thus enforceable against everyone. So this measure

[163] **HERBERT, D.**, *Les "class action" arrivent en France... sans Erin Brockovich*, Nouvel observateur, Paris, France, May 2, 2013. [Online] http://tempsreel.nouvelobs.com/economie/20130502.OBS8031/les-class-action-arrivent-en-france-sans-erin-brockovich.html (page consulted on June 3, 2013).
[164] *Décret-Loi 446/1985* of October 25, 1985.
[165] The law was amended in 1999 by the *Décret-loi 249/1999* of July 7, 1999 to also cover individual contracts.
[166] **TWIGG-FLESNER, C.** *Injunctions Directive (98/27)*, EC Consumer Law Compendium, Bielefeld University, Germany, 2007, 919 pages, p. 693. [Online] available on the Europa website at http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf (document consulted on June 10, 2013).
[167] *Ibid*.

has legal effects on all merchants, who must ensure that their contracts comply with the decisions rendered; it should be noted that this measure's constitutionality is disputed[168].

In Hungary, the principle of the *res judicata* effect, and its undesirable effects, are similarly mitigated. Decisions rendered in a class action declaring a term to be unfair and without effect are applicable to all consumers with whom the convicted merchant has entered into a contract[169]. Moreover, Hungary's Civil Code provides that those decisions also have an *erga omnes* effect on all actors in the market[170] and that "only contracts executed before the action was introduced into law are excluded[171]."

3.5 Germany

The introduction in German law of measures infringing on certain legal principles, such as the principle of the *res judicata* effect, is not new. The first time was in 1976, with the *Act on General Business Conditions*.

The 1976 law aimed at eliminating adhesion contracts whereby the weaker party has no negotiating power and is disadvantaged by the contract's general conditions. That law, very broad in application, and covering all adhesion contracts – whether commercial or consumer contracts – nevertheless contains a very important restriction, likely to greatly affect consumers. Indeed, if in the context of a consumer contract, a merchant alleges and establishes that the general conditions were negotiated, the *Act on General Business Conditions* will no longer apply and the contract will be governed by ordinary law, whose measures are less protective. It should be noted that "general conditions" may be defined as "conditions pre-formulated for a multitude of contracts"[172].

The *Act on General Business Conditions* grants to certain consumer associations a right of action to have infractions sanctioned – a right of action limited to consumer contracts (the law also applies to commercial contracts, so professional groups too have a right of action). The authors Puis and Weil note that this right of action is unfortunately used rarely[173]. To reinforce the role of consumer associations, and to ensure that consumers are better served, a consumer who has suffered prejudice following the violation of a provision of that law cannot approach the courts directly; he must obtain information from a consumer association, which will bring the action for an injunction. Under the 1976 law, the latter must be initiated in the defendant's area of residence and be preceded by a notice to the professional to cease the practice or withdraw the unfair term. According to the authors, this measure proves very effective, because the merchants' disputed practices usually end with the notices, thus avoiding a lawsuit. If the

[168] **EBERS, M.** *Comparative Analysis: Unfair Contract Terms Directive (93/13)*. EC Consumer Law Compendium, Bielefeld University, Germany, 2007, 919 pages, p. 481. [Online] available on the Europa website at http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf (document consulted on June 10, 2013).
[169] Art. 209, par. 2, *Act IV of 1959 on the Civil Code of the Republic of Hungary*.
[170] Art. 209/B, *Act IV of 1959 on the Civil Code of the Republic of Hungary*.
[171] **EBERS, M.** *Analyse comparative, op. cit.,* note 161, p. 481.
[172] **K. G. WEIL and F. PUIS.** *Le droit allemand des conditions générales d'affaires revu et corrigé par la directive communautaire relative aux clauses abusives*, Rev. de droit international comparé, 1994, Vol. 46, No. 1, pages 125 to 140, p. 133. [Online] available on the website of persee.fr http://www.persee.fr/web/revues/home/prescript/article/ridc_0035-3337_1994_num_46_1_4814 (document consulted on June 10, 2013).
[173] *Ibid.*, p. 136.

merchant does not honour his pledge to cease the practice or withdraw the term, a criminal prosecution may be initiated.

Judgments rendered in this type of redress procedure have an *erga omnes* effect, which was not foreseen in the legislative system that existed before 1976[174]. Under German law, the broadened force of *res judicata* is twofold. First, the judgment has a traditional *res judicata effect* on the stipulator, i.e., the merchant concerned, in the case of a consumer contract. He will thereby be obliged to stop using the offending term, to withdraw from his general conditions the stipulation declared "ineffective," and to refrain from advising others to use it.

The judgments also benefit from the force of *res judicata* in favour of third parties[175]. According to Alfred Rieg, this is a revolutionary innovation introduced by that 1976 law[176]. Under this rule, all contracts prior or subsequent to a decision declaring a term ineffective must be amended to comply with the decision rendered. So the decision has an immediate and future effect on all merchants and consumers. A consumer who is a party to a contract containing a stipulation declared of deemed unfair may invoke that prior judgment so that the term is not applicable to him, even though he was not a party to the dispute. Of course, for the consumer to be able to rely on the judgment, he has to be aware of it. To make it easier to apply this broadening of the effects of judgments rendered, the German lawmakers have adopted a series of measures. Firstly, judgments rendered with regard to injunctions are published. Some authors think the law should have gone further by allowing the judge to invoke *ex officio*, in any case, a previous declaration of ineffectiveness entailing a prohibition of use[177].

The law provides that the judgment rendered must contain a specific provision to broaden its application. Thus, the judgment must specify:

- *The wording of the offending terms;*
- *The legal operations for which they must no longer be used;*
- *The injunction to stop using the sanctioned terms;*
- *The general conditions previously used against other co-contractors must be retracted*[178]*.*

[174] **RIEG, A.** *Les clauses abusives et le consommateur en République fédérale d'Allemagne*, Rev. de droit international comparé, 1982, Vol. 34, No. 3, pages 905 to 958, p. 954. [Online] available on the website of persee.fr http://www.persee.fr/web/revues/home/prescript/article/ridc_0035-3337_1982_num_34_3_4275 (document consulted on June 10, 2013).
[175] Art. 21, *Law Governing Standard Business Conditions*.
[176] **RIEG, A.** *Les clauses abusives et le consommateur*, *op. cit.,* note 167, p. 955.
[177] *Ibid*.
[178] **K. G. WEIL and F. PUIS,** *Le droit allemand des conditions générales d'affaires, op. cit.,* note 165, p. 136.

3.6 Brazil: Consumer Protection Class Action

Brazilian law grants consumer associations a right of action in consumers' collective interest. To understand the effects of procedural measures adopted in Brazil, the status of consumer rights in that country should be emphasized.

Consumer rights are enshrined in Brazil's Constitution[179]. The *Consumer Defence Code* facilitates the protection of consumer rights[180]. In this overview of Brazilian measures broadening the effect of judgments or the right of action, we will discuss the *Civil Action Code* and then the *Consumer Defence Code*[181].

In 1985, the *Public Civil Action Act* came into effect, introducing consumer collective actions[182]. This tool allows consumer collective actions when consumers suffer moral and property damage. It is important to differentiate the Brazilian civil collective action from the Canadian class action. Whereas the Canadian class action allows the collectivization, in a single redress procedure, of the individual interests of the members of a group defined by the class action, the Brazilian collective action allows not only representation of all the individual interests of consumers, but also representation of their collective interests.

Five years later, this concept of collective action was introduced in the *Consumer Defence Code*[183] [hereinafter CDC]. To understand the scope of that Brazilian procedural tool, it should be noted that the CDC has a broad definition of "consumer" compared to what is found elsewhere. Indeed, the definition includes the consumer in the "collective" sense[184], in order to protect consumers collectively at a time when adhesion contracts are proliferating, along with unfair commercial and contractual practices worsening the imbalance of power between merchants and consumers. This broader Brazilian concept of consumer protection means that the CDC does not apply exclusively to the contractual relationship. On the contrary, it even ignores that limitation and specifically aims at also protecting those who are outside the contractual sphere, by rather taking the consumer relationship as a basis. The absence of a close link between consumer and merchant has led Brazilian lawmakers to handle consumer protection differently. The depersonalization of contractual and commercial relationships has a collective effect, so protecting rights by means of traditional procedures, based on personal relationships, no longer sufficed – thus the usefulness of Brazil's type of collective action[185]. This broader definition of "consumer" and the Brazilian vision of consumer protection constitute the bases of the collective action described in CDC articles 81 and following.

Brazilian consumer law thus provides a collective action that may be brought both by the Public Ministry and consumer protection organizations, so long as they have been constituted for over one year and have as a primary mission the defence of consumer rights and interests[186]. This

[179] Art. 5, par. XXXLII, *Constituiçao da Republica Federativa do Brasil de 1988*, 4 October 1988 [*Consitution Brazilienne de 1988*].
[180] Art. 6, *Lei 8.078, Codigo de Defesa do Consumidor*, 1990 [hereinafter CDC].
[181] *CDC*.
[182] Art. 1.II, *Public Civil Action Act*.
[183] Art. 81 and fol., CDC.
[184] Art. 2 CDC.
[185] **FONSECA, Patricia Galindo da.** *Le dynamisme du droit Brazilien de la protection du consommateur*. Revue québécoise du droit international, Political Science and Law Faculty, Department of Legal Sciences, Université du Québec à Montréal, Montreal, Canada, April 2011, Vol. 23.1, 41 pages, pp. 134-135. [Online] http://rs.sqdi.org/volumes/23_1-Fonseca.pdf
[186] Art. 82, CDC.

action, for the purpose of protecting and restoring collective rights, takes place within a "judicial system protecting collective and common rights[187]."

Brazilian law defines common rights as belonging to a group, which may or may not be determined or determinable[188], whose members are linked by factual situations. The author Patricia Galindo da Fonseca gives the example of misleading television advertising[189]. Those rights, belonging to a sphere between public and private rights, are also referred to as meta-individual rights. As for collective rights[190], they are indivisible rights held by determined or determinable persons, linked together or to the defendant by a legal relationship. Professor Fonseca gives, as an example of collective rights, the right to be compensated held by customers of a telephone service company who would suffer a service interruption lasting several days[191].

As indicated by Professor Fonseca, given the broad effect of violating a common right, the collective action for violating a common or meta-individual right aims at "avoiding a proliferation of similar legal actions, based on the same legal or factual situation[192]." It should be noted that judgments rendered in the context of such a legal action cannot serve as precedent and do not bind judges who will have to rule in future cases. However, to avoid contradictory decisions, federal Supreme Court decisions have binding effect[193].

In the context of class actions for violation of collective rights, the effect of decisions rendered is different. Under the CDC, those decisions benefit from an "*ultra partes* extension of the *res judicata* effect, so that the corresponding court decision does not benefit only one person in the same legal situation as others. In fact, all holders of collective interests are affected by the *res judicata*[194]."

On the whole, the introduction of this type of class action as an instrument to protect consumer rights has proven highly effective[195]. The measure has improved access to justice for consumers who, due to the same barriers as in Canada, would likely not have brought individual actions. As mentioned by Brazil's federal Supreme Court in a 2005 decision, out of concern for the economics of justice, "to the extent possible, considering existing law, holding macro-trials should be encouraged to avoid the proliferation of cases originating from individual actions[196]." The Brazilian lawmakers seem to have understood that to slow down the proliferation of trials, given that a consumer's problems usually repeat themselves on a large scale, it is essential to provide a collective response to abuses experienced by consumers taken collectively, because traditional procedures often prove ineffective.

[187] **FONSECA, P.,** *op. cit.*, note 178, p. 139. Our translation.
[188] *Ibid*, p.140.
[189] *Ibid.*, p. 142.
[190] Art. 81.II, CDC.
[191] **FONSECA, P.** *op. cit.*, note 178, p. 143.
[192] *Ibid.*, p. 140. Our translation.
[193] Constitutional Amendment No. 45- *Emenda constitucional 45/2004 (EC 45/2004)*, December 30, 2004.
[194] **FONSECA, P.** *op. cit.*, note 178, p. 143. Our translation.
[195] *Ibid.*, p. 141.
[196] STF, *RE 441.318, rel. Min. Marco Aurélio, c. 25/10/2005,* p. 24/02/2006 – As cited in FONSECA, *op. cit.*, note 178, p. 141. Our translation.

4. Analysis of Infringements of Certain Basic Legal Principles and Summary of Measures Adopted to Improve Consumer Access to Justice

4.1 Infringement of Legal Principles

In the preceding pages we analysed certain measures that, to improve consumer access to justice, have somewhat relaxed the universal application of certain recognized legal principles, such as the interest to take action and the *res judicata* effect of judgments. A third legal principle, that of adversarial debate, which constitutes a pillar for Canada's two legal systems[197], may also be at play in the context of those measures.

Those measures adopted abroad – and some in Quebec – are mainly procedural measures to apply the substantive law[198] contained in consumer protection laws. In foreign jurisdictions, infringements of certain rules of law have been justified by the need to protect consumers and guarantee adequate reparation in consumers' collective interest.

a) Role of Procedures

Whereas substantive law provides the protections, rights and obligations of litigants, procedural law provides the rules for asserting those rights and remedy violations of rules provided by substantive law. Procedural rules mainly encompass court organization, jurisdiction and operation, as well as procedures to undertake and rules to follow when taking legal action.

A legal procedure is not only subject to the general rules of the *Civil Code of Québec*[199] or *common law* principles, depending on the province, but also to constitutional or quasi-constitutional laws, and must respect the rights enshrined notably in the Canadian Charter of Rights and Freedoms (CCRF) and the Quebec Charter of Human Rights and Freedoms (QCHRF). Those two documents, for example, guarantee to claimants and defendants alike the right, in full equality, to a public hearing before an independent and impartial court[200]. The procedure must implement those rights.

Accordingly, Canadian provinces, with their exclusive jurisdiction in civil procedures[201], are responsible for establishing the various procedures applicable to the legal system's organization and operation in civil cases: the conditions for bringing an action, the competent court, the ways of challenging a legal claim, the judge's powers, the conduct of a trial, taking under advisement, the judgment, the ways of executing a judgment, the necessary capacity and competence to take legal action, the effect of judgments rendered, and a panoply of other aspects and principles ensuring that the legal system is effective, fair and reliable.

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[197] The civil law system prevails in the province du Quebec, whereas the rest of Canada applies the common law.
[198] **BELLEAU, C.** *Les règles générales de la procédure civile et le déroulement de la demande en justice en première instance*, in Collection de droit 2012-2013, vol. 2-Preuve et procédure, 2012-2013, École du Barreau, Montreal, Canada, 92 pages, p. 28.
[199] *2858-0702 Québec Inc. v. Lac d'Amiante du Canada Ltée*, [2001] 2 S.C.R. 743, 2001 SCC 51;
[200] Art. 23, *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12; art. 24, *Canadian Charter of Rights and Freedoms*, Schedule B to the Canada Act 1982, R.S.C. (1985), App. II.
[201] Art. 92(14), *Constitution Act, 1867*, R.S.C. (1985), App. I.

b) Principle of Adversarial Debate

As a pillar of our legal system, the principle of *audi alteram partem*, i.e., the right to be heard, can be compromised or set aside only with difficulty. This cardinal rule is, with the right to an objective and impartial decision (*nemo judex in sua causa debet esse*), one of the two components of the principle of natural justice. Section 5 of the *Code of Civil Procedure* expressly states that "No judicial demand can be adjudicated upon unless the party against whom it is made has been heard or duly summoned," thus enshrining this basic right in Quebec's judicial law.

The right to be heard supposes that everyone has the right to use every means at his disposal in a legal dispute. We mentioned above that a good number of foreign measures have broadened the effect of judgments, by obliging all merchants – whether or not they were parties to a dispute – to take action (amending their contracts, for example) so as to comply with the court order[202].

Such a measure, obliging a merchant to sustain a judgment's fallout without having been able to assert his positions or possible means of defence, infringes on the principle of *audi alteram partem*. Some authors indicate that the constitutionality of a similar measure may be questioned in Poland[203]. However, the European Union, given the absolute necessity of protecting consumers' collective interest, advocates the adoption of such measures, in order to improve the effectiveness of consumer protection laws and of redress procedures provided therein. Given the difficulties of access to justice that confront consumers, and the inadequacy of the legal system to receive and manage those specific disputes adroitly, some Member States have also deemed it necessary to infringe on the principle of adversarial debate by making a judgment affect certain parties who did not participate in the debate during a dispute.

Given the large-scale effect of certain commercial practices and of unfair contractual terms, and given mass consumption and the generalized use of adhesion contracts, it seems indispensable today that solutions with a collective effect be provided for problems that are also collective, and that affect a great many if not all consumers. In this conflict between the right to be heard, which remains an individual right, and the right to consumer protection, which has become a collective right, we think that the objectives of such a measure should prevail over the infringement of a legal principle, however basic. In the wording of section 1 of the Canadian Charter, which states that basic rights are subject to reasonable limits, we think that those measures, which would be prescribed by law, would be reasonable, and that it would be possible nowadays to demonstrably justify them in a free and democratic society.

[202] See the example of the Spanish, Hungarian and Polish measure described on page 48.

[203] **EBERS, M.** *Comparative Analysis: Unfair Contract Terms Directive (93/13) (93/13)*, *op. cit.,* note 165. Article 45, par. 1 of the *Constitution of the Republic of Poland* adopted on April 2, 1997 provides that "Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court."

c) Principle of Sufficient Interest to Act

The majority of measures identified confer on certain qualified entities a broadened right to bring actions for injunctions against unfair terms.

Some of the traditional requirements for taking legal action should be briefly recalled. For example, under Quebec law, for a legal action to be admissible, the claimant, "whether for the enforcement of a right which is not recognized or is jeopardized or denied, or otherwise to obtain a pronouncement upon the existence of a legal situation, must have a sufficient interest therein[204]."

In that context, the principle of sufficient interest, in private law, is based on the applicant's direct and personal interest in having the action allowed by the courts[205]. Moreover that interest will be sufficient only if it is innate and current[206]. To justify a sufficient interest, the claiming party must demonstrate that it will draw direct benefit from exercising its right to act, from its claim and from its eventual success[207]. Under Quebec private law, the same conditions prevail for recognizing the interest of a third party wanting either to intervene in a dispute to which it is not a party[208] or to obtain a declaratory judgment[209].

Moreover, section 59 of Quebec's *Code of Civil Procedure* specifies that no one can plead for anyone else. This rule results from the same principle; a third party does not have sufficient legal interest to bring a legal action on the basis, for example, of damages suffered by someone else. But this is precisely the right that measures seek to grant by conferring on consumer associations a right to take legal action in consumers' collective interest.

Unfortunately, neither Quebec law nor that of other Canadian provinces recognizes the principle of consumers' collective interest. That principle supports the intervention of foreign jurisdictions that confer on certain consumer associations a right to take legal action beyond personal interest alone. We mentioned above the presumption of interest introduced by Quebec lawmakers in 2010 in the second paragraph, section 316 of the *Consumer Protection Act* in favour of certain consumer protection organizations, in terms of exercising the power to apply for an injunction – a power held mainly by the OPC president and aimed at certain practices or stipulations prohibited by the Act. It should be noted that, along with the right of representation conferred by the *Code of Civil Procedure* with regard to class actions, this is one of the first intrusions of a broadened legal interest in Quebec consumer law.

In the common law provinces, the principle is essentially the same. An action is deemed inadmissible if the claiming party has a "lack of standing," i.e., if it is not personally concerned by the conclusions of its legal claim[210]. But this common law principle contains an exception, which justifies that a legal action be brought without personal interest if a public interest issue is at stake. That "public interest standing" has been established by three decisions rendered by the

[204] Sec. 55, *Code of Civil Procedure*, R.S.Q., c. C-25 [hereinafter the C.C.P.]. The term pertaining to interest is added to those pertaining to quality (sec. 59) and legal capacity (sec. 56-58), which exceed the scope of our research.
[205] *Jeunes canadiens pour une civilisation chrétienne v. Fondation du Théâtre du Nouveau-Monde*, [1979] C.A. 491.
[206] **BELLEAU, C.** *Les règles générales de la procédure civile, op .cit.*, note 191, p. 66.
[207] *Kingsway, compagnie d'assurances générales v. Bombardier Produits récréatifs Inc.*, EYB 2010-178449 (C.A.), 2010 QCCA 1518, par. 21.
[208] Sec. 208, C.C.P.
[209] Sec. 453, C.C.P.
[210] **McCANN, J**. "Les motifs d'irrecevabilité" in *Prescriptions extinctives et fins de non-recevoir*, Wilson & Lafleur, Montreal, Canada, January 1, 2011, 278 pages, pp. 192-193. .

Supreme Court of Canada between 1975 and 1981[211]. Often criticized for the excessively heavy burden on anyone seeking recognition of his *public interest standing*[212], the Supreme Court revised the applicable test in 2012, in the judgment *Canada (Attorney General) v. Downtown Sex Workers against Violence Society*[213] in order to lighten that burden.

d) Principle of the *Res Judicata* Effect of Judgments

A judgment rendered in a civil case generally binds only the parties to a dispute and pertains only to the issues decided by the judgment. This is a basic principle of our legal system, and is at the heart of justice administration[214]. According to this principle, judgments will thus only have a relative effect – solely on what is being judged (*res judicata*) – and cannot be imposed on third parties. The *res judicata* doctrine occupies an important place in our legal system: its objective is reportedly to maintain order, social peace and legal stability[215]. It also aims at limiting the possibility of contradictory decisions being rendered by the courts[216].

As described above, some Member States wanted to protect the rights of all consumers adequately, by avoiding both the useless proliferation of redress procedures and, curiously, the possibility of contradictory decisions not recognizing the same rights to consumers in identical situations. So those jurisdictions have made exceptions to this principle as it applies to consumer law. Thus, a consumer who has entered with a merchant into a contract containing a term already declared unfair in a prior case against that merchant may invoke against him the judgment rendered. The effect – as in Germany, for example – is to make the term inapplicable to that consumer, although he was not a party to the prior case. Indeed, under Hungarian and Polish law, a judgment rendered against a merchant compels all merchants to stop committing the infraction prohibited by the judgment.

By taking into account consumers' collective interests while pooling their individual interests, this more modern and realistic approach to consumer law opens the door to solutions better suited for today's consumer realities.

The application of the *res judicata* principle continues to prevail in this country. This individualistic approach to consumer justice does not correspond to the realities of consumer disputes. Decisions rendered by the Small Claims Division, which remains the court where the majority of consumer cases are heard, will of course have the force of *res judicata* on the parties to the dispute[217]. But this effect is in reality very small. As Professor Lafond notes, "The current

[211] *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Canada (Justice Min.) v. Borowski*, [1981] 2 S.C.R. 575.
[212] To be able to submit a legal action by invoking "public interest standing," the claimant had to meet the following three criteria: (i) the case raises a serious justiciable issue, (ii) the party bringing the case has a real stake in the proceedings or is engaged with the issues that it raises, and (iii) the proposed suit is, in all of the circumstances and in light of a number of considerations, a reasonable and effective means to bring the case to court. It should be noted that the third criterion was very strictly applied and often posed an obstacle prior to the decision of 2012.
[213] *Canada (Attorney General) v. Downtown Sex Workers Against Violence Society*, SCC 45, [2012] 2 S.C.R. 524. See paragraph 20 in particular.
[214] *Toronto (City of) v. C.U.P.E. local 79,* [2003] 3 S.C.R. 777, 2003 SCC 63, par. 15.
[215] **McCANN, J.** "Les motifs d'irrecevabilité," *op. cit.*, note 205, p. 178.
[216] *Ibid*.
[217] Sec. 985, par. 1, *Code of Civil Procedure*.

small claims system deprives consumers of a judgment's collective scope and thus of full and true access to justice[218]."

In addition, that court's decisions are little publicized, it is at the bottom of the legal system's hierarchy, and its decisions do not usually make case law since under law they do not have the authority of precedents before another court[219].

While the force of *res judicata* constitutes a pillar of our legal system – which, as mentioned above, was established before the era of mass production, mass consumption and ubiquitous adhesion contracts –, its consequences for consumer disputes raise major issues of consumer access to justice. The *res judicata* effect of judgments rendered in consumer affairs perpetuates the necessity of proliferating redress procedures with no regard to the burden thus imposed on legal resources[220].

In terms of consumer protection, the useful redress procedures available to consumers are individual. And yet, it seems obvious that the actions brought before competent courts by a few consumers are just the tip of the iceberg. Indeed, so many other consumers are likely to be confronted with the same problems, given the uniform practices and contracts, not only within a given company, but also among companies. In this context, the absolute maintenance of the *res judicata* effect is retrograde. Is it tolerable that only one consumer who overcomes barriers to access to justice has the right not to be imposed a term declared unfair by a court, while it can still be imposed on everyone else? Or that a merchant can impose fees deemed illegal on all his customers, except the one who had the illegality recognized by a court? Or that, despite concern for the economics of and the access to justice, each consumer who does not want to continue being victimized by an illegality recognized by a court has to go to court himself? Or that the heavy machinery of class actions may be cranked up in such cases (which is unlikely unless the amount involved justifies it)?

In response to those questions, the approach taken in the European Union and in Brazil, of infringing somewhat on the principle of *res judicata*, for the sake of consumers' collective interest and the effectiveness of consumer protection laws and redress procedures, seems imbued with elementary wisdom and fairness.

It should be noted that the class action procedure already points the way. Indeed, the second paragraph of C.C.P. section 2848 provides, in what Professor Lafond calls a "collective concept of procedural law[221]," that the effect of a class action judgment is not restricted to the traditional parties – claimant and defendant – to the procedure, but rather extends to the entire group defined and designated by that procedure[222]. Moreover, the class action procedure directly contradicts the civil law tradition that the parties must have sufficient interest to take legal action and benefit from it. The class action provides that those who will benefit from the judgment and will be bound by it are not named specifically. Rather, it allows them to be designated as members of a group, a collectivity. The members' common characteristics are the only ones

[218] **LAFOND, P.-C.** "*L'exemple québécois de la Cour des petites créances*," *op. cit.*, note 42, p. 79. Our translation.
[219] Sec. 985, par. 2, *Code of Civil Procedure*.
[220] **SHULMAN, A.I.** *Bill 70- Comparative Legislation, Analysis and Comment*, 1973, 33 R. of B.145, pp. 150-151.
[221] **LAFOND, P.-C.** "*Le recours collectif québécois : entre commodité procédurale et la justice sociale*," 1998-99 29 R.D.U.S., Canada, 35 pages, p. 32. [Online] available on the website of Sherbrooke University at http://www.usherbrooke.ca/droit/fileadmin/sites/droit/documents/RDUS/volume_29/29-12-lafond.pdf (document consulted on June 10, 2013).
[222] *Ibid*.

determined, and the members share similar (not identical) causes of action, without the necessity of individually establishing a personal and direct interest in the action[223]. According to one author, given these variances between traditional civil law and the class action, the latter is outside the scope of both civil law and common law traditions:

> *Appliquer le droit civil, c'est l'appliquer à l'égard d'un individu; si le droit est appliqué autrement qu'à l'égard d'un individu, ce n'est plus le droit civil.*
>
> *Il est évident que le recours collectif et cette tradition du droit civil s'affrontent, et même brutalement. L'article 2848, para. 2, du Code civil du Québec -- ."".. le jugement qui dispose d'un recours collectif a l'autorité de la chose jugée ..." est impensable à l'intérieur de la tradition.*

Moreover, this is not the only procedural affront made to traditional procedural principles by the class action. Whereas no one is supposed to be able to plead on others' behalf without a mandate (C.C.P. 59), C.C.P. section 999 provides precisely the opposite, even in the procedure's definition: "*d)* 'class action' means the procedure which enables one member to sue without a mandate on behalf of all the members." The class action's goals, eminently desirable, obviously justify those breaks with tradition.

4.2 Summary Analysis of Measures Broadening Either the Right to Take Legal Action or the Effect of Judgments: Procedure, Pros and Cons, Effects, and Effectiveness

This section of our study summarizes existing measures, in foreign jurisdictions and in Quebec, that infringe on the *res judicata* principle and on the principle of personal interest to act. For each measure identified, we will discuss the following: operation, effects, effectiveness, pros and cons, and expectations for consumer access to justice.

In addition to the right of injunction conferred on consumer organizations (CPA section 316, *2*nd par., adopted in Quebec in 2010) and to the class action procedure we discussed, we have analysed measures adopted in seven foreign jurisdictions: the European Union, France, Portugal, Poland, Hungary, Germany and Brazil. Whereas the majority of EU Member States adopted those measures after the transposition of EU Directives, others (France, Portugal and Germany) already had provisions for a broader right of action, conferred notably to consumer associations, to defend consumers' collective interest.

We also identify two categories of measures: (i) those broadening the right to take legal action by allowing entities not directly affected by a practice to go to court and (ii) those that broaden the effect of judgments.

The measures belonging to those two categories deal with unfair terms and prohibited practices. As we will see, some jurisdictions have adopted laws with broader application, but in most

[223] **GLENN, H.P.** "*Le recours collectif, le droit civil et la justice sociale*," 1998-99 29, R.U.D.S., Canada, 17 pages, p. 43. [Online] available on the website of Sherbrooke University at http://www.usherbrooke.ca/droit/fileadmin/sites/droit/documents/RDUS/volume_29/29-12-glenn.pdf (document consulted on June 10, 2013).

cases, the measures pertain only to contractual terms used in consumer contracts, as do the European Directives whose transposition is the measures' source in most cases.

Even before the Directives came into effect, some European Community Member States had laws granting consumer associations a right to act; those laws have broader application. In fact, the German and Portuguese laws apply to all adhesion contracts, whether consumer or commercial, that contain pre-formulated terms. However, regarding unlawful practices, the measures pertain only to consumer contracts. It should be noted that those measures are not intended for specific commercial sectors such as auto or home appliance sales, but rather for all consumer contracts. For its part, France makes a wider range of redress procedures available to consumer associations.

When legislatures adopt measures broadening the effect of judgments, it is often to improve the effectiveness of consumer associations' right to act and the actions they bring. Thus, in Hungary, Poland and Germany, judgments pertaining to unfair terms or injunctions and rendered in an action brought by an association will apply to everyone, once published.

The operation of those measures is essentially the same in all the jurisdictions that have adopted them. Consumer associations' right to act will also be asserted through an action before competent courts. In Brazil, the consumer association must be consulted beforehand by the consumer alleging violation of a collective right, and that association will bring the action. In Germany, the association must, before bringing an action, notify the merchant, who may agree to comply before the action is brought; if he does agree, failure to meet his commitment will constitute a penal offence. This measure, known as prior consultation, is provided in European Directive 98/27/EC. More than a simple notice is involved; the notice may entail a consultation with the public organization charged with protecting consumers' collective interest. The results of this measure seem convincing.

In all Member States, the qualification of entities on which the right to take legal action is conferred depends on their meeting a series of conditions. In all cases except Portugal, the concept of "qualified entity" includes consumer associations as well as public consumer protection organizations[224]. Generally, for consumer associations to be deemed qualified, they must meet criteria such as: the organization's primary mission – which must be to defend consumer rights –, independence, representativeness, and age[225].

In three of the Member States studied (Hungary, Poland and Germany), consumer associations' right to act is accompanied by a measure that, to improve the effectiveness of actions brought and for the sake of the economics of justice, gives decisions rendered an *erga omnes* effect. The measure's implementation depends on publication of judgments rendered, which makes them applicable to all. All contracts that, for example, would contain a term declared unfair must thus be amended to comply with the decision rendered – even the contracts of merchants who were not parties to the dispute. In some cases, this *erga omnes* effect is twofold: this is the case in Hungary, where the *Civil Code* provides that a decision rendered in an action brought by the professional's client for an injunction against an unfair term will apply to all parties having entered into a contract with that professional. All the professional's clients are thus concerned by the decision rendered, whether or not they were parties to it.

[224] Directive 98/27/EC states that a qualified entity is an organization with a legitimate interest to ensure the implementation of provisions resulting from the transposition of the directives mentioned in this Directive.
[225] **DUCHESNE G. and Y. LABELLE.** *Les associations de consommateurs*, *op. cit.,* note 98, p. 57.

As mentioned in the preceding section, those measures constitute substantial infringements of legal principles long considered pillars of legal systems. It is therefore important to consider the arguments used for supporting and justifying the adoption of such measures[226]. The prevailing argument is certainly that the measures improve consumer access to justice. In all the jurisdictions we analysed, this argument has been used for supporting the adoption both of measures broadening the right to take legal action, and of measures broadening the effect of judgments. Multiple barriers to consumer access to justice were observed in those countries – essentially the same barriers as in Canada. Faced with that situation, it was necessary to infringe on certain legal principles; in doing so, the lawmakers proved their determination to remove those barriers and improve consumer access to justice.

A good number of those measures are based on the concept of "the collective interest of consumers." This concept recognizes that an individualistic approach does not protect consumers effectively; that a collective problem requires collective solutions; and that the effects of a consumer/merchant dispute are usually, if not always, reproduced on a large scale. Accordingly, the measures invoke the necessity of protecting consumers' collective interest.

Again in order to protect consumers' collective interest, a broadened right to take legal action, recognizing that certain qualified entities have the necessary interest to act, is justified by the need to eliminate from consumer contracts unfair terms unduly disadvantaging the weaker party, i.e. the consumer. In its response to the questionnaire we submitted to certain consumer associations as part of the present study, the Brazilian consumer association IDEC-Brazil points out that such measures, which are appropriate means of ensuring legal representativeness, have greatly empowered consumer associations and increased their political power.

The same arguments are often used for adopting measures broadening the effect of judgments. Those measures are also viewed as a way to improve the effectiveness of redress procedures, given the still-difficult conditions of access to justice. The economics of justice constitutes another justification for such measures, given the costs borne by consumers and the legal system alike in bringing multiple actions that are similar, if not identical, except for the defendants' identity. For those reasons, the European Union advocates, in its assessment reports on the transposition of its Directives, the adoption of measures broadening the effect of decisions rendered, so that court decisions may benefit all consumers.

To assess the appropriateness of adopting those measures, it is necessary to recognize the inadequacy of national legal systems in receiving and handling consumer disputes, which have certain peculiarities, and thus in removing barriers to consumer access to justice. Unfortunately, in some countries, consumer associations face, when bringing actions as they are allowed to do, the same difficulties faced by consumers: high costs, long waiting times, complex procedures, etc.

To improve consumer access to justice, the various measures' expected effects are several: recognition and defence of consumers' collective interest, more user-friendly redress procedures, effective consumer protection laws, a deterrent effect on merchants, etc. The primary goal is always to improve consumer access to justice, through measures that improve the economics of justice and remove many barriers to access to justice, by allowing a great many if not all of a country's consumers to benefit individually and collectively from the effects of

[226] To know the arguments made in each jurisdiction studied, please refer to the sections pertaining to each jurisdiction, (pp. 36 and fol.) where the subject is addressed more broadly.

judgments. As we have seen, access to justice should not be viewed as limited to individual access to the courts. Consumers should have access to justice itself, not only to the means of rendering it.

The intentions in adopting those measures are certainly laudable and the latter's benefits undeniable. Our review of the literature, and the answers received to a questionnaire we sent to consumer associations in Quebec and in the foreign jurisdictions where the measures studied had been adopted[227], revealed several benefits to adopting the measures we identified. The collectivization of access to justice, and the measures' large-scale effects on a great many consumers, are among the most remarkable benefits. Also perceived as an undeniable benefit is that a decision with a broadened effect has a collective preventive effect benefiting both the current and the future clientele of the professional concerned, in situations where all such contracts must be amended. This preventive effect is also present during the preliminary step of sending the merchant a notice before an action for an injunction is brought (as provided by Directive 98/27/EC and German law). As mentioned above, this procedure appears to have a strong deterrent effect, with the offending practice usually ending at that moment, without the lawsuit having to be brought. The advantages of this measure are clear in terms of access to justice: the fact that a consumer association takes legal action removes many barriers that would confront a consumer; whether the results are effected by a judgment or an out-of-court settlement, all consumers can benefit from the dispute's results, thus avoiding the necessity of proliferating redress procedures.

Despite the many benefits of measures broadening the effect of judgments or the right to take legal action, certain shortcomings should nevertheless be reported.

In the European Union, those shortcomings are deplored, particularly with regard to cross-border disputes, by authors as well as consumer associations. The shortcomings reportedly explain the limited success both of some redress procedures provided by European Directives, and of some transpositions of the Directives in national legal systems. For example, cross-border redress procedures cost more: fees, research costs due to differences between Member States' laws, etc. Moreover, judgments rendered in actions brought by consumer associations still have no *erga omnes* effect, so their scope and effectiveness are limited. So limited, in some cases, that to escape the judgment's effects, the professional has only to move to another Member State or amend the wording of the term judged illegal. As mentioned above, without a broadened effect recognized for those judgments, the equitable protection of all consumers requires an undesirable proliferation of redress procedures.

Unsurprisingly, the integration of such measures in national laws is slow. Also unsurprisingly, those actions and procedures, while giving consumers access to justice without having to go to court themselves, in turn face traditional barriers to access to justice: slow procedures and long waiting periods clearly hinder the effectiveness of those actions and procedures, to the point that people hesitate to use them. As suggested by the European Commission, emergency procedures should be applied. The issue of costs also poses a problem, especially since the associations, when bringing an action, do not aim at obtaining compensation for damage suffered, and thus have nothing to gain economically. It therefore appears essential, as stated by the European Commission, that consumer associations recognized to have an interest in taking legal action in consumers' collective interest receive government financial support to do

[227] As we will see in the following section, the rate of responses to that survey was very low.

so. The example of France is interesting, by allowing, in some cases, plaintiff associations to benefit from an order to pay damages for harm done to consumers' collective interest.

In addition, when such measures are integrated in a system expressly adapted to consumer disputes and aiming to protect consumers collectively, as is notably the case in Brazil, they clearly seem more effective.

4.3 Consultation of Consumer Associations

Union des consommateurs contacted 24 consumer associations to learn their views about the pros and cons of measures adopted in their jurisdictions, about the effect of those measures on access to justice, and about the use made of them. A questionnaire was sent to 14 consumer associations in Quebec and to 10 operating in foreign jurisdictions[228]. Unfortunately, we received answers only from 5 Quebec organizations (all members of our own organization) and 2 foreign organizations, i.e., DECO in Portugal and IDEC-Brazil.

In Quebec, the first finding is the marked ineffectiveness of the right of injunction conferred on consumer associations (CPA sec. 316, par. 2). The responding organizations, mainly small regional associations, deplore that a lack of resources, both human and financial, prevents them from using this right to act. Whereas the measure's theoretical, albeit relative, effectiveness is admitted, the possibility of its actual use is questioned. One association pointed out that the consumer's non-access to justice is replaced by the organization's non-access. The associations recognize that allowing an organization to bring an action is a step in the right direction to facilitate access to justice for all consumers.

The Quebec associations propose several means they think might raise the effectiveness of redress procedures and improve access to justice. They think it essential to adequately fund consumer organizations wanting to use available redress procedures. Other measures they advocate include application to all consumers of decisions rendered in consumer actions, and application of a rendered decision to all merchants with the same or similar practices. Some also think that creating a court specializing in consumer disputes would make redress procedures more effective for consumers as well as associations.

We obtained the same views from foreign organizations as from the documentary review. The Portuguese consumer association DECO discusses all the measures adopted in Portuguese law to better protect consumers (arbitration centres, Small Claims Divisions, right of collective action including the award of damages, injunctions, and the supervisory powers of government organizations). It concludes that such measures have improved consumer access to justice, since many consumers would not have gone to court themselves, given the long and costly process involved.

Although the right of class action is widely used by the parties concerned, the Portuguese organization considers that this measure disadvantages consumers individually, because class actions do not allow each wronged consumer to be compensated. It also deplores that

[228] On March 27, 2013, Union des consommateurs sent a questionnaire to 23 organizations, including 14 Quebec associations and 9 foreign organizations. We asked them to answer the questionnaire and send us their answers and comments by April 26. At the request of some of the organizations, we agreed to extended periods so that they could answer the questionnaire. The list of solicited organizations and a copy of the questionnaire are reproduced in Annex 1 of the present report.

exercising the right of class action can prove costly for the plaintiff, and prove lengthy too, given the action's complexity. The organization hopes for swifter and more effective class actions; decisions rendered more quickly would have an immediate effect on practices.

The consumer association IDEC-Brazil considers that the right conferred on consumer associations to bring class actions in consumers' collective interest has given the associations a certain legal and political power while improving consumer access to justice, by lowering the costs of disputes. But it deplores the limited territorial effect of class action decisions rendered.

5. Feasibility in Quebec

5.1 Feasibility and Effectiveness in Quebec

a) Finding: Difficult Access to Justice for Consumers

The fact is already well documented: consumer access to justice remains deficient in Quebec and in the rest of Canada. Our study was intended to discern if certain specific measures could be considered to end the individualism of consumer redress procedures and their resulting proliferation, in order to give as many people as possible true access to justice.

Such measures include those broadening either the effect of judgments or the right to take legal action. They broaden both the access to and the scope of redress procedures, in order to improve consumer access to justice and the economics of justice.

In foreign jurisdictions, these types of measures – adopted notably to avoid the proliferation of consumer redress procedures by addressing issues rather than particular cases, and thus to settle those issues for all consumers – have been adopted without too much opposition, even though they seriously infringe on certain well established legal principles. Likewise, in Quebec, for the right of injunction conferred on consumer associations.

Is it possible to adopt that vision and those bold approaches in Quebec?

b) Measures Broadening the Effect of Judgments or the Right to Take Legal Action: Supporting Arguments, Pros and Cons

To implement effective means for ensuring consumer access to justice and the effectiveness of redress procedures, several jurisdictions have deemed it necessary to adopt measures infringing on certain established principles: notably, sufficient interest to act and the *res judicata* effect of judgments.

Other than the economics of justice, the collective interest of consumers motivated those jurisdictions to stop the proliferation of consumer disputes before the courts. Two types of specific measures – conferring on consumer associations the right to act and broadening the effect of judgments – have been adopted, mainly against unfair terms. The goal was to provide collective protection, both upstream by attempting to eliminate unfair terms from consumer contracts, and downstream by allowing all consumers to benefit from judgments rendered.

As we have seen, the benefits claimed for these two types of measures are many. Actions for injunction or elimination granted to consumer associations have collectivized redress procedures, by considering consumers' collective interest. In addition, consumers benefit from a judgment without having to face the barriers to access to justice that exist in all legal systems. The *erga omnes* effect granted to judgments rendered implements a collective approach to consumer problems, which are widespread due to mass consumption and ubiquitous adhesion contracts. The individualistic approach to consumer problems is no longer suitable for the realities of consumer affairs; it generally continues to require that consumers bring individual actions in turn, even while the consumers' situations are similar. These types of measures also

have an important deterrent effect on merchants aware of the redress procedure available to consumer associations, so that the risk of being sued is now higher.

And yet, as mentioned above, the two types of measures have shortcomings and barriers to their optimal use or effectiveness: the slowness of national legal systems; the high costs borne by consumer associations bringing such actions, in a context where the associations receive no support or compensation; the dissociation of the two types of measures – measures conferring on associations a right to act are more effective if judgments have a broadened effect.

c) Feasibility and Necessity of Such Measures in Quebec Law

Regarding the feasibility of adopting such measures in Quebec law, one of the problems is of course the infringement on established legal principles.

Such infringements would not be the first. Quebec lawmakers have in the past adopted measures setting aside certain established principles of civil law, in order to improve access to justice.

As mentioned above, the class action disregards the principle of the *res judicata* effect of judgments, because class action judgments apply to all members of a group and not only to the parties[229], and have the force of *res judicata* for all members who are not excluded[230]. This procedure also creates an exception to the rule, stated in C.C.P. section 59, that no one may plead for another without a mandate; in fact, section 999, paragraph d) defines the class action by this exception: “class action” means the procedure which enables one member to sue without a mandate on behalf of all the members.”

In 2010, the lawmakers set aside the rule requiring a direct and personal interest to take legal action; they expressly recognized that consumer associations have sufficient interest to apply for injunctions[231]. The lawmakers had previously set aside that same principle by recognizing that certain legal persons have sufficient interest to act as representatives in class actions (C.C.P. sec. 1048), although those entities, as opposed to the member they will name, have no personal interest to act in those cases (C.C.P. section 999 specifies that the entity cannot be a member of the group if it is bound to the representative).

We thus note that the necessity of improving access to justice for all litigants and for consumers has led lawmakers to set aside certain principles of general application. But to date, consumer access to justice has been improved only by class actions, and partially even then. And yet, the special context of consumer law, and the crying need to better protect consumers by giving them access to justice in the broadest sense, are no longer in doubt. Therefore, similar infringements of certain traditional legal principles must now be considered to allow the adoption of bolder measures.

[229] C.C.P. sec. 1027. The final judgment describes the group and binds the member who has not requested his exclusion from the group.
[230] Sec. 2848, par.. 2, C.C.Q.
[231] Sec. 316, CPA.

d) Comments of Participants in the Summary Document's Consultation

To confirm our interpretation of the measures we studied that broaden the effect of judgments or the right to act, we submitted to a group of experts a summary document presenting those various measures adopted in foreign jurisdictions and in Quebec, and requested their views on the measures identified and on the possible applicability of such measures in Canada.

A request for participation was sent to a group of 13 experts including university professors, *Barreau du Québec* committees, Quebec's *Office de la protection du consommateur*, the Court of Quebec, the *ministère de la Justice du Québec* and Ontario's Ministry of Consumer Policy Branch[232]. Only five of the persons or organizations consulted agreed to participate in our consultation. Despite participation confirmations and a follow-up request, in the end we received comments from only two sources: Court of Quebec Associate Chief Justice Pierre E. Audet and Quebec's Office de la protection du consommateur (OPC)[233].

It should be noted that our summary document did not contain reading keys and that its analysis was less detailed than that of the final report. Some participants rightly pointed out this shortcoming of our survey.

i) Comments of the Honourable Pierre E. Audet[234]

In his personal capacity, and not on behalf of the Court, Justice Audet agreed to participate in our survey. The viewpoint expressed in his comments thus does not officially bind the Court of Quebec.

Although Justice Audet thinks that consumer associations' right to act and the broadened right of action under section 316 of the *Consumer Protection Act* suggest an interesting avenue, he expresses serious concerns. The Justice questions whether the interventionist role of the judge sitting at the Small Claims Division should be reimagined if consumer associations are allowed to represent consumers, whereas lawyer or mandatory representation is, with exceptions, prohibited before that court. He notes that an imbalance of power between the party representing a consumer and the merchant party can persist, so that the judge should be able to intervene to guarantee a certain balance between the parties.

The Associate Chief Justice also recalls that there are other means, seldom used by litigants, that could improve access to justice: the mediation service offered when an action is filed before the Small Claims Division, and the conciliation offered by the judge during the hearing. He mentions that those dispute resolution mechanisms have a low rate of use and that they should be advocated. The Associate Chief Justice also points out that in consumer disputes, the *draft*

[232] See Annex *2: Summary Document.*
[233] On receipt of our summary document, Professor Lafond told us he did not think it suited this type of consultation. The Barreau's consumer protection committee, to which the requested extension period had been granted, has never sent us the awaited comments. The Ontario Department, despite its initial agreement, told us it was impossible for it to opine on measures that had not yet been studied or that had not been deemed priorities for the Department.
[234] *Comments of the Associate Chief Justice of the Court of Quebec,* Pierre E. Audet- *Summary Document - Consultation*, April 5, 2013, p. 2.

Code of Civil Procedure[235] provides that, in a consumer contract dispute, mediation pilot projects will be launched.

With regard to the broadened effect of judgments rendered, the judge recalls that judgments rendered by the Small Claims Division have only limited authority and that integrating this type of measures before that court might pose problems. He also states that the raison d'être of that force of *res judicata* is probably that in the Small Claims Division the parties are not always able to take part in a full legal debate of all the issues with as many procedural guarantees as in a regular division. Finally, Justice Audet asks, does not the class action itself make it possible for a decision rendered to be enforceable on a group of merchants or even of consumers?

ii) Comments of the Office de la protection du consommateur[236]

The Office de la protection du consommateur (OPC) reiterated in its comments its willingness to improve consumer access to justice, particularly by amending, as necessary, the provision conferring on consumer associations the necessary interest to apply for injunctions (sec. 316 CPA).

The OPC is of course in favour of measures broadening the right to act for certain entities that would not otherwise have the interest to act. But the organization is doubtful about an "extensive" approach that would confer a right to act on other organizations or on individuals, as is notably the case in Portugal. The OPC mentions the risk that actions be brought for other motives than the general interest of consumers. It also points out the difficulties that may arise for adequately assessing according to certain criteria such as independence, competence and the objectives pursued. The OPC therefore advocates an approach like that adopted in CPA section 316, i.e., a right to act conferred on entities that meet certain specific criteria. As for the principle of sufficient interest and the requirement of a direct legal link, on which that section infringes, the Quebec consumer protection organization explains that, while there actually is an infringement, there remains a link between the redress procedure's objective and the plaintiff organization's mission: the defence of consumers' collective interests.

Again regarding a broadened right to act, the OPC expresses concern about a possibly difficult cohabitation between the right to act based on the defence of consumers' collective interests and the powers conferred on public authorities (charged with monitoring to ensure that the laws are applied and followed); those powers include steps that the monitoring organization can take to compel merchants to end certain practices. The OPC also states that discussions should be held about obstacles that may confront consumer associations wanting to bring such actions. The issues include high costs, the consequences facing a merchant who does not comply with the decision rendered, and the nature of provisions that may be the object of such actions.

In addition, the organization explains that the very limited information contained in the summary document about the conditions for a decision to acquire an *erga omnes* effect makes it difficult for it to opine on measures that would so broaden the effect of judgments. However, the Office de la protection du consommateur thinks it problematic for a merchant to be bound by a

[235] Sec. 830, *Bill 28: Act to establish the new Code of Civil Procedure*, presented to the National Assembly on April 30, 2013.
[236] *Comments of the Office de la protection du consommateur*, Geneviève Duchesne- *Summary Document - Consultation*, April 9, 2013, p. 1. The OPC's comments were written by Me Geneviève Duchesne.

judgment without having had the opportunity to make representations before the court where the decision was made. Rather, the government organization advocates an approach modelled after the sectoral class action, which would allow an association to bring an action against many merchants with similar practices, even without a direct legal link between the association and the merchant, and although the designated representative has a legal link only with one of the merchants targeted by the application.

Conclusions

Despite all the talk about the importance of guaranteeing consumers access to justice, despite the new rights and redress procedures granted to them, despite measures to facilitate such access, the evidence must be admitted. The traditional barriers to access to justice often remain insurmountable for the consumer. The analysis of those access problems has developed: it is admitted that the generally low monetary value of consumer disputes is not a strong incentive for bringing individual actions, and that the time and money needed for completing a legal action end up convincing consumers to avoid going to court or to give up along the way. A more thorough analysis of those barriers has led authors to produce an exhaustive classification of them… but not of the solutions.

The concept of access to justice has long been addressed in a very narrow way. Analyses have been limited to considering the wronged individual's access to the courts or to other ways of settling his dispute individually. Obviously, such an interpretation is no longer suitable. Adequate access to justice will depend on the adoption of effective laws, on observance of those laws by those to whom they impose obligations or restrictions, and on swift means of asserting one's rights and obtaining redress in case of violation. It is also essential, for the sake of full access to justice, to remove a good number of the barriers that prevail nowadays in many justice systems, such as barriers intrinsic to the legal system, sociocultural barriers, or barriers related to mental or physical disorders. In addition, it is essential that solutions be implemented to prevent problems of access to individual dispute resolution mechanisms from making it impossible to obtain justice.

When consumer disputes are involved, a narrow vision of access to justice and a search for solutions that focuses solely on problems inherent to individual access to various dispute resolution mechanisms can only move us away from the realities of this specific type of disputes. As we have seen, various jurisdictions handle consumer disputes according to very different visions of consumer law. In Canada, the application of consumer protection laws and, in many circumstances, of protection measures thereby provided depends on the existing contractual relationship between consumer and merchant (except for redress procedures available to organizations responsible for applying the law). Even class actions are authorized (or rejected) on the basis of that relationship between applicant and respondent.

While this approach rests on solid traditions, it remains that this individualistic vision of consumer law no longer corresponds to the realities surrounding consumer disputes. Those realities include the ever more widespread use of adhesion contracts, mass consumption, the lack of a close relationship between merchant and consumer, and the imbalance of power between the parties. Thus, an individual's consumer problems are now repeated on a large scale and likely affect many other consumers similarly, if not identically.

Some jurisdictions have decided to move away from this archaic individualistic approach to consumer law and to favour a more collective approach that includes, in certain circumstances, a broader definition of "consumer" and is implemented beyond the contractual relationship alone. This collectivist vision of consumer law pertains not only to protection measures, but also to court access through more suitable redress procedures and to redress procedures available without the consumer going to court. Thus, certain mechanisms (such as the broader scope given to some judgments) offer consumers solutions to collective problems by removing a good number of barriers to access to justice. This collectivist vision of access to justice entails the

establishment of specific measures that have enabled many jurisdictions to avoid the proliferation of redress procedures.

To date, Canada has not adopted such an approach. Barriers to consumer access to justice remain for consumers and the latter do not have adequate access to justice, despite many attempts made by lawmakers to improve access either for citizens generally or for consumers specifically. But the latter still do not appear able to benefit from adequate access to justice, because most attempts still aim at individual access to dispute settlement. The legal system's slowness, its complex procedures, the long waiting times for obtaining hearing dates, consumers' lack of knowledge of the rights and of the legal system's workings, the disparities of knowledge and financial resources between the parties, and obstacles related to social status and to health: these are among the reasons why consumers do not go to court or give up along the way.

The class action allows wronged consumers to obtain justice without having to bring an action themselves, and has been key to the collective defence of consumers, although this procedure is neither reserved nor specifically intended for them. But even in the case of class actions, the necessity of multiplying redress procedures has not been eliminated, given the Court of Appeal's prohibition, for all practical purposes, of sectoral redress procedures. And other measures do not seem to have met their objectives.

For its part, the Small Claims Division perpetuates the obstacles to access to justice that it was designed to remove, since it maintains the individualistic approach, which denies the fundamentally collective nature of consumer law. The mediation service added to it (and that the revision of the Code of Civil Procedure is intended to broaden) cannot compensate for the shortcomings identified, if the barriers that prevent access to that court from the start are not removed.

In an attempt, modelled after measures adopted in Europe, to improve the effectiveness of legal protections offered to consumers, Quebec has conferred on consumer associations the sufficient interest to exercise a right of injunction that was reserved hitherto for the President of the Office de la protection du consommateur. However, this right conferred on consumer associations has too narrow a field of application; and since the high costs of such a redress procedure cannot be defrayed by the associations, it is simply not used.

Our analysis reveals that the adoption of measures broadening the effect of certain judgments or recognizing that certain entities have an interest to act that exceeds personal interest alone yields substantial benefits for consumers and society. This type of measures collectivizes consumer redress procedures by basing the action on consumers' collective interest – respect for rights, maintaining a balance between merchants and consumers, access to a market with sound and equitable practices – as well as on their individual interests – right of injunction against unlawful or unfair practices, compensation. A collectivist vision of consumer law will lead to adopting specific measures making all consumers benefit from decisions rendered against similar wrongs victimizing consumers individually, since an unfair term in an adhesion contract will generally be as unfair to all those having entered into a similar contract, whoever the co-contracting merchant is.

While it is impossible to eliminate the barriers individually separating consumers from adequate access to the legal process, and thus to justice, the initiative of totally removing that burden and placing it on the shoulders of organizations with the mission of asserting and defending their

rights seems ideal. Of course, that depends on whether the third-party organizations' access to the courts actually gives consumers access to justice.

The interest to act conferred on consumer organizations in some countries is not limited to having certain terms declared unenforceable or to having certain existing practices cease. Some redress procedures can end with an order of removal; the problematic term will no longer appear in the contracts of the company's current or future customers.

Whereas the barriers facing consumers who needed access to the legal system seemed insurmountable, those facing consumer organizations are much less numerous. The substantial costs those organizations must pay to play their role constitute the main barrier, but also the one that seems easiest to overcome.

The other barriers do not confront the organizations, but can prevent procedures from effectively protecting consumers' collective interests and meeting economics of justice requirements: will the procedures have to be repeated without end, against market players with identical practices, or against those who amend – while preserving its undesirable effects – a term judged illegal?

The effectiveness of this type of redress procedures will always depend on that of the legal system in which they are involved; that effectiveness will always be affected by the slowness of legal processes.

Jurisdictions where this type of measures has a certain success have a vision of consumer protection that is entirely different from that in Quebec. Their vision recognizes that consumer law is a collective, and even a social, issue rather than a simple issue of individual rights, by recognizing that protecting consumers and their interests also requires a collective approach. It recognizes that violations of consumer rights – whether through unfair clauses or other unlawful or unfair practices – have major consequences for all consumers, the market and society, and not only for individuals considered one by one.

After 40 years of attempts to improve consumer access to justice by adopting measures not very suitable, if at all, for consumer disputes, should we not review the applicable approach to this type of dispute, along with our conception of consumer law? We think such a review is possible, with political will. On a few occasions in the past, Quebec lawmakers judged that improving access to justice justified infringements on traditional principles – that of *res judicata* and of the necessary interest to act, notably. Today, we think the state of consumer access to justice is sufficiently alarming to warrant an immediate reassessment of consumer access to justice measures and a feasibility analysis for broadening such measures in Quebec.

Consumers' individual or collective interests are certainly not best served by forcing consumers to multiply redress procedures; or by ensuring access to justice only to those who go to court despite the obstacles; or by requiring a proliferation of redress procedures undertaken on behalf of all consumers victimized by a merchant's illegal practice, so that the customers of his competitors, engaging in identical practices, may also have access to justice.

While, as stated by the Supreme Court, "procedure is the servant of substantive law[237]" and thus exists to uphold the rights asserted in consumer protection laws, the reality seems unfortunately to prove its ineffectiveness in many respects. Consumer dispute procedures are

[237] *Corporation municipale de St-David de Falardeau v. Munger*, [1983] R.D.J. 207 (SCC), conf. [1981] C.A. 308.

intended to guarantee consumers actual access to justice and the actual effectiveness of laws protecting them. Doing otherwise, and maintaining the status quo by patching up the most obvious tears in the legal process, without seriously taking into account the special characteristics of consumer disputes, is no longer acceptable. It should now be recognized that, as applied to consumer law, "procedural law, as opposed to what we have always been taught, is not the servant of substantive law, but rather its mistress – a mistress with requirements that dictate its intentions[238]," and that it should be given its rightful place.

To actually improve consumer access to justice, the rights of action made available to consumer associations must also provide measures that limit or eliminate the obligation to multiply redress procedures pertaining to similar matters of fact or law. Procedural measures broadening the effect of judgments could remedy this problem. Also essential would be recognition of the interest to bring class actions on the basis of consumers' collective interests, including their individual interests, rather than on the sole basis of the legal link of one member of the group.

The measures considered herein may seem attractive in theory and be viewed as clear improvements in consumer access to justice. But they likely cannot have full effect unless supported by procedures and a legal system focused on protecting consumers considered collectively and as key economic agents who must have trust and confidence in the marketplace. The recommendations below are based on this perspective and approach.

The measures studied in this study depend on a swift and effective legal system adapted to consumer disputes so as to ensure optimal effectiveness. They cannot belong to a legal system that does not correspond adequately to the peculiarities of consumer disputes.

A consumer court may need to be created, specifically to handle this type of disputes, and to adequately support measures that broaden the effect of judgments rendered and the right to act of consumer associations. But the present study did not focus on that particular question[239]. To be continued?

[238] **MARQUIS, J. et al.** *Rapport sur l'évaluation de la loi portant sur la réforme du Code de procédure civile et les poursuites stratégiques contre la mobilisation publique (SLAPP)*, February 1, 2008, Québec City, Canada, 105 pages, p. 2. [Online] available on the National Assembly website at http://www.assnat.qc.ca/Media/Process.aspx?MediaId=ANQ.Vigie.Bll.DocumentGenerique_277&process=Default&token=ZyMoxNwUn8ikQ+TRKYwPCjWrKwg+vIv9rjij7p3xLGTZDmLVSmJLoqe/vG7/YWzz (page consulted on May 21, 2013). Our translation.

[239] Union des consommateurs published in 2011 a research that looked at the benefits the creation of a tribunal dedicated to consumer-related disputes could represent for consumers and, more generally, for the access to and the administration of justice. The reader should refer to this report for our arguments on the relevancy and the feasibility of creating such a court. See : CARREAU, Simon, *Consommateurs et accès à la justice : un guichet unique pour les consommateurs, Op. Cit.*, note 3

Recommendations

- Whereas consumer problems are experienced nowadays on a large scale, given ubiquitous adhesion contracts and mass consumption;
- Whereas issues of access to justice are still too often approached from the angle of individual access to dispute settlement;
- Whereas the barriers to access to justice that various measures are intended to mitigate prove inherent to the procedures available and are thus insurmountable from that angle;
- Whereas an individualistic conception of access to justice has proven too limited for the realities of consumer disputes;
- Whereas a more collective vision of consumer law, as advocated by certain foreign jurisdictions, seems more suitable for consumer disputes and allows more effective measures for improving consumer access to justice;
- Whereas the MacDonald task force's recommendations have not been implemented;
- Whereas the legal system, in its current form, does not appear to meet consumer needs adequately or to be suitable for consumer disputes generally;
- Whereas multiple barriers to access to justice seem persistent despite measures adopted to remove them;
- Whereas the measures adopted in Canadian provinces and territories to improve consumer access to justice do not seem to have met the objectives set, given the shortcomings of those measures;

On the basis of those findings and:

- Whereas Small Claims Divisions have been unable to remove barriers of access to justice as intended;
- Whereas Small Claims Divisions are unable to offer citizens swift, low-cost and effective access to justice;
- Whereas consumers continue to suffer from an imbalance of power in relation to merchants;
- Whereas greater publicity for Small Claims Division decisions would likely better inform consumers of their rights;
- Whereas broader application of Small Claims Division decisions could limit the proliferation of redress procedures and give consumers better access to justice;

1. Union des consommateurs recommends a reassessment of the effectiveness of Small Claims Divisions in receiving and handling consumer disputes and meeting consumers' specific needs;
2. Union des consommateurs recommends an assessment of jurisdictional limitations, material accessibility, long waiting periods, complex rules of evidence, and judgment execution difficulties, as experienced by consumers wanting to go to Small Claims Court;
3. Union des consommateurs recommends that provincial lawmakers take into account that the individual nature of redress procedures in Small Claims Court is not suitable for the realities of consumer disputes, which are experienced by consumers collectively and require collective solutions;
4. Union des consommateurs recommends that a system be established to guarantee that decisions be better publicized, to better inform consumers, who could consult court decisions to better know their rights;

- Whereas class actions have improved consumer access to justice, by allowing consumers to benefit from a judgment without being parties to the procedure;
- Whereas recognition of consumer groups' interest to act as representatives in a class action has removed some barriers to consumer access to justice;
- Whereas case law allows a class action to be brought only on the basis of the personal right to act of the applicant or designated member;
- Whereas this limitation is likely, when shared issues affect many merchants, to proliferate similar, if not identical, redress procedures;
- Whereas such necessary proliferation is neither in consumers' collective interest nor in that of sound economics of justice;
- Whereas recognition of consumer associations' interest to act in consumers' collective interest would help remove that barrier;
- Whereas consumer associations' interventions in consumer class actions remain limited by their resources;
- Whereas it is important that the fear the financial risk which the order to pay costs may constitute for the petitioner in a class action should not constitute a barrier preventing relevant matters from being submitted to courts;

5. Union des consommateurs recommends, to improve the effectiveness of class actions, that the procedure be reviewed to make it less cumbersome and that waiting periods between filing an application for authorization and the case's outcome be shortened;
6. Union des consommateurs recommends that the rules of the *Code of Civil Procedure* be amended to unequivocally authorize sectoral class actions, to improve the economics of justice, avoid the useless proliferation of redress procedures and make justice more accessible to all consumers;
7. Union des consommateurs recommends, to foster the involvement of consumer associations, a clarification of the possibility that consumer associations acting as representatives receive compensation for work done as part of a class action, in the best interest of consumer members of the group;
8. Union des consommateurs recommends an examination of the possibility that such compensation be provided by the Fonds d'aide aux recours collectifs;
9. Union des consommateurs recommends that the possible impact of the risk for the petitioner in a class action to be ordered to pay the costs of the proceedings be examined;

- Whereas the Consumer Protection Act recognizes that consumer associations have sufficient interest to act against merchants by using the power of injunction that the Act confers to the President of the Office de la protection du consommateur;
- Whereas the right of action conferred on consumer associations is still limited to redress procedures against prohibited practices or the use of certain prohibited terms;
- Whereas, in consumers' collective interest, that right of action deserves broader application;
- Whereas, in similar redress procedures initiated by consumer associations in other countries, merchants may be ordered to pay damages for harming the collective interest of consumers;
- Whereas other countries, regarding similar redress procedures, give the judgments rendered a broadened effect, to make them applicable to other merchants or allow consumers to benefit from their effects, in order to avoid the proliferation of redress procedures and give consumers better access to justice;
- Whereas consumer associations do not have the necessary resources for bringing class actions at their own expense;

10. Union des consommateurs recommends allowing, in such redress procedures, consumer associations to seek damages for prejudice done to consumers' collective interest;
11. Union des consommateurs recommends that the field of application of this right of action be broadened, in order to improve its effectiveness;
12. Union des consommateurs recommends that adequate funding be made available to consumer associations recognized as having the right of action, in order to enable them to use that redress procedure effectively;

- Whereas foreign jurisdictions have adopted measures granting consumer associations a broadened interest to act in certain circumstances;
- Whereas those same measures are often accompanied by measures broadening the effect of judgments rendered, in order to improve the effectiveness of redress procedures, avoid their proliferation and better protect consumers;
- Whereas those measures often have limited success, notably due to the underfunding of consumer associations and to the lengthy handling times of consumer redress procedures;
- Whereas the primary goal of adopting those measures is to improve consumer access to justice;
- Whereas those measures are more effective when integrated in a legal system centred on the collective protection of consumers;
- Whereas those measures operate adequately when accompanied by parallel measures, such as funding claimant consumer associations and adopting strict procedural methods with no loopholes;

13. Union des consommateurs recommends that Canadian provinces make an in-depth assessment of the capacity of legal systems to handle consumer disputes adequately;
14. Union des consommateurs recommends that discussions be held on the type of legal system that would be most suitable for the special characteristics of consumer disputes;
15. Union des consommateurs recommends that each province mandate to that end a task force to study the legal system's shortcomings and consumers' difficulties with it;
16. Union des consommateurs recommends that those task forces have the mandate to study the distinction between consumer disputes and other types of disputes and, on the basis of a collective vision of consumer protection, to suggest necessary amendments that lawmakers should make to the *Code of civil Procedure* and to any other legislation concerned, in order to integrate measures broadening, in consumer cases, the effect of judgments or the right of certain entities to take legal action;
17. Union des consommateurs recommends that those task forces report to the organizations responsible for applying consumer protection laws;
18. Union des consommateurs recommends that those task forces be comprised, besides representatives of public authorities, of consumer law experts and consumer rights groups, to ensure that the actual concerns raised by difficulties of consumer access to justice be taken into account;
19. Union des consommateurs recommends that adequate funding be made available to task force participants who do not have the necessary resources, in order to ensure quality and sustained participation;

- Whereas a collective vision of consumer protection appears to protect consumers more adequately;

- Whereas some consumer associations already work to defend the collective rights of consumers;

20. Union des consommateurs recommends that consumer associations discuss a collective approach to implementing consumer law;
21. Union des consommateurs recommends that consumer associations working to defend consumers' collective rights take necessary measures to make all stakeholders aware of the importance of taking a collective approach to consumer protection.

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Spain
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France
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ANNEX 1: Consultation of Consumer Associations

1.1 French-Language Questionnaire

QUESTIONNAIRE AUX ASSOCIATIONS DE CONSOMMATEURS
DES MESURES PRÉVOYANT UN EFFET ÉLARGI DE L'USAGE ET DE LA PORTÉE DE CERTAINS RECOURS ENTREPRIS EN MATIÈRE DE CONSOMMATION

Pourquoi une recherche sur la multiplication des recours et l'accès à la justice?

Les problèmes d'accès à la justice persistent dans différentes sphères du droit : méconnaissance des droits, longs délais, engorgement des tribunaux, etc. Ce problème d'accès à la justice est encore plus présent dans les litiges de consommation : incitatifs économiques minimes qui ne font pas contrepoids à l'investissement en temps et en argent d'un recours, longs délais, etc. Afin de pallier ces problèmes d'accès à la justice, une variété de mesures ont été adoptées : recours collectifs, instauration des divisions des petites créances, modes alternatifs de règlement de litige, etc. Des nouvelles mesures sont également proposées : la création de tribunaux spécialisés en litige de consommation et la mise en place de sanctions administratives en sont des exemples.

Les litiges de consommation se déployant désormais à grande échelle étant donné la consommation de masse et l'utilisation de contrats d'adhésion, les obstacles à l'accès à la justice apparaissent d'autant plus clairement. Devant les problèmes que rencontrent les consommateurs dans différents secteurs, les législateurs s'affairent maintenant régulièrement à l'adoption de nouvelles lois en vue de mieux protéger les consommateurs ou encore à la bonification des encadrements législatifs existants. Les législateurs sont de plus en plus encouragés à s'attaquer, dans la conception de ces nouvelles mesures ou des modifications envisagées, à tout ce qui touche directement aux recours dont devraient disposer les justiciables en matière de droit de la consommation.

Ce que l'on observe aujourd'hui, c'est que les litiges donnent lieu à une multiplication des recours, qui s'exprime notamment de deux façons : soit qu'une multitude de consommateurs se plaignent ou poursuivent un même commerçant pour le même problème de consommation, ce qui entraîne une multitude de recours individuels et un engorgement des tribunaux; soit qu'un recours est entrepris de façon collective contre un commerçant, qui devra être répété contre tous les commerçants qui auraient les mêmes pratiques fautives.

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Nous estimons essentiel de nous pencher sur les mesures qui pourraient avoir pour effet d'accroître l'efficacité des mesures existantes, en prévoyant des mesures qui permettraient que la portée des recours intentés lors de litiges de consommation soit élargie. C'est sur cette question que porte un projet, financé par le Bureau de la consommation d'Industrie Canada, qui est en cours de réalisation.

La recherche d'Union des consommateurs

Union des consommateurs mène une recherche qui dressera le portrait des recours particuliers qui trouvent application en droit de la consommation et qui examinera leur efficacité. Nous dresserons une liste des avantages qu'ils présentent et examinerons les barrières à la réalisation de ces avantages. Enfin, nous examinerons des mesures, législatives ou autres, mises en place au Canada ou à l'étranger, qui permettraient d'élargir l'effet des recours en matière de consommation. Cet examen sera complété par une analyse détaillée des mesures et par une étude de l'applicabilité de telles mesures en droit canadien.

Quel est l'objet de cette consultation?

Notre recherche comprend la consultation d'associations de consommateurs œuvrant dans des juridictions qui ont adopté des mesures qui prévoient un effet élargi. Il s'agirait de sonder les associations afin de connaître leur point de vue quant à l'adoption de mesures qui ont pour effet d'élargir l'usage et la portée de certains recours qui peuvent être entrepris lors des litiges de consommation.

Étant donné la mission de votre association, nous désirons vous soumettre le présent questionnaire afin de connaître votre point de vue sur les mesures adoptées dans votre juridiction.

Votre participation à cette consultation

Vous trouverez annexée au présent document une liste des mesures recensées dans plusieurs juridictions. Vos commentaires sont très importants pour notre recherche et nous apprécions énormément votre participation. Dans l'éventualité où vous ne seriez pas en mesure de répondre à nos questions précises, nous vous invitons à nous soumettre votre impression générale des mesures en vigueur dans votre juridiction.

Auriez-vous l'amabilité de bien vouloir nous faire parvenir vos réponses au plus tard le vendredi 26 avril 2013, à l'adresse suivante : YLabelle@uniondesconsommateurs.ca.

Pour toute information additionnelle, n'hésitez pas à nous contacter.

Merci de votre collaboration!

UNION DES CONSOMMATEURS
Yannick Labelle, Analyste en pratiques commerciales et protection du consommateur
Téléphone: (514) 521-6820 poste 240
Télécopieur: (514) 521-0736
Courriel: YLabelle@uniondesconsommateurs.ca

Votre opinion des mesures qui ont pour effet d'élargir l'usage et la portée de certains recours entrepris lors des litiges de consommation

Vous trouverez en annexe un tableau dans lequel nous identifions une série de mesures adoptées dans différentes juridictions qui ont pour effet d'élargir l'usage et la portée de certains recours entrepris lors des litiges de consommation. Parmi celles que nous avons identifiées, nous retrouvons la possibilité pour les associations de consommateurs d'ester en justice alors qu'il y a usage de clauses abusives ou de pratiques illicites (Québec, Pologne, Hongrie, Allemagne, Louisiane (États-Unis)); des mesures qui permettent aux associations de consommateurs d'ester en justice dans l'intérêt collectif des consommateurs (Portugal, France, Brésil; ainsi que des mesures prévoyant la possibilité pour la Cour d'ordonner le retrait du marché d'un produit défectueux (Pakistan, District du Punjab).

1. **Veuillez identifier votre association :**

   Nom :

   Adresse :

   Personne ressource :

2. **Est-ce que votre association s'est prononcé en faveur l'adoption de mesures qui auraient pour effet d'élargir l'usage et la portée de certains recours entrepris en matière de consommation?**

3. **Quels ont été les arguments au soutien de l'adoption de ce type de mesures dans votre juridiction?**

4. **Quels étaient les effets escomptés de telles mesures sur l'accès à la justice pour les consommateurs?**

5. **Quels sont les avantages perçus des mesures adoptées dans votre juridiction?**

6. **Quels sont les inconvénients perçus des mesures adoptées dans votre juridiction?**

7. **Est-ce que ces mesures sont abondamment utilisées par les personnes auxquelles elles s'adressent? Si oui ou non, pourquoi?**

8. **Selon vous, est-ce que de telles mesures sont efficaces? Pourquoi?**

9. **Existe-t-il, selon vous, des moyens pour améliorer les mesures adoptées?**

10. **Autres commentaires:**

1.2 English-Language Questionnaire

union des consommateurs

STAKEHOLDER QUESTIONNAIRE
MEASURES WHICH BROADEN THE EFFECT OF CONSUMER REMEDIES

Why a study on the proliferation of redress procedures and on access to justice?

Various problems of access to justice persist: a lack of knowledge about rights, long delays, clogged courts, etc. Problems of access to justice are even more prevalent in consumer disputes: minimal economic incentives that do not justify the time and money invested in a court remedy, long delays, etc. To alleviate those problems, a variety of measures has been adopted: class actions, small claims courts, alternative dispute resolution mechanisms, etc. New measures have also been proposed: courts specializing in consumer disputes, administrative penalties, for example.

Consumer disputes are ever-more numerous due to mass consumption and adhesion contracts, so barriers to access to justice are more apparent. Given the problems facing consumers in various sectors, lawmakers frequently adopt new consumer protection laws or improve existing ones. In designing such new measures or improvements, lawmakers are encouraged to focus on remedies that should be available to consumer litigants.

Nowadays we observe that those disputes are leading to a proliferation of legal redress procedures that is manifested in two ways: either many consumers complain or sue a single merchant for the same consumer problem, so that a multitude of individual legal actions clogs the courts; or legal action is taken collectively against a merchant, which must be repeated against all merchants engaging in the same infractions.

We think it essential to focus on improving the effectiveness of existing measures, by broadening the scope of consumer remedies, as it has been done in other jurisdictions and a project funded by Industry Canada's Office of Consumer Affairs is being carried out to that end.

Union des consommateurs' study

Union des consommateurs is conducting a study to paint a portrait of specific consumer remedies and examine their effectiveness. We will draw a list of their intended results and will consider the obstacles they face. Then we will examine legal and other measures, established in Canada and elsewhere, to broaden the effect of consumer

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remedies. A detailed analysis of those measures will be followed by a study of how applicable such measures are under Canadian law.

What is the purpose of this consultation?

Our research includes a consultation of consumer groups working in jurisdiction where such measures were adopted; to obtain their views on the measures identified (effectiveness, advantages, disadvantages, objectives,etc.).

Given your organization's mission as a defender of consumers' rights, we would like to submit this questionnaire to you, in order to obtain your comments on the measures broadening the use and scope of consumer redress procedures adopted in your jurisdiction.

Participation in the consultation

Appended to the present document is a list of measures identified in several jurisdictions. Your comments are extremely important for our study and we would greatly appreciate your participation. Should you not be able to provide us with specific answers to each questions, please feel free to provide us with your general impression regarding the measure adopted in your jurisdiction.

Please e-mail us your answers/comments by Friday, April 26th, 2013 at YLabelle@uniondesconsommateurs.ca.

For further information, don't hesitate to contact us.

We would like to thank you once again for your participation.

UNION DES CONSOMMATEURS
Yannick Labelle, Consumer Protection and Business Practices Analyst
Telephone: (514) 521-6820 ext. 240
Fax: (514) 521-0736
E-mail: YLabelle@uniondesconsommateurs.ca

Your opinion of measures that broadened consumer redresses procedures

In the appended table, we have identified a series of jurisdictions where measures broadening the effect of consumer redress procedures were adopted. Amongst the measures we have identified the consumer groups' to sue in matters of abusive clauses and illegal practices (Quebec, Poland, Hungary, Germany, Louisiana (United-States)); measures allowing consumer groups' to sue in the collective interest of consumers (Portugal, France, Brazil) and also in matters regarding defective products the possibility for the Courts to order the withdrawal of the product from the market (Pakistan, District of Punjab).

1. **Please identify your organization:**

   Name:

   Address:

   Contact person:

2. **Was your organization in favour of measures that broaden the effect of certain consumer redress procedures?**

3. **What were the arguments that favoured the adoption of such measures in your jurisdiction?**

4. **What were the expected effects of those measures on access to justice for consumers?**

5. **What are the perceived advantages of the measures adopted in your jurisdiction?**

6. **What are the perceived disadvantages of the measures adopted in your jurisdiction?**

7. **Are those measures widely used by different stakeholders? Why?**

8. **In your point of view, are those measures efficient? Why?**

9. **Are there ways in which those measures could be improved?**

10. **Other comments:**

1.3 List of Consulted Associations

Liste des associations consultées

QUÉBEC			
Organisme responsable	**Répondant, titre et courriel**	**Loi/mesures**	**Dates de correspondance**
Montréal Option consommateurs	Robert Cazelais, directeur C : info@option-consommateurs.org C : cazelais@option-consommateurs.org	Art. 316, Loi sur la protection du consommateur	**Envoi :** 27/03/2013 à 10h26 **Rappel :** 19/04/2013 à 15h35 **Réponse :** rien reçu
Organismes membres de UC : **Granby** ACEF Montérégie-est **Joliette** ACEF de Lanaudière **Laval** ACEF de l'île Jésus **Lévis** ACEF Rive-sud de Québec **Montréal** ACEF de l'Est de Montréal ACEF du Nord de Montréal **Rivière-du-loup** ACEF du Grand-Portage **Sherbrooke** ACEF Estrie **Thetford mines** ACEF Appalaches-Beauce-Etchemins **Val d'or** ACEF Abitibi Témiscamingue	 Roger Lafrance, coordonnateur C : acefme@videotron.ca Lise Dalpé, consultante budgétaire C : aceflanaudiere@consommateur.qc.ca Micheline Côté, directrice C : aceflav@mediom.com Édith St-Hilaire, coordonnatrice C : acef@acefrsq.com Maryse Bouchard, coordonnatrice C : acefest@consommateur.qc.ca Carole Laberge, consultant budgétaire C : info.acefnord@videotron.ca Sonia St-Pierre, coordonnatriuce C : acefgp@videotron.ca Sylvie Bonin, coordonnatrice C : acefestrie@consommateur.qc.ca Danielle Morneau, coordonnatrice C : acefabe@consommateur.qc.ca Marianne Caouette Lafleur, coordonnatrice C : acef.at@gmail.com	Art. 316, *Loi sur la protection du consommateur*	**Envoi :** 27/03/2013 à 10h30 **Rappel :** 19/04/2013 à 15h35 **Réponses :** - ACEF Montérégie Est : 25/04/2013 @11 :06 - ACEF Lanaudière : 01/05/2013 à 16h07 - ACEF de l'Est : 29/04/2013 à 10h25
Montréal Coalition des associations de consommateurs du Québec	Andrée Grégoire, coordonnatrice C : agregoire@cacq.ca	Art. 316, *Loi sur la protection du consommateur*	**Envoi :** 27/03/2013 à 10h33 **Rappel :** 9/04/2013 à 15h38 **Réponse :** rien reçu

INTERNATIONAL			
Provenance et Organisme responsable	**Répondant, titre et courriel**	**Loi/mesures**	**correspondance**
Hongrie National Association for Consumer Protection in Hungary	Gusztavne Dietz, President C: ofe@ofe.hu	Art. 209/B du CC (Act IV of 1959 On the Civil Code of the Republic of Hungary)	**Envoi 1 :** 27/03/2013 à 11h09 **Envoi 2 (corrigé) :** 27/03/2013 à 11h38 **Rappel :** 19/04/2013 à 15h35 **Réponse :** rien reçu
Pologne Polish Consumer Federation - Federacja Konsumentów	Elzbieta Szadzinska, International Relations Officer C: prezes@federacja-konsumentow.org.pl C: biuro@federacja-konsumentow.org.pl	Art. 479 des règles de procédure civile (Extrait du *Compendium du droit de la consommation*- BERNES, 481 «En POLOGNE, une décision juridiquement contraignante qui interdit l'utilisation de clauses abusives est publiée dans le journal économique et des tribunaux et insérée dans un registre. Grâce à cet enregistrement, la décision acquiert un effet erga omnes en vertu de l'Art. 479 des règles de procédure civile – une conséquence juridique, même si on peut s'interroger sur la constitutionnalité de cette disposition en POLOGNE »	**Envoi :** 27/03/2013 à 11h11 **Rappel :** 19/04/2013 à 15h35 **Réponse :** rien reçu
Pologne Association of Polish Consumers	Grazyna Rokicka, President C: consumer@skp.pl	Art. 479 des règles de procédure civile	**Envoi :** 27/03/2013 à 11h13 **Rappel :** 19/04/2013 à 15h35 **Réponse :** rien reçu
France UFC – Que choisir ?	Cedric Musso, Director of Institutional Relations C: quechoisir@quechoisir.org	- *Art. L-421.1, Code de la consommation* - *Directive 93/13/CEE* (les clauses abusives dans les contrats conclus avec les consommateurs), 23e considérant et art. 7, paras 2 et 3 - *Directive 98/27/CE* (action en cessation en matière de protection des intérêts des consommateurs), art. 2, 3 et 4.	**Envoi :** 27/03/2013 à 10h35 **Rappel :** 19/04/2013 à 15h35 **Réponse :** rien reçu
Brésil DEC – Instituto Brasileiro de Defesa do Consumidor (Council)	Fulvio Giannella Junior, Executive Coordinator C: coex@idec.org.br	*Lei 8.078, Codigo de Defensa do Consumidor*, 1990, art. 81.11 et 82	**Envoi :** 27/03/2013 à 11h15 **Rappel :** 19/04/2013 à 15h35 **Réponse :** 26/04/2013 à 19h19

INTERNATIONAL			
Provenance et Organisme responsable	**Répondant, titre et courriel**	**Loi/mesures**	**correspondance**
Brésil PRO TESTE - Associação Brasileira de Defesa do Consumidor	Maria Ines Dolci, Institutional Coordinator C: institucional@proteste.org.br	*Lei 8.078, Codigo de Defensa do Consumidor*, 1990, art. 81.11 et 82	**Envoi :** 27/03/2013 à 11h18 **Rappel :** 19/04/2013 à 15h35 **Réponse :** rien reçu
Brésil Patricia Galindo de Fonseca, professeur	Patricia Galindo de Fonseca, professeur C : pbmgalindo@yahoo.ca	*Lei 8.078, Codigo de Defensa do Consumidor*, 1990, art. 81.11 et 82	**Envoi :** 27/03/2013 à 10h40 **Rappel :** 19/04/2013 à 15h35 **Réponse :** rien reçu
États-Unis- (Lousianne) American Council on Consumer Interests (ACCI)	Virginia Phillips, Executive Director C : information@consumerinterests.org Correction: Ginger Phillips C : gphillips@consumerinterests.org	SS. 51:1409, *Unfair Trade Practices and Consumer Protection Law*, Louisiana Revised Statutes	**Envoi 1 :** 27/03/2013 à 11h19 **Envoi 2 (corrigé) :** 27/03/2013 à 11h41 **Rappel :** 19/04/2013 à 15h35 - échec **Rappel 2 (corrigé) :** 19/04/2013 à 15h41 **Réponse :** rien reçu
Pakistan-Punjab District de Gujrat-District Consumer Court The Network for Consumer Protection in Pakistan	Nadeem Iqbal, CEO C : main@thenetwork.org.pk	*The Punjab Consumer Protection Act of 2005*- art. 31 (ordonnance concernant produit défecteux)	**Envoi :** 27/03/2013 à 11h20 **Rappel :** 19/04/2013 à 15h35 **Réponse :** rien reçu
Allemagne VZBV: Federation of German Consumer Organisations	Maren Osterloh, Director of International and European Affairs C: info@vzbv.de	*Loi sur le droit des conditions générales de vente* (Loi de 1976)	**Envoi :** 27/03/2013 à 11h33 **Rappel :** 19/04/2013 à 15h35 **Réponse :** rien reçu
Portugal DECO: The Portuguese Association for Consumer Protection - Associaçáo Portugesa para a Defesa do Consumidor	Jorge Manuel Morgado Fernandes, Secretary General C: decolx@deco.pt	"Le droit portugais a une approche très extensive de la notion « d'entité qualifiée » en reconnaissant un droit d'action aux consommateurs individuels (qu'ils aient été ou non lésés par la conduite litigieuse), le associations de consommateurs, le procureur (ministère public) et l'institut des consommateurs (Insituto do Consumidor). Cela s'explique par la législation préexistante en ce domaine, qui avait adopté une approche plus large que celle de la Directive » (Université de Bielefeld, *Compendium CE de droit de la consommation*, Allemagne, 2007, p. 683.)	**Envoi :** 27/03/2013 à 11h30 **Rappel :** 19/04/2013 à 15h35 **Réponse :** 26/04/2013 à 13h14

ANNEX 2: Consultation - Summary Document

2.1 Summary Document - French-Language Consultation

Projet finance par le Bureau de la consommation (2012-2013) : Multiplication des recours

Document synthèse- Consultation

Février 2013

Pourquoi une recherche sur la multiplication des recours et l'accès à la justice?

Les problèmes d'accès à la justice persistent dans différents sphères du droit : méconnaissance des droits, longs délais, engorgement des tribunaux, etc. Ce problème d'accès à la justice est encore plus présent dans les litiges de consommation : incitatifs économiques minimes qui ne font pas contrepoids à l'investissement en temps et en argent d'un recours, longs délais, etc. Afin de pallier ces problèmes d'accès à la justice, une variété de mesures ont été adoptées : recours collectifs, instauration des divisions des petites créances, modes alternatifs de règlement de litige, etc. Des nouvelles mesures sont également proposées : la création de tribunaux spécialisés en litige de consommation et la mise en place de sanctions administratives en sont des exemples.

Les litiges de consommation se déployant désormais à grande échelle étant donnée la consommation de masse et l'utilisation de contrats d'adhésion, les obstacles à l'accès à la justice apparaissent d'autant plus clairement. Devant les problèmes que rencontrent les consommateurs dans différents secteurs, les législateurs s'affairent maintenant régulièrement à l'adoption de nouvelles lois en vue de mieux protéger les consommateurs ou encore à la bonification des encadrements législatifs existants. Les législateurs sont de plus en plus encouragés à s'attaquer, dans la conception de ces nouvelles mesures ou des modifications envisagées, à tout ce qui touche directement aux recours dont devraient disposer les justiciables en matière de droit de la consommation.

Ce que l'on observe aujourd'hui, c'est que les litiges donnent lieu à une multiplication des recours, qui s'exprime notamment de deux façons : soit qu'une multitude de consommateurs se plaignent ou poursuivent un même commerçant pour le même problème de consommation, ce qui entraîne une multitude de recours individuels et un engorgement des tribunaux; soit qu'un recours est entrepris de façon collective contre un commerçant, qui devra être répété contre tous les commerçants qui auraient les mêmes pratiques fautives.

Nous estimons essentiel de nous pencher sur les mesures qui pourraient avoir pour effet d'accroître l'efficacité des mesures existantes, en prévoyant des mesures qui permettraient que la portée des recours intentées lors de litiges de consommation soit élargie. C'est sur cette question que porte un projet, financé par le Bureau de la consommation d'Industrie Canada, qui est en cours de réalisation.

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La recherche d'Union des consommateurs

Union des consommateurs mène une recherche qui dressera le portrait des recours particuliers qui trouvent application en droit de la consommation et qui examinera leur efficacité. Nous dresserons une liste des avantages qu'ils présentent et examinerons les barrières à la réalisation de ces avantages. Enfin, nous examinerons des mesures, législatives ou autres, mises en place au Canada ou à l'étranger, qui permettraient d'élargir l'effet des recours en matière de consommation. Cet examen sera complété par une analyse détaillée des mesures et par une étude de l'applicabilité de telles mesures en droit canadien.

Quel est l'objet de cette consultation?

Notre recherche comprend une consultation auprès d'experts du milieu de la consommation et du milieu juridique, qui vise à recueillir leur avis sur les mesures identifiées et, le cas échéant, sur l'applicabilité de telles mesures au Canada.

Vous avez été contacté auparavant par Union des consommateurs afin de participer à la présente consultation. Suite à votre acceptation, nous vous soumettons maintenant le présent document synthèse afin d'avoir vos commentaires sur les mesures adoptées au Canada et à l'étranger qui ont pour effet d'élargir l'usage et la portée de certains recours entrepris lors des litiges de consommation.

Des exemples de mesures à portée élargie en matière de consommation?

Parmi les mesures recensées tant au Canada que dans des juridictions étrangères, nous retrouvons principalement des mesures applicables en matière de clauses abusives. Ces mesures prévoient, par exemple, lorsqu'une clause a été déclarée abusive et que cette décision est publiée, que l'effet de cette décision est étendu à l'ensemble des commerçants qui utilisent une telle clause et qu'un consommateur tiers pourra invoquer contre ce commerçant le jugement, et même contre tout commerçant dont le contrat contient une telle clause, qui serait inapplicable et serait inopposable au consommateur en vertu de ce jugement obtenu par un autre consommateur contre ce commerçant.

Dans le même ordre d'idée, nous retrouvons également des mesures qui donnent à certaines associations de consommateurs le droit d'ester en justice afin, par exemple, de faire cesser l'utilisation d'une clause abusive. Cette action est possible malgré l'absence d'un lien de droit direct, au sens traditionnel du terme, entre l'association de consommateurs et le commerçant.

En Louisiane, aux États-Unis, un commerçant ayant signé avec l'autorité règlementaire un engagement volontaire de cesser l'usage d'une clause abusive ou d'une pratique déloyale peut ester en justice afin de contraindre un de ses concurrents qui ferait usage de cette même clause ou pratique de cesser lui aussi de l'utiliser.

Dans une loi de protection du consommateur du Pakistan, on trouve une mesure qui a un effet sur l'ensemble des consommateurs. La loi prévoit de manière précise qu'en matière de produit défectueux, le tribunal peut, quoique le litige intervienne entre un consommateur détenteur du bien défectueux et le commerçant, rendre comme ordonnance forçant le retrait du produit défectueux du marché ou son rappel.

Il s'agit de mesures qui sont exorbitantes des principes de droit traditionnels que nous retrouvons tant dans les régimes de *Common Law* que dans les régimes civilistes. Par exemple, il y a dans certains cas entorse au principe de l'effet relatif des jugements ou entorse au principe voulant que seule une partie ait un lien de droit direct puisse agir à titre de demandeur dans un litige.

Ces mesures se veulent un moyen d'accroître l'accès à la justice pour les consommateurs en leur permettant, par exemple, de bénéficier des effets d'un jugement qui leur serait favorable sans qu'il soit nécessaire pour eux de participer directement à une action en justice, ou en permettant à des parties tierces, qui ne sont pas des consommateurs, de faire des demandes en justice dans l'intérêt collectif des consommateurs afin de faire respecter les dispositions des lois qui visent à les protéger et pour exiger, le cas échéant, réparation.

On retrouve incidemment une telle mesure en droit québécois. L'article 316 de la *Loi sur la protection du consommateur* prévoit que les associations de consommateurs qui répondent à certains critères partagent avec le président de l'Office de la protection du consommateur l'intérêt nécessaire pour ester en justice afin de contraindre un commerçant à cesser une pratique interdite ou à mettre fin à l'utilisation de certaines stipulations.

Il est certain qu'une mesure unique ne peut être une panacée aux problèmes d'accès à la justice pour les consommateurs. Les mesures que nous avons recensées comportent, telles que conçues, des avantages aussi bien que des inconvénients : un des avantages avoués de telles mesures est l'accroissement de l'efficacité des lois, en reconnaissant par exemple un intérêt pour agir à certains acteurs dont les actions pourront avoir une portée plus large. Certaines de ces mesures permettent également d'écarter un des plus grands obstacles à l'accès la justice pour les consommateurs. Comme le rapportent un bon nombre de recherches, la faible valeur des litiges ne justifie pas l'investissement en temps et en argent que nécessite une poursuite devant les tribunaux et a pour effet de dissuader les consommateurs de recourir à la justice. Certaines mesures permettent au consommateur de bénéficier d'une décision de la cour qu'il ait lui-même intenté de poursuite.

Les dispositions qui confèrent le droit d'agir qui est reconnu aux associations de consommateurs (en matière d'injonction et de clauses abusives, notamment) ne prévoient que très rarement de mécanismes par le biais desquels ces organismes pourraient ne serait-ce que couvrir les frais d'une action en justice, qui peuvent évidemment être trop élevés pour le moyens dont ils disposent. D'autre part, certaines mesures semblent incomplètes : En Allemagne, par exemple, un consommateur tiers pourra, en vertu de la *Loi de 1976,* invoquer contre un commerçant un jugement rendu contre lui et qui a déclaré abusives certaines clauses. Certains auteurs déplorent le fait que la loi ne prévoie pas que le tribunal saisi de l'affaire puisse soulever d'office l'interdiction de faire usage des clauses imposée par un autre jugement.

Certains s'opposent aux mesures qui prévoient un effet élargi des jugements. Les commerçants qui seront tenus d'ajuster leur comportement suite au jugement rendu n'ont pas eu l'occasion de faire valoir leurs arguments dans le cadre du litige; cela constituerait-il une atteinte à leur droit fondamental d'être entendu?

Participation à la consultation

Vous trouverez annexé au présent document une liste des mesures recensées dans plusieurs juridictions. Nous vous demandons de bien vouloir nous soumettre vos commentaires généraux sur les points suivants : Selon vous, serait-il souhaitable que de telles mesures soit adoptées dans nos juridictions? Quels sont les avantages et inconvénients que vous percevez? Croyez-vous qu'il soit nécessaire d'adopter de telles mesures pour accroître l'accès à la justice pour les consommateurs? Croyez-vous que les lois de protection du consommateur seront plus efficaces si elles prévoient de telles mesures? Etc.

Auriez-vous l'amabilité de nous faire parvenir vos commentaires au plus tard le **vendredi 22 mars 2013 à 16h par courriel à l'adresse suivante YLabelle@uniondesconsommateurs.ca**?

Pour toute information n'hésitez pas à nous contacter.

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2.2 Summary Document - English-Language Consultation

Project funded by the Office of Consumer Affairs (2012-2013): Proliferation of Redress Procedures

Summary document - Consultation

February 2013

Why a study on the proliferation of redress procedures and on access to justice?

Various problems of access to justice persist: a lack of knowledge about rights, long delays, clogged courts, etc. Problems of access to justice are even more prevalent in consumer disputes: minimal economic incentives that do not justify the time and money invested in a court remedy, long delays, etc. To alleviate those problems, a variety of measures has been adopted: class actions, small claims courts, alternative dispute resolution mechanisms, etc. New measures have also been proposed: courts specializing in consumer disputes, administrative penalties, for example.

Consumer disputes are ever-more numerous due to mass consumption and adhesion contracts, so barriers to access to justice are more apparent. Given the problems facing consumers in various sectors, lawmakers frequently adopt new consumer protection laws or improve existing ones. In designing such new measures or improvements, lawmakers are encouraged to focus on remedies that should be available to consumer litigants.

Nowadays we observe that those disputes are leading to a proliferation of legal redress procedures that is manifested in two ways: either many consumers complain or sue a single merchant for the same consumer problem, so that a multitude of individual legal actions clogs the courts; or legal action is taken collectively against a merchant, which must be repeated against all merchants engaging in the same infractions.

We think it essential to focus on improving the effectiveness of existing measures, by broadening the scope of consumer remedies. A project funded by Industry Canada's Office of Consumer Affairs is being carried out to that end.

Union des consommateurs' study

Union des consommateurs is conducting a study to paint a portrait of specific consumer remedies and examine their effectiveness. We will draw a list of their intended results and will consider the obstacles they face. Then we will examine legal and other measures, established in Canada and elsewhere, to broaden the effect of consumer remedies. A detailed analysis of those measures will be followed by a study of how applicable such measures are under Canadian law.

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What is the purpose of this consultation?

Our research includes a consultation of consumer and legal experts, to obtain their views on the measures identified and the applicability of such measures in Canada.

You were contacted by Union des consommateurs to participate in this consultation. Following your agreement, we now submit this summary document to you, in order to obtain your comments on the measures adopted in Canada and elsewhere to broaden the use and scope of consumer redress procedures.

Examples of broadened consumer redress procedures?

Most of the measures identified in Canada and abroad apply to unfair clauses. Those measures provide, for example, that when a merchant's clause is deemed unfair and the verdict is published, the effect spreads to all merchants using such a clause, and a third-party consumer may invoke the verdict against that merchant, and even against any merchant whose contract contains such a clause. The latter is thus inapplicable to the third-party consumer because of the verdict won by another consumer against that merchant.

In the same vein, we find measures giving certain consumer associations the right to take legal action, in order to have an unfair clause prohibited, for example. Such action is possible even in the absence of a direct legal connection, in the traditional sense, between the consumer association and the merchant.

In Louisiana, a merchant who has signed with the regulatory authority a voluntary commitment to cease using an unfair clause or practice can take legal action to have a competitor also stop using that clause or practice.

In Pakistan, a consumer law contains a measure that has an impact on all consumers. That law specifies that if a product is defective, the court may – even though the dispute is between the defective product's owner and the merchant – order the product to be withdrawn from the market or recalled.

Such measures exceed the traditional legal principles found in common law and civil law systems. For example, in some cases the principle of the relative effect of judgments is thereby contradicted, or the principle that only one party may have a direct legal connection for acting as a plaintiff.

Such measures are intended as means to increase consumers' access to justice by allowing them, for instance, to benefit from a favourable verdict without having to take direct part in a legal action, or by allowing third parties who are not consumers to take legal action in the collective interest of consumers in order to have consumer protection laws complied with and compensation ordered if applicable.

There is such a measure in Quebec. Under section 316 of the *Consumer Protection Act*, consumer associations that meet certain criteria have, in a power-sharing arrangement with the president of the Office de la protection du consommateur, the interest required to take legal action for a merchant to cease a prohibited practice or stop using certain clauses.

Of course, no one measure can be a panacea for the problems of consumer access to justice. The measures we identified have pros and cons: on the plus side is the improved effectiveness of laws, by recognizing that certain actors have an interest in taking legal action that may have broader scope. Some of those measures also remove one of the major barriers to consumer access to justice. As reported in many studies, the low monetary value of consumer disputes does not justify the necessary investment in time and money for going to court and deters consumers from doing so. Some measures allow consumers to benefit from a court decision without having sued.

Provisions giving consumer associations the right to take legal action (in matters of injunctions and unfair clauses, notably) very rarely provide mechanisms for even covering those organizations' legal costs, which obviously can be too high for them. On the other hand, some measures appear incomplete: in Germany, for example, a third-party consumer may, under the *Act of 1976,* invoke against a merchant a decision previously rendered against the merchant that deemed certain clauses unfair. Some authors deplore that the law does not empower the court seized of the case to raise ex officio the prohibition to use clauses that was imposed by a previous decision.

Some are opposed to measures broadening the effect of verdicts. Merchants who would be compelled to change their behaviour after a court decision have not had the opportunity to argue their case in a dispute; does this deny their basic right to be heard?

Participation in the consultation

Appended to the present document is a list of measures identified in several jurisdictions. Please give your general comments on the following points: Do you think it desirable that such measures be adopted in our jurisdictions? What pros and cons do you perceive? Do you think it necessary to adopt such measures to improve consumer access to justice? Do you think that consumer protection laws would be more effective by providing such measures? Etc.

Please e-mail us your comments by **4 p.m. Friday, March 22, 2013 at YLabelle@uniondesconsommateurs.ca**.

For further information, don't hesitate to contact us.

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2.3 List of Measures and Other Procedures Aiming at a Broader Effect

LISTE DE MESURES ET AUTRES PROCÉDURES PRÉVOYANT UN EFFET ÉLARGI (CANADA ET JURIDICTIONS ÉTRANGÈRES)				
JURI-DICTION	**LOI**	**MESURE PROCÉDURE**	**CONTENU**	**EFFETS**
QUÉBEC-CANADA	*Loi sur la protection du consommateur,* L.R.Q., P-40.1	Art.316 –Capacité pour les associations de consommateur de faire une demande d'injonction pour usage de pratique interdite au Québec hors normes et utilisation de stipulation interdite.	316. Lorsqu'une personne s'est livrée ou se livre à une pratique interdite visée par le titre II ou qu'un commerçant a inséré ou insère, dans un contrat, une stipulation interdite en vertu de la présente loi ou d'un règlement ou a inséré ou insère une stipulation inapplicable au Québec visée à l'article 19.1 sans respecter les exigences qui sont prévues à cet article, le président peut demander au tribunal une injonction ordonnant à cette personne de ne plus se livrer à cette pratique ou à ce commerçant de cesser d'insérer une telle stipulation dans un contrat ou, le cas échéant, de se conformer à l'article 19.1. Un organisme destiné à protéger le consommateur et constitué en personne morale depuis au moins un an peut demander une injonction en vertu du présent article et, à cette fin, est réputé avoir l'intérêt requis. Le tribunal ne peut statuer sur la demande en injonction présentée par un tel organisme à moins qu'un avis, joint à la requête introductive d'instance ou, le cas échéant, à la requête en injonction interlocutoire, n'ait été notifié au président. Lorsqu'une injonction prononcée en vertu du présent article n'est pas respectée, une requête pour outrage au tribunal peut être présentée par le président ou par l'organisme visé au deuxième alinéa.	Malgré l'absence de lien de droit entre l'organisme et le commerçant, l'organisme est réputé avoir /l'intérêt requis pour agir afin de déposer une demande d'injonction. = partage des pouvoirs du président de l'Office
	Code de procédure civile	999 d) «recours collectif»: le moyen de procédure qui permet à un membre d'agir en demande, sans mandat, pour le compte de tous les membres.	999. Dans le présent Livre, à moins que le contexte n'indique un sens différent, on entend par : a) « jugement » : un jugement du tribunal; b) « jugement final » : le jugement qui dispose des questions de droit ou de fait traitées collectivement; c) « membre » : une personne physique, une personne morale de droit privé, une société ou une association faisant partie d'un groupe pour le compte duquel une de ces personnes, une société ou une association exerce ou entend exercer un recours collectif; d) «recours collectif » : le moyen de procédure qui permet à un membre d'agir en demande, sans mandat, pour le compte de tous les membres. La personne morale de droit privé, la société ou l'association ne peut être membre d'un groupe que si, en tout temps au cours de la période de 12 mois qui précède la requête pour autorisation, elle comptait sous sa direction ou son contrôle au plus 50 personnes liées à elle par contrat de travail et qu'elle n'est pas liée avec le représentant du groupe.	La possibilité d'exercer un recours au nom d'un groupe sans avoir un mandat de chacun des membres du groupe.
PORTUGAL	Inconnue	Droit d'agir dans l'intérêt collectif des consommateurs	«Le droit PORTUGAIS a une approche très extensive de la notion « d'entité qualifiée » en reconnaissant un droit d'action aux consommateurs individuels (qu'ils aient été ou non lésés par la conduite litigieuse) les associations de consommateurs, le procureur (ministère public) et l'Institut des consommateurs (Instituto do Consumidor). Cela s'explique par la législation préexistante en ce domaine, qui avait	- Droit d'agir malgré l'absence de lien de droit entre l'entité qualifiée et le commerçant.

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JURI-DICTION	**LOI**	**MESURE PROCÉDURE**	**CONTENU**	**EFFETS**
			adopté une approche plus large que celle de la Directive.» (Université de Bielefeld, *Compendium CE de Droit de la consommation.* Allemagne, 2007, p. 693).	
POLOGNE	*Règles de procédure civile*	Art. 479- clause abusive, effet erga omnes du jugement.	«En POLOGNE, une décision juridiquement contraignante qui interdit l'utilisation de clauses abusives est publiée dans le journal économique et des tribunaux et insérée dans un registre. Grâce à cet enregistrement, la décision acquiert un effet erga omnes en vertu de l'Art. 479 des règles de procédure civile – une conséquence juridique, même si on peut s'interroger sur la constitutionnalité de cette disposition en POLOGNE » (Université de Bielefeld, *Compendium CE de Droit de la consommation.* Allemagne, 2007, p. 481)	- Application d'un effet erga omnes d'une décision. - Tout contrat qui contient la clause déclarée abusive par une décision est tenu de se conformer à cette nouvelle décision.
HONGRIE	*Act IV of 1959 On the Civil Code of the Republic of Hungary*	Art. 209 Art. 209/A, paragraphe 2 Art. 209/B, paragraphe 2 Art. 209/B, paragraphe 1l	Section 209 (1) If the general contract conditions are unfair, such clauses may be contested by the injured party. (2) If an economic organization exploits an unfair general contract condition when a contract is concluded, the prejudicial clause may be contested before a court of law by an organization described in a separate legal regulation. (3) If the contention described in Subsection (2) is found to be substantiated, the court shall declare the unfair stipulation null and void in favor of all of **the parties with which the party imposing the condition has a contractual relationship**. Having the stipulation overturned by the court shall not affect the contracts that have already been performed prior to the date on which the contention was filed. Section. 209/A A consumer may contest any unfair clause in a contract between an economic organization and a consumer regardless of whether or not such clause is regarded as a general contract condition Section 209/B (1) A general contract condition, or the term of a contract between an economic organization and a consumer, shall be regarded unfair if the clause or term, in violation of the obligation to act in good faith, unilaterally and unjustifiably establishes the contractual rights and obligations of parties to the detriment of one of the parties. (2) The definition of rights and obligations is unilaterally and unjustifiably detrimental, in particular if a) it substantially deviates from major provisions of the contract; or b) it is incompatible with the subject matter or purpose of the contract. (3) When establishing the unfair nature of a contract condition, it shall be necessary to examine all of the circumstances leading to the conclusion of the contract as well as the nature of the stipulated service and the relationship of the condition in question with other contract conditions and other contracts.	Action en cessation des clauses abusives par les associations de consommateurs Effet Erga omnes « double »: la décision du juge dan sn action en cessation vaut « à l'égard de toute partie ayant conclu un contrat avec un professionnel utilisant la dite clause ». Tant les professionnels qui envisageraient d'utiliser la clause en question, que la personne victime de l'usage de la clause sont concernés.

LISTE DE MESURES ET AUTRES PROCÉDURES PRÉVOYANT UN EFFET ÉLARGI (CANADA ET JURIDICTIONS ÉTRANGÈRES)				
JURI-DICTION	**LOI**	**MESURE PROCÉDURE**	**CONTENU**	**EFFETS**
			(4) Other legal regulations may define the conditions that are regarded to be unfair in respect of contracts concluded with consumers or that shall be regarded as unfair until proven otherwise. (5) The provisions on unfair contract conditions shall not be applied to a contract clause stipulating the service and the consideration for such, if the phrasing of such clause is clear and understandable for both parties. (6) The contract conditions defined by legal regulation, or established in accordance with the provisions of legal regulations, shall not be deemed unfair.	
FRANCE	*Code de la consommation*	Art. L-421-1	Article L-421-1 Les associations régulièrement déclarées ayant pour objet statutaire explicite la défense des intérêts des consommateurs peuvent, si elles ont été agréées à cette fin, exercer les droits reconnus à la partie civile relativement aux faits portant un préjudice direct ou indirect à l'intérêt collectif des consommateurs. Les organisations définies à l'article L. 211-2 du code de l'action sociale et des familles sont dispensées de l'agrément pour agir en justice dans les conditions prévues au présent article.	Exercice des droits reconnus à la partie civile relativement aux faits qui portent un préjudice direct ou indirect à l'intérêt collectif des consommateurs par les associations agréées.
BRÉSIL	*Code de défense du consommateur (Lei 8.078, Codigo de Defesa do Consumidor, 1990 [CDC])*	Arts. 81.II et 82	TITRE III La protection des consommateurs à la Cour CHAPITRE I Dispositions générales Article 81. La défense des intérêts et droits des consommateurs et les victimes peuvent être exercés individuellement ou collectivement. Seul paragraphe. La défense collective sera exercé lorsqu'il s'agit de: I - intérêts ou des droits diffus, sont ceux qui sont transindividuels, de nature indivisible, dont sont titulaires des gens indéterminées et liées par des circonstances factuelles; II - intérêts ou droits sociaux collectifs sont ceux qui sont transindividuels de nature indivisible dont est titulaire un groupe, une catégorie ou une classe de personnes connectées les unes aux autres ou à la partie adverse par une relation juridique fondamentale; III - intérêts individuels ou de droits homogènes sont ceux qui découlent d'une origine commune Art 82. Pour les fins de l'art. 100, seul paragraphe, sont légitimés en même temps: I - le ministère public II - l'Union, les États, les municipalités et le District fédéral; III - les institutions publiques de l'administration publique directe et indirecte même si non constituée en société, ayant en particulier pour but de protéger	Droit d'agir des associations de consommateurs dans l'intérêt collectif des consommateurs.

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JURI-DICTION	**LOI**	**MESURE PROCÉDURE**	**CONTENU**	**EFFETS**
			les intérêts et les droits protégés par le présent code; IV - Les associations légalement constituées depuis au moins un an et comptant parmi leurs objectifs institutionnels de défendre les intérêts et les droits protégés par le présent code, étant écarté l'autorisation de l'assemblée. § 1 L'exigence de pré-constitution peut être levée par le juge dans les actions prévues dans le domaine des arts. 91 et suivantes, lorsqu'il y a un intérêt social manifeste et mis en évidence par la dimension ou par l'importance du bien juridique à protéger.	
UNION EUROPÉENNE	*Directive 93/13/CEE du Conseil, du 5 avril 1993, concernant les clauses abusives dans les contrats conclus avec les consommateurs (Clauses abusives)*,	Les États membres de l'UE sont obligés, en vertu de l'Art. 7(2) de la Directive 93/13, de permettre aux associations de consommateurs d'engager des actions collectives contre les utilisateurs de clauses abusives 23e considérant et article 7 paras., 2 et 3.	«considérant que les personnes ou les organisations ayant, selon la législation d'un État membre, un intérêt légitime à protéger le consommateur, doivent avoir la possibilité d'introduire un recours contre des clauses contractuelles rédigées en vue d'une utilisation généralisée dans des contrats conclus avec des consommateurs, et en particulier, contre des clauses abusives, soit devant une autorité judiciaire soit devant un organe administratif compétents pour statuer sur les plaintes ou pour engager les procédures judiciaires appropriées; que cette faculté n'implique, toutefois, pas un contrôle préalable des conditions générales utilisées dans tel ou tel secteur économique; » Article 7 1. Les États membres veillent à ce que, dans l'intérêt des consommateurs ainsi que des concurrents professionnels, des moyens adéquats et efficaces existent afin de faire cesser l'utilisation des clauses abusives dans les contrats conclus avec les consommateurs par un professionnel. 2. Les moyens visés au paragraphe 1 comprennent des dispositions permettant à des personnes ou à des organisations ayant, selon la législation nationale, un intérêt légitime à protéger les consommateurs de saisir, selon le droit national, les tribunaux ou les organes administratifs compétents afin qu'ils déterminent si des clauses contractuelles, rédigées en vue d'une utilisation généralisée, ont un caractère abusif et appliquent des moyens adéquats et efficaces afin de faire cesser l'utilisation de telles clauses. 3. Dans le respect de la législation nationale, les recours visés au paragraphe 2 peuvent être dirigés, séparément ou conjointement, contre plusieurs professionnels du même secteur économique ou leurs associations qui utilisent ou recommandent l'utilisation des mêmes clauses contractuelles générales, ou de clauses similaires.	Droit d'agir des associations de consommateurs dans l'intérêt collectif des consommateurs, faire établir caractère abusif de clauses contractuelles, exercice large du recours : conjointement ou séparément contre plusieurs professionnels du même secteur économiques ou contre associations de professionnels
	Directive 98/27/CE du Parlement européen et du Conseil du 19 mai 1998 relative aux actions en cessation en	Arts. 2, 3 et 4	Article 2 Actions en cessation 1. Les États membres désignent les tribunaux ou autorités administratives compétents pour statuer sur les recours formés par les entités qualifiées au sens de l'article 3 visant:	Action en cessation par les associations de consommateurs

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JURI-DICTION	**LOI**	**MESURE PROCÉDURE**	**CONTENU**	**EFFETS**
	matière de protection des intérêts des consommateurs		a) à faire cesser ou interdire toute infraction, avec toute la diligence requise et le cas échéant dans le cadre d'une procédure d'urgence; b) le cas échéant, à obtenir la prise de mesures telles que la publication de la décision, en tout ou en partie, sous une forme réputée convenir et/ou la publication d'une déclaration rectificative, en vue d'éliminer les effets persistants de l'infraction; c) dans la mesure où le système juridique de l'État membre concerné le permet, à faire condamner le défendeur qui succombe à verser au trésor public ou à tout bénéficiaire désigné ou prévu par la législation nationale, en cas de non-exécution de la décision au terme du délai fixé par les tribunaux ou les autorités administratives, une somme déterminée par jour de retard ou toute autre somme prévue par la législation nationale aux fins de garantir l'exécution des décisions. 2. La présente directive est sans préjudice des règles de droit international privé en ce qui concerne le droit applicable, qui devrait donc normalement être, soit le droit de l'État membre où l'infraction a son origine, soit celui de l'État membre où l'infraction produit ses effets. Article 3 Entités qualifiées pour intenter une action Aux fins de la présente directive, on entend par «entité qualifiée» tout organisme ou organisation dûment constitué conformément au droit d'un État membre, qui a un intérêt légitime à faire respecter les dispositions visées à l'article 1er et, en particulier: a) un ou plusieurs organismes publics indépendants, spécifiquement chargés de la protection des intérêts visés à l'article 1er, dans les États membres où de tels organismes existent et/ou b) les organisations dont le but est de protéger les intérêts visés à l'article 1er, conformément aux critères fixés par la législation nationale. Article 4 Infractions intracommunautaires 1. Chaque État membre prend les mesures nécessaires pour que, en cas d'infraction ayant son origine dans cet État membre, toute entité qualifiée d'un autre État membre, lorsque les intérêts protégés par cette entité qualifiée sont lésés par l'infraction, puisse saisir le tribunal ou l'autorité administrative visés à l'article 2, sur présentation de la liste prévue au paragraphe 3. Les tribunaux ou autorités administratives acceptent cette liste comme preuve de la capacité pour agir de l'entité qualifiée, sans préjudice de leur droit d'examiner si le but de l'entité qualifiée justifie le fait qu'elle intente une action dans une affaire donnée. 2. Aux fins de la lutte contre les infractions intracommunautaires et sans préjudice des droits	

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			reconnus à d'autres entités par la législation nationale, les États membres communiquent à la Commission, à la demande de leurs entités qualifiées, que lesdites entités sont qualifiées pour intenter une action au titre de l'article 2. Les États membres informent la Commission du nom et du but de ces entités qualifiées. 3. La Commission établit une liste des entités qualifiées visées au paragraphe 2, en précisant leur but. Cette liste est publiée au Journal officiel des Communautés européennes; toute modification de cette liste fait l'objet d'une publication immédiate, une liste actualisée étant publiée tous les six mois.	
PAKISTAN-Punjab-District de Gujrat	*The Punjab Consumer Protection Act of 2005*-	art. 31 (ordonnance concernant produit défectueux)	31. Order of Consumer Court.– If, after the proceedings conducted under this Act, the Consumer Court is satisfied that the products complained against suffer from any of the defects specified in the claim or that any or all of the allegations contained in the claim about the services provided are true, it shall issue an order to the defendant directing him to take one or more of the following actions, namely:- (a) to remove defect from the products in question; (b) to replace the products with new products of similar description which shall be free from any defect; (c) to return to the claimant the price or, as the case may be, the charges paid by the claimant; (d) to do such other things as may be necessary for adequate and proper compliance with the requirements of this Act; (e) to pay reasonable compensation to the consumer for any loss suffered by him due to the negligence of the defendant; (f) to award damages where appropriate; (g) to award actual costs including lawyers' fees incurred on the legal proceedings; (h) to recall the product from trade or commerce; (i) to confiscate or destroy the defective product; (j) to remedy the defect in such period as may be deemed fit; or (k) to cease to provide the defective or faulty service until it achieves the required standard.	- Bien que l'action intervienne entre un consommateur particulier et le commerçant, le tribunal peut émettre des ordonnances à effet élargi : retrait du produit du marché ou la cessation de mise en marché d'un service défectueux.
ALLEMAGNE	*Loi sur le droit des conditions générales de vente* (Loi de 1976)	Art. 21 Action collective, action en rétractation, action en cessation, association de consommateurs, associations de commerçants également	N/A	Capacité des associations de consommateurs d'ester en justice afin de faire déclarer inefficaces inapplicables/inopposables des clauses contractuelles. Jugement – effet en faveur des tiers : si le stipulant contrevient au jugement, il suffit que le cocontractant invoque le jugement pour que les clauses en litiges soient

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				considérées comme inapplicables/inopposables.
ÉTATS-UNIS-LOUISIANE	*Unfair Trade Practices and Consumer Protection Law*, Louisiana Revised Statutes	§51:1409 Clauses contractuelles abusives, recours, action privée.	§51:1409 A. Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by R.S. 51: 1405, may bring an action individually but not in a representative capacity to recover actual damages. If the court finds the unfair or deceptive method, act, or practice was knowingly used, after being put on notice by the attorney general, the court shall award three times the actual damages sustained. In the event that damages are awarded under this Section, the court shall award to the person bringing such action reasonable attorney fees and costs. Upon finding by the court that an action under this Section was groundless and brought in bad faith or for purposes of harassment, the court may award to the defendant reasonable attorney fees and costs. […] D. If any person is enjoined from the use of any method, act, or practice or enters into a voluntary compliance agreement accepted by the attorney general under the provisions of this Chapter, such person shall have a right of action to enjoin competing businesses engaged in like practices.	Une partie ayant signé un engagement volontaire peut faire une demande d'injonction contre compétiteur.