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The Ontario Court of Appeal Provides Clarity on Late Opt Outs from Class Proceedings

Class actions are strange creatures, even to other lawyers.

The nature of a class action is that individuals' legal rights can be affected by proceedings they have no role in. They can be bound by judgments and settlements that they had no knowledge of or involvement in. They can receive unexpected payments for injuries suffered, but also have their rights extinguished, all without doing anything or having any participation in the process. From one perspective, class actions appear distasteful from the perspectives of party autonomy and procedural fairness.

Yet an important procedural protection that normatively justifies these aspects of class actions is the ability for class members to opt out. Under class proceedings legislation across Canada, every class action must provide the ability for class members to opt out, such that they are free to pursue their own individual action. The right to opt out is what turns a class action from a process that automatically binds everyone in a class to merely a default regime that binds everyone who does not have a sufficient interest to affirmatively opt out.

While Ontario's *Class Proceedings Act* requires that every certification order specify a means of opting out of a class proceeding, there had been no appellate decisions that articulate the test for when a class member should be permitted to opt out after the opt-out deadline. The Ontario Court of Appeal's recent decision in *Johnson v Ontario* definitively answers that question.

The underlying proceeding in *Johnson v Ontario* is a class action against Ontario on behalf of persons incarcerated at Elgin Middlesex Detention Centre ("EMDC") between January 1, 2010 and May 18, 2017. That action was formed from the consolidation of two proceedings, one commenced in 2016 and one commenced in 2017. The consolidated proceeding was certified in 2017.

Donald Parker was a member of the class. He had been an inmate at EMDC between July 2016 to August 2017. He was included in a list of class members to whose address notice and information about opting out was sent after the class

proceeding was certified. However, only his father lived at that address at that time, and the evidence was that Mr. Parker had never actually received notice of the class proceeding or of his right to opt out.

In April 2020, Mr. Parker commenced an individual claim against, among others, the province, in respect of injuries he suffered at EMDC. After commencing the claim, counsel for Ontario wrote to Mr. Parker's lawyer, taking the position that the individual action overlapped the consolidated class action. Ontario's counsel therefore asked that the individual action be discontinued as against Ontario.

Mr. Parker then brought a motion to extend the time to opt out of the class proceeding so that he could pursue his individual action. That motion was initially dismissed by the motion judge. Mr. Parker then appealed to the Ontario Court of Appeal. The Court of Appeal overturned the motion judge's decision and permitted Mr. Parker to opt out late of the class proceeding.

In its decision, the Court of Appeal established a two-part test for a late opt out of the class proceeding. The party seeking to opt out late must show that: (1) their neglect in complying with the court-imposed deadline to opt out is excusable; and (2) the extension would not result in prejudice to the class, the defendant, or the administration of justice.

The Court of Appeal in its decision underscored that the right to opt out is a fundamental element of class actions procedure and the protections afforded to individual class members:

[47] The choice to opt out is a serious one for a class member, as it involves choosing to forego any remedy that might be obtained in the class proceeding and being limited to the pursuit of the class member's rights against the defendant on his or her own and at his or her own risk: *Pet Valu*, at para. 42. It gives a class member the opportunity to privilege their own litigation autonomy – to develop their own strategy, retain their own counsel, settle, or litigate as they decide – over the benefits of the class proceeding that is conducted for their benefit, but outside their control: *Johnson v. Ontario*, 2021 ONCA 650, 158 O.R. (3d) 266, at para. 16.

[48] The right to opt out is fundamental not just to a class member, but to the integrity of the class proceedings scheme under the CPA as a whole. As the intervener aptly puts it, "[t]he opt-out mechanism legitimizes a procedure that would otherwise be contrary to basic procedural fairness and principles of natural justice: it is the only way a person can exclude themselves from

litigation that affects their rights but over which they have no control.”

[49] This court has endorsed the opt-out right's characterization as “[t]he primary protection for the absent class members in the class proceeding” and has noted “[i]t is axiomatic that no class member need participate in a class action against his or her will”: *Pet Valu*, at para. 41, citing *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.), *aff'd* (2004), 70 O.R. (3d) 182 (Div. Ct.), leave to appeal to Ont. C.A. refused, M31109 (May 11, 2004), at para. 75. Underscoring the importance of the opt-out right, this court has stressed that a class member's decision to participate in or abstain from a class proceeding must also be an informed and voluntary one, free from undue influence: *Pet Valu*, at para. 41.

The Court of Appeal also held that the appropriateness of a late opt-out does not depend on the appropriateness of the notice plan that informed class members about their right to opt out. The Court held that the appropriateness of the Notice Plan should not be relitigated in such a motion. By the same token, the mere fact that the Notice Plan is adequate does not mean that a motion for a late opt-out should be denied.

On the facts of Mr. Parker's case, the Court of Appeal held that Mr. Parker was not aware of the class action, and he therefore had a reasonable excuse for not opting out earlier. Moreover, given that the class action remained at an early stage with no judgment or settlement, there was no prejudice to the late opt-out.

The Court of Appeal's reasoning very much speaks to a distinction between a late opt-out early in the class proceeding, versus a late opt-out after judgment or settlement. The opt-out process typically happens shortly after certification, generally quite early in the class proceeding. Given the complexity of class proceedings, it can take several years after the opt-out process runs to get to a settlement or judgment following a summary judgment motion or a common issues trial. During this earlier period, there will generally not be much, if any, prejudice to the other stakeholders in the class action from allowing an individual to opt out late. In those circumstances, the tenor of the Court's decision is that the first prong of the test of excusability should not be applied too rigorously. However, the Court also suggested that after a settlement or judgment, the prejudice prong of the test would generally preclude a late opt out.

The Court of Appeal's decision provides useful guidance on the

test for opting out late and will be required reading for all class actions practitioners. The decision strikes a healthy balance between the need for certainty as to who is in the class as against individual class members' autonomy rights to pursue their own separate litigation.