

COURT OF APPEAL FOR ONTARIO

BETWEEN:

GLEN JOHNSON, MICHAEL SMITH, TIMOTHY HAYNE

Plaintiffs
(Respondents)

- and -

HER MAJESTY THE QUEEN IN THE RIGHT OF ONTARIO

Defendant
(Respondent)

- and -

DONALD PARKER, CLASS MEMBER

Appellant

- and -

THE CLASS ACTION CLINIC, UNIVERSITY OF WINDSOR, FACULTY OF LAW

Intervener

Proceeding under
The Class Proceedings Act, 1992, SO 1992, Ch. 6

**FACTUM OF THE INTERVENER,
THE CLASS ACTION CLINIC AT UNIVERSITY OF WINDSOR, FACULTY OF LAW**

February 24, 2022

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PART I – OVERVIEW

1. A class member’s ability to opt out of a class proceeding is a substantive statutory right fundamental to the class action process in Ontario.¹ The 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. For too long, the right to opt out has been treated as merely procedural or administrative in nature.
2. While it is incontrovertible that courts have the jurisdiction under s. 12 of the *Class Proceedings Act, 1992*² to issue orders protecting the interests of absent class members in the opt-out process,³ no appellate court has provided a definitive test to be applied when class members request an opportunity to opt out after the original opt-out deadline. This Court has a unique opportunity on this appeal to provide the appropriate framework through which such requests may be fairly considered.
3. The Class Action Clinic (“Clinic”) respectfully submits that when faced with a class member’s motion for an extended opt-out, judges should take into account the following considerations:
 - i. whether the original notice of the opt-out deadline, including the manner of dissemination and language used, was adequate, having regard to the nature of the claims pursued and the demographics of the class members;

¹ *Johnson v Ontario*, [2021 ONCA 650](#), at [paras. 14-17](#), Intervener’s Book of Authorities [“IBOA”], at Tab 8.

² [S.O. 1992, c. 6](#) (“CPA”). The October 2021 amendments did not change the opt-out provisions in the CPA, nor were there any submissions made to the Law Commission Class Action Project on the issue.

³ *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, [2013 ONCA 279](#) at [paras 40-44](#) (“*Pet Valu*”), Book of Authorities of the Respondent, Ontario [“AOR”] at Tab 14 and *Cannon v. Funds for Canada Foundation*, [2014 ONSC 2259](#) at [paras. 9-10](#) (“*Cannon*”), AOR at Tab 13.

- ii. whether the notice was disseminated in compliance with the court-approved notice plan; and
 - iii. if the notice was adequate and distributed in compliance with the notice plan, whether there are circumstances that hindered or prevented the class member's ability to make an informed decision about opting out.
4. These considerations provide a principled basis upon which judges may fairly and transparently assess whether an extended opt-out ought to be granted while maintaining the integrity of class actions, the opt-out process, and class members' litigation rights.

PART II – THE FACTS

5. The facts in this appeal are set out in Part II of the Appellant's Factum and Part II of the Factum of the Respondent, Her Majesty the Queen in Right of Ontario ("Ontario"). The Clinic takes no position on the facts.

PART III – THE ISSUES

6. In his factum, the Appellant raises the following issue at para. 44(e):

Did the motion Judge err in misconstruing the test for when it is in the interests of justice to grant an extension of time for a class member to *opt out* of a class action, and instead relying on cases and principles relevant to when a class member can *opt in* to a settled class action to take advantage of a concluded settlement?

7. There is limited judicial authority on the issue of when it would be appropriate to grant an extension of time for a class member to opt out of a class action. The ruling under appeal reflects the type of errors in law that may occur from the lack of guidance in the jurisprudence. In the present case, the motion judge erroneously applied a test from a different context in concluding that the Appellant is not entitled to opt out of this proceeding.

8. The Clinic makes the following submissions:
- a. Because of the unique context of representative litigation, the courts have an important role in guarding the interests of class members. In keeping with this important role, the intervener proposes that the Court should establish a test governing motions to extend the opt-out deadline which requires the same degree of scrutiny required at other important stages of a class proceeding;
 - b. Because there is little appellate jurisprudence on the issue of extending the opt-out period, the Court has the unique opportunity to provide guiding principles in this case;
 - c. The Clinic proposes a framework for determining all extension requests of the opt-out period that involves three considerations: i. the adequacy of notice; ii. compliance with the notice plan; and iii. circumstances affecting a class member's ability to make an informed opt-out decision; and
 - d. The proposed framework balances the rights of class members against the policy objectives of class actions.

PART IV – ARGUMENT

a. Courts have a special duty to guard the interests of class members.

9. The importance of a judge's role vis-à-vis class members is well-recognized in class action jurisprudence. This Court has confirmed that the existence of "absent class members" is the reason courts have a supervisory role from the inception of an intended class proceeding through all stages until a final disposition is reached.⁴
10. The right to opt out of a class proceeding is a procedural and substantive right of significant importance. As this Court stated in its decision dismissing Ontario's motion to quash the appeal:

Our society places a high premium on a person's ability to initiate and participate in litigation as an incident of personal autonomy. Along with it

⁴ *Fantl v. Transamerica Life Canada*, [2009 ONCA 377](#) at [para 39](#), IBOA at Tab 5.

goes the right to appoint counsel of one's choice, the right to participate meaningfully in the development of litigation strategy, to participate in settlement negotiations, and to settle the action. The legislative right to opt out of a class proceeding recognizes these significant rights.⁵

11. Class action legislation recognizes and protects these significant rights by providing judges with supervisory powers over the conduct of a class action at all critical moments in the litigation. Unlike almost all other civil litigation, parties to a class action are not free to initiate, resolve or try their actions without judicial approval. At all key junctures in the litigation, courts are charged with safeguarding the interests of the absent class members.
12. For example, at certification, courts are tasked with protecting class member interests by ensuring that the action is the preferable procedure to resolve the common issues, by considering the impact of the class proceeding on class members, and by ensuring that they have access to a fair process to resolve their claims.⁶ Likewise, when a court fixes a class definition, the court must be satisfied that the definition allows a person to clearly determine whether they are a member of the class.⁷
13. Furthermore, communications with the class and notices regarding certification, settlement approval, or any other stage that may affect the interests or rights of a class member or that may require individual participation, all require court approval under the *CPA*.⁸

⁵ *Johnson v. Ontario*, [2021 ONCA 650](#) at [para. 16](#), IBOA at Tab 8.

⁶ *CPA* at [ss. 5\(1\)\(d\) and 5\(1.1\)](#); *Hollick v. Toronto (City)*, [2001 SCC 68](#) at [para. 29](#), IBOA at Tab 7 and *AIC Limited v. Fischer*, [2013 SCC 69](#) at [para 24](#), IBOA at Tab 2.

⁷ *CPA* at [s. 5\(1\)\(b\)](#); *Hickey-Button v. Loyalist College of Applied Arts & Technology*, [\[2006\] OJ No 2393](#) (ONCA) at [para 49](#), IBOA at Tab 6.

⁸ *CPA* at [ss. 17-20](#).

14. Finally, at the settlement stage, courts safeguard class members' interests by requiring the parties to submit both the settlement agreement and class counsel's proposed fee for approval.⁹
15. Just as courts must vigorously protect class members' legal and financial interests at certification, settlement and fee approval, so too should they be equally vigilant in protecting class members' rights to pursue their legal claims. A class action extinguishes a class member's litigation rights by transferring control over absent class members' claims to the representative plaintiff and class counsel. As Justice Winkler (as he then was) stated in *A&P*: "The primary protection for the absent class members in the class proceeding process is the right to opt out of the class action. It is axiomatic that no class member need participate in a class action against his or her will. However, to ensure the integrity of the opt-out process, absent class members must be fully informed of the issues in the proceeding and their impact on them as individuals."¹⁰
16. For each class member, the decision whether to opt out of a proceeding is a serious access to justice issue. Remaining in a class action may mean limiting or eliminating claims that could have been brought on an individual basis, while excluding oneself from the class means relinquishing rights to a remedy that may be obtained in that proceeding.¹¹ As this Court stated in its ruling on the motion to quash this appeal, opt-out rights recognize the significant rights associated with initiating and participating in

⁹ *Ibid* at [s. 27.1](#).

¹⁰ *1176560 Ontario Ltd. v. Great Atlantic & Pacific Company of Canada Ltd.*, 2002, [62 OR \(3d\) 535](#) (SCJ), at [para. 75](#) ("*A&P*"), IBOA at Tab 1.

¹¹ *Pet Valu*, [2013 ONCA 279](#) at [para. 42](#), AOR at Tab 14.

litigation as an incident of personal autonomy.¹² These rights should be carefully protected by the courts.

b. A framework for determining extended opt-outs is needed.

17. The motion judge did not approach the Appellant’s request for an extended opt-out deadline in a principled fashion. Beyond acknowledging that he had the jurisdiction to extend the opt-out period and that such an order is rarely granted, the motion judge did not refer to any authority or precedent that set out the proper analysis required to determine whether a motion to extend the opt-out deadline should be granted.¹³
18. The two authorities that the motion judge relied upon that dealt specifically with requests to extend opt-out or opt-in deadlines were *Young v. London Life Insurance Co.*¹⁴ and *Gregg v. Freightliner*.¹⁵ Neither case offers a test or principles for the extension of opt-out periods.
19. A review of the jurisprudence reveals that there is no appellate level precedent in Canada that provides a framework to determine in what circumstances an extended opt-out request should be granted pursuant to s. 12 of the *CPA* or comparable provisions in other provinces. There are, however, several lower court decisions¹⁶ and three appellate

¹² *Johnson v Ontario*, [2021 ONCA 650](#), at [paras. 14-17](#), IBOA at Tab 8.

¹³ Endorsement of Justice Grace dated April 16, 2021, at para 14, Tab 5 of Appeal Book and Compendium [“ABC”], p. 38.

¹⁴ [2002] O.J. No. 5971 (S.C.J.), AOR at Tab 10.

¹⁵ [2012 BCSC 415](#), AOR at Tab 20.

¹⁶ *A & P*, [62 OR \(3d\) 535](#), IBOA at Tab 1; *ALS Society of Essex County v Corporation of the City of Windsor*, [2016 ONSC 676](#), IBOA at Tab 3; *Crider v Nguyen*, [2016 ONSC 4400](#), AOR at Tab 17; *Cannon*, [2014 ONSC 2259](#), AOR at Tab 13; *Robinson v. Rochester Financial Limited*, [2010 ONSC 5116](#), IBOA at Tab 10; and *Quenneville v Volkswagen Group Canada Inc.*, [2018 ONSC 1020](#), AOR at Tab 16.

decisions¹⁷ that touch on the importance of opt-out rights in different contexts. While these decisions comment on the importance of opt-out rights, they provide only minimal guidance as to how an extended opt-out request should be assessed.

20. The principles that can be gleaned from the jurisprudence can be summarized as follows:

- a. Although failure to get notice of the original opt-out deadline does not automatically justify an extension of the opt-out period, the court must consider whether sufficient steps were taken to provide adequate notice of the class member's opt-out rights.¹⁸
- b. Courts may invalidate opt-outs where the class members were not free to exercise their right to participate in or abstain from the class action on an informed, voluntary basis, free from undue influence.¹⁹
- c. Where there is conduct that amounts to misinformation, threats, intimidation, coercion or that reveals some other improper purpose in an attempt to undermine the opt-out process, the court may intervene to restrain and remediate the effect of such conduct.²⁰

21. These principles provide minimal guidance for assessing an extended opt-out request.

Class members and counsel would benefit from more precise direction regarding how the requests should be considered.

¹⁷ *3113736 Canada Ltd v Cozy Corner Bedding Inc*, [2020 ONCA 235](#), AOR at Tab 15; *Pet Valu*, [2013 ONCA 279](#), AOR at Tab 14; and *Hébert v. Wenham*, [2020 FCA 186](#), AOR at Tab 1.

¹⁸ *Crider v Nguyen*, [2016 ONSC 4400](#) at [para 53](#), AOR at Tab 17 and *3113736 Canada Ltd v Cozy Corner Bedding Inc*, [2020 ONCA 235](#), at [para 32](#), AOR at Tab 15.

¹⁹ *A & P*, [62 OR \(3d\) 535](#), at [para 74](#), IBOA at Tab 1; *ALS Society of Essex County v Corporation of the City of Windsor*, [2016 ONSC 676](#), IBOA at Tab 3.

²⁰ *Pet Valu*, [2013 ONCA 279](#) at [para 43](#), AOR at Tab 14; *Hébert v. Wenham*, [2020 FCA 186](#) at [para. 22](#), AOR at Tab 1.

c. The Proposed Framework

i. The content of the notice and the adequacy of the notice plan must be considered in context.

22. The substantive right to litigation autonomy that is protected by a class member's opt-out right is meaningless unless proper and adequate notice of that right is provided to class members. The previous approval of a notice plan ought not to be the sole justification for dismissing a class member's request for an extended opt-out deadline. Where a class member brings a timely motion to seek an extension of the opt-out deadline and shows that they did not receive notice of certification of the action, it is a significant injustice for that class member to be bound by an opt-out deadline about which they knew nothing. In our respectful submission, courts have an obligation to consider the adequacy of the notice given in the context of the opt-out motion, notwithstanding the previous approval of the notice plan.
23. Contrary to Ontario's position that only compliance with (and not adequacy of) the notice plan is relevant to whether an extension of the opt-out deadline should be granted,²¹ courts have previously considered lack of adequate notice as a basis for refusing to bind class members to a settlement in a class action from which they did not opt out. In *Currie v. McDonald's Restaurants of Canada Ltd.*, for example, this Court stated that the "right to opt out is an important procedural protection afforded to unnamed class action plaintiffs" that allows them "to preserve legal rights that would otherwise be determined or compromised in the class proceeding."²² In *Currie*, Ontario residents were not bound

²¹ Para. 42 of the Factum of the Respondent, Ontario.

²² *Currie v. McDonald's Restaurants of Canada Ltd.*, (2005) 74 OR (3d) 321 (CA) at para. 28 ("Currie"), Book of Authorities of the Appellant, Donald Parker ["AOA"], at Tab 4.

by a U.S. class action settlement because the court found the notice of the settlement was inadequate, despite the notice plan having been approved by another court.

24. The Court in *Currie* considered the nature of the rights at stake when it assessed the adequacy of the notice and the other procedural protections afforded non-resident class members. In the same vein, a court tasked with determining whether to extend an opt-out deadline should consider the nature of the moving party's claim. Where an important right with potentially significant damages is at issue, the notice must be effective and clear. Conversely, where a nominal right is at issue, a less effective notice may be acceptable. It is worth noting that in *Currie*, notice with "wall-to-wall legalese" that reached approximately 30% of the class was found to be inadequate even where the interests of class members were extremely nominal.²³
25. It is also relevant to consider the demographic of the class. For example, a class action involving individuals with intellectual disabilities would require a very different notice plan than a securities class action affecting sophisticated investors. If the class is comprised of a transient and vulnerable population, motion judges must consider whether the notice of their opt-out rights was provided in a manner that would likely come to that group's attention. Extensive notice programs involving prisoners or people in remote areas of Canada have been required in previous cases.²⁴
26. Effective notice requires not only that the notice be published or provided in a way that is likely to come to the attention of most class members, it also requires that the notice

²³ *Ibid* at [paras. 35-38](#). The action sought compensation for the loss of a game of chance.

²⁴ *Brazeau v. Canada (AG)/Reddock v. Canada (AG)*, 2021 ONSC 4294, IBOA at Tab 4; and *Canada Post Corp. v. Lépine*, [2009 SCC 16](#) ("Lépine"), AOR at Tab 6.

adequately inform the class about the substance of the claim, who the class members are, and what rights are affected by the order giving rise to the notice.²⁵ In the context of certification of historic institutional abuse claims, such notices may include contact information for independent legal advice concerning opt-out rights.²⁶

27. When a class member seeks an extension of the opt-out period, the motion judge is in a position to carefully consider the adequacy of the notice as it was actually implemented and to assess whether the moving class member had a meaningful opportunity to exercise their right to participate in or abstain from the class action. In carrying out the assessment, the judge ought to consider:
- a. Did the notice of certification provide the class member with adequate information in plain language regarding the types of claims being pursued in the class action?
 - b. Did the notice objectively provide enough information in plain language that would allow a class member to identify themselves as part of the class?
 - c. Did the moving party actually receive the court-approved notice? If not, was it because the notice plan failed to provide adequate notice to all class members, or was it because the notice plan was not carried out as required?
28. While *Lépine* is unequivocal that *approval* of a notice plan does not require proof *ex ante* that every class member will receive notice, this does not mean that class members who do not receive actual notice of their opt-out rights are without a remedy. Where a class member can establish that through some deficiency in the notice plan or in the manner in which the notice plan was executed they did not receive notice, they ought to be afforded

²⁵ *Currie*, (2005) 74 OR (3d) 321 at paras. 38-40, AOA at Tab 4 and *Lépine*, 2009 SCC 16 at para 43, AOR at Tab 6.

²⁶ *Keeping v. Her Majesty the Queen (Ontario)*, 2019 ONSC 2044, IBOA at Tab 9.

the opportunity to opt out if they move swiftly to assert that opt-out right upon discovery of the class action.

29. If the motion judge finds that notice was inadequate and that it led to the moving class member being unable to exercise their opt-out rights, the judge ought to allow the class member to exercise their opt-out rights beyond the initial deadline.

30. If, however, the court finds that the content of the notice and the plan for dissemination were adequate, the court should next consider whether the parties complied with the notice plan.

ii. Was the notice disseminated in compliance with the court-approved notice plan?

31. An adequate notice and dissemination plan in theory may be ineffective in practice if it was not carried out by the parties in accordance with the court order. For example, if the parties were required to send notice by email to all former and current students of a defendant university but the notice was only emailed to current students, the parties did not comply with the court-approved notice plan. Similarly, if the court ordered the notice to be sent in both official languages but it was only delivered in French, the parties did not comply with the court-approved notice plan. In both instances, the failure may be causally connected to the moving class member's lack of notice.

32. If the motion judge finds that the parties did not comply with the approved notice plan and that it led to the moving class member being unable to exercise their opt-out rights, the judge ought to allow the class member to exercise their opt-out rights beyond the initial deadline.

33. If the parties did comply with an adequate notice plan, the court may still consider if there are factors which may have affected the class member's ability to make an informed decision regarding their participation in the class action.

iii. The existence of circumstances that affected the class member's ability to make an informed decision about opting out must be considered.

34. Inadequate notice is not the only justification for revisiting a class member's exercise of the opt-out right. In *Pet Valu*, this Court stated that "class members 'ought to be free to exercise their right to participate in or abstain from the class action on an *informed, voluntary basis, free from undue influence*'.²⁷

35. A court will give class members who have opted out the opportunity to reconsider when their decision to do so may have been the result of "misinformation, a threat, intimidation, coercion" or some other communication aimed at undermining the process.²⁸

36. Applying this principle, the Clinic submits that courts should also give class members who failed to opt out the right to do so when their failure to opt out resulted from misinformation, a threat, intimidation, or coercion. "It is axiomatic that no class member need participate in a class action against his or her will."²⁹

37. In addition, the existence of circumstances that affected the class member's ability to make an informed decision about opting out, such as a lack of capacity during the

²⁷ [2013 ONCA 279](#), at [para. 41](#), AOR at Tab 14, citing *A & P* at [para. 74](#) (original emphasis), IBOA at Tab 1.

²⁸ *A & P*, [2002 CanLII 6199 \(ON SC\)](#) at [paras 75-76](#), IBOA at Tab 1.

²⁹ *A & P*, [2002 CanLII 6199 \(ON SC\)](#) at [paras 75-76](#), IBOA at Tab 1.

original opt-out period, may constitute extenuating circumstances justifying an extended opt-out deadline.

d. The proposed framework balances the rights of class members against the policy objectives of class actions.

38. On the motion to quash this appeal, this Court recognized the relationship between the right to opt out and the nature of the rights at stake when it stated that “for an individual with a major claim like Mr. Parker, a class action is self-evidently not the preferable vehicle.”³⁰ In other words, the more significant the individual interests of the class member, the greater the prejudice that will accrue to them if the opt-out deadline is not extended.
39. A class member who moves in a timely way for an extension of the opt-out deadline upon learning that their proposed individual lawsuit is covered by a class action in its early stages presents different considerations than a class member who knew about their opt-out rights but delayed bringing the motion until after the result of a settlement approval hearing is known. The former does not delay the class action, while the latter may undermine a settlement in which the class size is an important factor for consideration in settlement approval. Where the moving class member brings a late motion for an extension of the opt-out deadline after taking a wait-and-see approach, the interests of the parties in maintaining the integrity of the opt-out process and the importance of predictability and finality may outweigh the moving class member’s interests in litigation autonomy.

³⁰ *Johnson v Ontario*, [2021 ONCA 650](#) at [para. 25](#), IBOA at Tab 8.

40. Ontario argues that the Appellant's motion and appeal threaten the predictability and finality on which the opt-out process was established. Predictability and finality are important goals in all legal proceedings, but they are not the only ones. Access to justice and litigation autonomy for individual class members are also critical.
41. Granting an extension of the opt-out deadline to a class member who would otherwise be precluded from pursuing a significant individual claim will not undermine the desired goals of predictability and finality in the class action. Opt-out rates are not known in Ontario, but even a cursory review of settlement approval decisions reveals that few class members opt out. This observation is consistent with a study of reported cases in the United States which has found that less than 1% of class members opt out.³¹
42. The exercise of the opt-out right does not result in automatic success on the merits for that class member. It merely results in a class member pursuing their own individual lawsuit with no guarantee of success. All of the risks and barriers to litigation that make class actions necessary will mitigate the likelihood that many class members would choose to pursue individual actions against the same defendant.
43. As to whether the lack of certainty regarding class size will make settlement negotiations or a common issues trial difficult – the reality is that litigants in class actions already face this uncertainty. Settlements are regularly approved where the number of class members is not known with any precision. Certification for settlement purposes is common, so it is

³¹ Theodore Eisenberg and Geoffrey Miller, "The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues" (2004) 57 *Vanderbilt L Rev* 1527 at 1532, IBOA at Tab 11.

possible for the parties to come to an agreement not knowing how many class members will opt out.

44. Class action policy also favours a more liberal extended opt-out rule. The parties are incentivized to propose the best possible notice plan in order to reduce or eliminate the risk of a class member seeking an extension of time to opt out. The parties are also incentivized to move the class action along and ultimately to propose the best possible settlement in order to reduce or eliminate the risk of a class member opting out to sue individually.

PART V – SUBMISSIONS ON COSTS

45. The Clinic does not seek costs and asks that it not be liable to pay the costs of any party.

PART VI – ORDER REQUESTED

46. The Clinic takes no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, at Windsor this 24th day of February, 2022.



Andrew Eckart



Jasminka Kalajdzic

Counsel for the Intervenor, Class Action Clinic

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *1176560 Ontario Ltd. v. Great Atlantic & Pacific Company of Canada Ltd.*, 2002, [62 OR \(3d\) 535](#) (SCJ).
2. *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, [2013 ONCA 279](#).
3. *3113736 Canada Ltd v Cozy Corner Bedding Inc*, [2020 ONCA 235](#).
4. *AIC Limited v. Fischer*, [2013 SCC 69](#).
5. *ALS Society of Essex County v Corporation of the City of Windsor*, [2016 ONSC 676](#).
6. *Brazeau v. Canada (AG)/Reddock v. Canada (AG)*, 2021 ONSC 4294.
7. *Canada Post Corp. v. Lépine*, [2009 SCC 16](#).
8. *Cannon v. Funds for Canada Foundation*, [2014 ONSC 2259](#).
9. *Crider v Nguyen*, [2016 ONSC 4400](#).
10. *Currie v. McDonald's Restaurants of Canada Ltd.*, [\(2005\) 74 OR \(3d\) 321](#) (CA).
11. *Fantl v. Transamerica Life Canada*, [2009 ONCA 377](#).
12. *Gregg v. Freightliner*, [2012 BCSC 415](#).
13. *Hébert v. Wenham*, [2020 FCA 186](#).
14. *Hickey-Button v. Loyalist College of Applied Arts & Technology*, [\[2006\] OJ No 2393](#) (ONCA).
15. *Hollick v. Toronto (City)*, [2001 SCC 68](#).
16. *Johnson v Ontario*, [2021 ONCA 650](#).
17. *Keeping v. Her Majesty the Queen (Ontario)*, [2019 ONSC 2044](#).
18. *Quenneville v Volkswagen Group Canada Inc.*, [2018 ONSC 1020](#).
19. *Robinson v. Rochester Financial Limited*, [2010 ONSC 5116](#).
20. *Young v. London Life Insurance Co.*, [2002] O.J. No. 5971 (SCJ).

21. Theodore Eisenberg and Geoffrey Miller, “The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues” (2004) 57 *Vanderbilt L Rev* 1527 at 1532.

**SCHEDULE “B”
RELEVANT STATUTES**

1. [Class Proceedings Act, 1992 SO, c 6](#), ss. 5(1), 5(1.1), 12, and 17-20:

Section 5(1) to 5(1.1):

Certification

5 (1) The court shall, subject to subsection (6) and to [section 5.1](#), certify a class proceeding on a motion under [section 2](#), [3](#) or [4](#) if,

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

Same

(1.1) In the case of a motion under [section 2](#), a class proceeding is the preferable procedure for the resolution of common issues under clause (1) (d) only if, at a minimum,

- (a) it is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding; and
- (b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members.

Section 12:**Court may determine conduct of proceeding**

12 The court, on its own initiative or on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a proceeding under this Act to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

Sections 17-20:**Notice of certification**

17 (1) Notice of certification of a class proceeding shall be given by the representative party to the class members in accordance with this section.

Court may dispense with notice

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so.

Order respecting notice

(3) The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,

- (a) the cost of giving notice;
- (b) the nature of the relief sought;
- (c) the size of the individual claims of the class members;
- (d) the number of class members;
- (e) the places of residence of class members; and
- (f) any other relevant matter.

Means of giving notice

(4) The court may, for the purposes of subsection (3), order that notice be given by any of the following means or combination of the following means, and may order that notice be given to different class members by different means:

1. Personally or by mail.
2. By posting, advertising, publishing or leafletting.

3. By individual notice to a sample group within the class.
4. By any electronic means the court considers appropriate.
5. By any means that may be prescribed.
6. By any other means the court considers appropriate.

Contents of notice

- (5) Unless the court orders otherwise, notice under this section shall,
- (a) describe the proceeding, including the names and addresses of the representative parties and the relief sought;
 - (b) state the manner by which and time within which class members may opt out of the proceeding;
 - (c) describe the possible financial consequences of the proceeding to class members;
 - (d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements;
 - (e) indicate whether there is a third-party funding agreement as defined in [section 33.1](#) between the representative plaintiff and a funder and, if so, provide a description of the payment to which the funder is entitled under the agreement;
 - (f) describe any counterclaim being asserted by or against the class, including the relief sought in the counterclaim;
 - (g) state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding;
 - (h) describe the right of any class member to participate in the proceeding;
 - (i) provide contact information for a person or entity to whom class members may direct inquiries about the proceeding;
 - (j) include the prescribed information; and
 - (k) include any other information the court considers appropriate.

Court to consider circumstances

- (6) The court shall make such orders under subsections (3), (4) and (5) as are necessary to ensure that the notice given is the best notice that is practicable in the circumstances.

Solicitations of contributions

- (7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements.

Public Guardian and Trustee

(8) Notice ordered to be given under this section shall be served on the Public Guardian and Trustee if there is a reasonable possibility that the Public Guardian and Trustee is authorized to act on behalf of one or more class members.

Notice where individual participation is required

18 (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, the representative party shall give notice to those members in accordance with this section.

Order respecting notice

(2) The court shall make an order setting out when and by what means notice shall be given under this section, and in so doing shall have regard to the factors set out in [subsection 17 \(3\)](#).

Means of giving notice

(3) The court may, for the purposes of subsection (2), order that notice be given by any of the following means or combination of the following means, and may order that notice be given to different class members by different means:

1. By any means referred to in paragraphs 1 to 4 of [subsection 17 \(4\)](#).
2. By any means that may be prescribed.
3. By any other means the court considers appropriate.

Contents of notice

(4) Unless the court orders otherwise, notice under this section shall,

- (a) state that common issues have been determined in favour of the class;
- (b) state that class members may be entitled to individual relief;
- (c) describe the steps to be taken to establish an individual claim;
- (d) state that failure on the part of a class member to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court;
- (e) provide contact information for a person or entity to whom class members may direct inquiries about the proceeding;
- (f) include the prescribed information; and
- (g) include any other information the court considers appropriate.

Court to consider circumstances

(5) The court shall make such orders under subsections (2), (3) and (4) as are necessary to ensure that the notice given is the best notice that is practicable in the circumstances.

Notice to protect interests of affected persons

19 (1) At any time in a proceeding under this Act, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party, or to ensure the fair conduct of the proceeding.

Order respecting notice

(2) The court shall make an order setting out when and by what means notice shall be given under this section, and in so doing shall have regard to the factors set out in [subsection 17 \(3\)](#).

Means of giving notice

(3) The court may, for the purposes of subsection (2), order that notice be given by any of the following means or combination of the following means, and may order that notice be given to different class members by different means:

1. By any means referred to in paragraphs 1 to 4 of [subsection 17 \(4\)](#).
2. By any means that may be prescribed.
3. By any other means the court considers appropriate.

Court to consider circumstances

(4) The court shall make such orders under subsections (2) and (3) as are necessary to ensure that the notice given is the best notice that is practicable in the circumstances.

Notices, general requirements**Plain language**

20 (1) A notice under [section 17](#), [18](#) or [19](#) shall be written in a plain language manner.

Bilingual

(2) A notice under [section 17](#), [18](#) or [19](#) shall be written in English and in French, unless the court orders otherwise.

Court approval

(3) A notice under [section 17](#), [18](#) or [19](#) shall be approved by the court before it is given.

GLEN JOHNSON, MICHAEL SMITH, TIMOTHY HAYNE
-and-
HER MAJESTY THE QUEEN IN RIGHT OF THE
PROVINCE OF ONTARIO
Plaintiffs (Respondents) Defendant (Respondents)

Court File No. C69417

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at LONDON

**FACTUM OF THE INTERVENER,
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