

Date: 20231222
Docket: CI 18-01-17220
(Winnipeg Centre)
Indexed as: Weremy v.
The Government of Manitoba
Cited as: 2023 MBKB 187

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

DAVID WEREMY,	)	<u>Andrew N. McDonald</u>
	)	<u>on a watching brief</u>
	)	<u>for the plaintiff and the class</u>
- and -)	
	)	<u>Jim R. Koch</u>
THE GOVERNMENT OF MANITOBA,	)	<u>Brian T. Jones</u>
	)	for the defendant
defendant.)	
	)	<u>Israel A. Ludwig</u>
	)	<u>Alexander Krush</u>
	)	for the moving party,
	)	Earl Ducharme
)	
)	
	)	<u>Judgment Delivered:</u>
	)	December 22, 2023

GRAMMOND J.

INTRODUCTION

[1] The claim in this matter proceeded as a class action, and was settled earlier this year. This decision relates to a motion filed by a class member, Mr. Earl Ducharme, to extend the time within which he can opt out of the class.

BACKGROUND

[2] On July 26, 2001, Mr. Ducharme filed a statement of claim against the Government of Manitoba (the "Government") regarding alleged abuses that he suffered at the "Institution for Mentally Retarded Youths"¹, later known as the Manitoba Developmental Centre (the "Ducharme Claim"). Thereafter, it appears that very little progress was made with respect to the prosecution of the Ducharme Claim, although there was some documentary disclosure, and interrogatories were asked and answered. In addition, counsel engaged in settlement discussions, though the timing and frequency of those discussions is not in evidence before me.

[3] On October 31, 2018, the statement of claim in this matter was filed.

[4] On December 5, 2018, Government counsel in the Ducharme Claim, Mr. Brian T. Jones, advised Mr. Ducharme's counsel, Mr. Israel A. Ludwig, that aspects of the Ducharme Claim may be statute-barred, and that the Government had instructed him to file a motion to dismiss for delay. Mr. Jones also advised Mr. Ludwig that:

... for your information we note the recent filing of a proposed class action relating to certain matters which appear to overlap part of your client's claim: David Weremy v. Government of Manitoba in QB file no. CI18-01-17220. We raise this simply as a matter of courtesy. We anticipate that the Weremy action will also be vigorously defended.

[5] On December 19, 2018, Mr. Ludwig responded to Mr. Jones with respect to the Ducharme Claim, but did not comment upon the claim in this matter.

¹ In Mr. Ducharme's affidavit sworn December 19, 2022, he deposed that he was abused at the "Manitoba Home for Boys".

[6] On May 29, 2020, I certified this matter as a class proceeding pursuant to ***The Class Proceedings Act***, C.C.S.M. c. C130 ("***Act***"). On April 8, 2021, leave to appeal my decision was denied.

[7] On August 25, 2021, I issued an order setting out the notice requirements to be implemented relative to the class, which provided that members could opt out of the class within four months of the date of the order. Thereafter, the Government attempted to serve Mr. Ducharme with written notice of the class proceeding at his last known address, which was returned as "undeliverable". The four month opt-out period expired on December 25, 2021².

[8] On June 17, 2022, Mr. Ludwig advised Government counsel of Mr. Ducharme's desire to opt out of the class in this proceeding, and on January 26, 2023, Mr. Ducharme filed this motion to extend the time within which to do so.

THE LAW

[9] The ***Act*** provides:

Contents of certification order

8(1) A certification order must

...

- (f) state the manner in which and the time within which a class member may opt out of the proceeding;

...

Court may determine conduct of proceeding

12 The court may at any time make any order that it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

² Class counsel's website reflects in a January 10, 2022 posting that the opt-out deadline was January 12, 2022. Although irrelevant to this motion, it is unclear how that date was determined.

...

Opting out of class proceeding

16 A member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

...

Contents of notice

19(6) Unless the court orders otherwise, notice under this section must

...

(b) state the manner in which and the time within which a class member may opt out of the class proceeding;

...

(f) state that the judgment on the common issues for the class, whether favourable or not, will bind all class members who do not opt out of the class proceeding;

(g) state that the judgment on the common issues for a subclass, whether favourable or not, will bind all subclass members who do not opt out of the class proceeding.

[10] Counsel agreed that the applicable test on this motion is set out in ***Johnson v.***

Ontario, 2022 ONCA 725, where the court stated:

[5] For the reasons that follow, I conclude that the test for an extension to opt out of a class proceeding requires the class member to show that their neglect in complying with the court-imposed deadline is excusable and that an extension will not result in prejudice to the class, the defendant, or the administration of justice. This test, previously recognized at the Superior Court level in Ontario in *Young v. London Life Insurance Co.*, [2002] O.J. No. 5971 (S.C.), and derived from that applied in the United States, balances the important role the right to opt out plays in the class proceedings scheme with the importance properly attributed to court-imposed deadlines.

...

[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.

...

[50] Considered in isolation, the importance of the opt-out right, both to a class member and to the integrity of the class proceedings scheme, would pull strongly in favour of a test for extensions that permits them liberally. But just as protecting the right to opt out is an important consideration, so is the fact that the *CPA* provides for the opt-out right in a time-limited way. As noted above, the *CPA* mandates that the court impose a deadline for opt-outs. An open-ended test for extensions would effectively rewrite that legislative choice.

[51] Respect for court orders is integral to the administration of justice. Court-imposed deadlines have purposes, are meant to be treated seriously, and are intended to have consequences. The deadline for opting out promotes certainty in the class proceeding. It defines, as at the deadline, the class members who are not participating, and thus those who are. Were there no deadline, or if it could be flouted, cavalierly ignored, or strategically treated as an invitation to “wait and see”[8], these matters would be an uncertain and moving target, to the potential prejudice of those with carriage of the class proceeding who must make decisions as to how to conduct it on behalf of the participating class members, and to defendants in deciding how to respond to it.

[52] In my view, the importance of the opt-out right and of the deadline for opting out are both properly respected when a court grants extensions only where (i) the delay in opting out is due to excusable neglect – in good faith and with a reasonable basis – and (ii) the court has considered whether any prejudice will accrue to participating class members, the defendant, or the integrity of the process, from permitting the late opt-out. This approach ensures that in a justifiable case a class member who does not want to be part of the class proceeding may have their litigation autonomy restored. But it also respects the need to ensure the court’s processes – its orders – are taken seriously, and that those who have planned and taken their courses of action on the strength of them do not suffer any prejudice.

[emphasis in original]

ANALYSIS

Was Mr. Ducharme’s delay excusable?

[11] I accept that Mr. Ducharme did not receive notice of this matter from the Government after certification, and the Government admitted candidly that its efforts to provide notice to Mr. Ducharme were imperfect.

[12] Having said that, neither the **Act** nor my certification order required that actual notice of certification be served upon every class member personally, or at all. The **Act** provides:

Notice of certification

19(1) Notice that a proceeding has been certified as a class proceeding must be given by the representative plaintiff to the class members in accordance with this section.

...

Method of giving notice

19(4) The court may order that notice be given by

- (a) personal delivery;
- (b) mail;
- (c) posting, advertising or publishing;
- (d) individually notifying a sample group within the class;
- (e) creating and maintaining an Internet site; or
- (f) any other means or combination of means that the court considers appropriate.

[13] The certification order provided as follows, with respect to service upon individual class members:

3. **THIS COURT ORDERS** that Class Members shall be notified that this proceeding has been certified as a class proceeding as follows:

- a) by the Administrator delivering a notice, in substantially the same form as the notice attached hereto as **Schedule "A"** (the "**Publication Notice**") and attached hereto as **Schedule "B"** (the "**Long Form Notice**"), by regular mail and email (if applicable), within thirty (30) days of this Order, to the addresses identified on the Class List and to any other potential Class Member who has otherwise contacted Class Counsel or the Administrator.

[14] The certification order included nine other sub-paragraphs setting out means by which notice could be given, including service upon community agencies, posting at the Manitoba Developmental Centre, publication in the newspaper, and posting on the website of class counsel.

[15] It is clear that while the goal of the notice process in a class action is to notify as many class members as possible of the claim, there are many ways in which notice can be given, and personal service is not required. In *Canada Post Corp. v. Lépine*, 2009 SCC 16, the court stated:

[43] ... In a class action, it is important to be able to convey the necessary information to members. Although it does not have to be shown that each member was actually informed, the way the notice procedure is designed must make it likely that the information will reach the intended recipients.

[16] Similarly, in *Crider v. Nguyen*, 2016 ONSC 4400, the court stated:

[50] ... [I]n protecting the right to opt out, a court need not ensure that the person with the right to opt out has actual notice of the right to opt out. Practically speaking, the only way to ensure that a person has notice that his or her legal rights could be affected is by some form of personal service on the person or his or her lawyer or agent. Short of requiring personal delivery, the chosen notification process may not be effective in every case. Moreover, depending on class size and the ability to identify and locate class members, personal service is not practical and may not even be feasible.

[17] As stated by the court in *Johnson*:

[54] ... I agree with the motion judge that the Notice Plan did not have to guarantee – indeed, it could not – that every class member would actually receive the Notices informing of the right to opt out. It only had to be designed to make it likely that the information will reach the intended recipients: *Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549, at para. 43. ...

...

[56] ... [a] judgment or settlement may be binding on class members who did not actually receive the notice, as long as an adequate notice plan was followed.

[18] I note also that pursuant to the **Act**, class members are included in the action unless they take steps to leave the class. In other words, like Ontario, Manitoba is an “opt-out” jurisdiction.

[19] In this case, Mr. Ducharme argued that at all material times, Mr. Jones was aware that he was represented by Mr. Ludwig in the Ducharme Claim. Nevertheless, notice of this matter was not sent to Mr. Ducharme through Mr. Ludwig beyond the contents of Mr. Jones’ December 5, 2018 letter. I appreciate Mr. Ducharme’s frustration with this approach given that Government counsel in this action, Mr. Koch, and Mr. Jones are both Government lawyers, but the fact remains that the Government was not required to serve Mr. Ludwig with notice of the certification order on Mr. Ducharme’s behalf either pursuant to the **Act** or the certification order. Nevertheless, Mr. Jones put Mr. Ludwig on notice of this claim in 2018.

[20] It is unclear when Mr. Ducharme learned about the filing of this claim because his affidavit is silent on that point. Having said that, Mr. Ludwig was aware of it since December 2018 and was in a position to monitor its progress through a variety of means, including the court registry, the website of class counsel, and making inquiries of Mr. Jones. There is no evidence before me that he pursued any of those avenues.

[21] It is also unclear when Mr. Ducharme learned about the certification order and opt-out deadline in this matter, because his affidavit is silent on those points also. Apparently, Mr. Ludwig became aware of the opt-out deadline in June 2022, yet this motion was not filed until January 2023, and no explanation for the delay has been provided.

[22] In all of these circumstances, I have concluded that Mr. Ducharme's delay was not excusable because:

- a) the Government attempted to serve Mr. Ducharme pursuant to the certification order;
- b) Mr. Ludwig was aware of the class action for years before the certification order issued; and
- c) various aspects of the progress of this proceeding were made public, including through the website of class counsel and the court registry, such that either or both of Mr. Ducharme and Mr. Ludwig could have followed the status of the claim as it progressed.

[23] I recognize that the Government did not provide to Mr. Ludwig any updates on the progress of this proceeding after December 2018, and while Mr. Jones could have done so, the Government had no such obligation, particularly in the absence of any response from Mr. Ludwig after being put on notice of the class action in December 2018.

Will any prejudice accrue if Mr. Ducharme is permitted to opt out?

[24] In December 2022, the class and the Government participated in a mediation process in this matter, which resulted in a settlement agreement of which I approved on May 5, 2023. At the time of the mediation, the Government had received Mr. Ludwig's advice that Mr. Ducharme wished to opt out of this proceeding, but no motion had been filed. In March 2023, the settlement details were made public, but additional and unexplained delay ensued, such that Mr. Ducharme's motion was not heard until December 2023.

[25] As referenced above, in *Johnson*, the court commented upon the “wait and see approach” by class members, which can give rise to an uncertain and moving target, to the potential prejudice of the class and defendants. More particularly, in my view, where a class member seeks to opt out after a settlement is reached and the settlement terms are made public, that individual is in the position, effectively, of being able to pick and choose between the class settlement and the likelihood that their individual claim will lead to a more fruitful outcome. I agree with the Government that this approach is prejudicial to the administration of justice. Conversely, where a class member opts out before the prescribed deadline and prior to a settlement, they are doing so without the knowledge of any potential settlement terms, and any subsequent settlement agreement is not binding upon them.

[26] I have also concluded that all parties to a class action should be able to negotiate a settlement with some certainty that any individuals who wished to opt out of the class had done so by the appointed deadline, because the scope of the class will inform their respective bargaining positions. Moreover, where a settlement agreement is reached, a defendant’s liability to the class will be extinguished, and that defendant should have some certainty about ongoing potential exposure.

[27] I am not suggesting that Mr. Ducharme’s delay in this case was purposeful or strategic, but the above-referenced legal framework exists for a reason, and I have concluded that if I were to grant this motion, there would be a prejudicial effect on both the Government and the class members who are bound by the settlement agreement.

[28] I have also considered any potential prejudice to Mr. Ducharme, and I note that although Mr. Ludwig submitted that the Ducharme Claim has been appraised in the “seven-figure” dollar range, which is much more than what he would receive under the approved settlement, there is no evidence before me of that appraisal, or of any aspect of the quantum of the Ducharme Claim.

CONCLUSION

[29] Mr. Ducharme’s motion is denied, and he will remain a member of the class.

[30] If costs cannot be agreed upon, counsel may seek an appearance to make submissions.

J.