

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

**FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and
ASSEMBLY OF FIRST NATIONS**

Complainants

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

ATTORNEY GENERAL OF CANADA
(representing the Minister of Indigenous Services Canada)

Respondent

-and-

**CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA, NISHNAWBE ASKI
NATION, TAYKWA TAGAMOU NATION and CHIPPEWAS OF GEORGINA ISLAND**

Interested Parties

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February 2, 2026

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Defending Class Actions in Canada, A Guide for Defendants, 6th Ed.

Alexandra Cocks, Samuel Lepage, McCarthy Tétrault LLP

Defending Class Actions in Canada: A Guide for Defendants, 6th Ed (McCarthy Tétrault, Cocks, Lepage) > Chapter 7 SETTLEMENT ISSUES > §7.06 Issues That Can Reduce The Effectiveness Of The Settlement

Chapter 7 SETTLEMENT ISSUES

§7.06 Issues That Can Reduce The Effectiveness Of The Settlement

[2] “Opting Out” of a Settlement

The second option available to class members who do not want to be bound by a settlement is to “opt-out” of the settlement. The availability of this second option can depend, in part, on the stage of the proceedings at which settlement is reached.

If settlement is reached at the pre-certification stage, certification of the proceeding as a class proceeding is normally a prerequisite of the settlement and the approval of the settlement. Generally, the certification order will provide a time period in which the putative class member can “opt-out” of the class proceeding such that the option to “opt-out” still exists. Those persons who “opt-out” may pursue relief from the defendant in individual actions.

If settlement is reached at the post-certification stage, then a person may “opt-out” of the settlement class if the period for “opting out” provided for in the certification order has not yet expired. If the period for “opting out” that is provided for in the certification order has expired, then persons who remained in the class will be bound by the settlement. These persons will have no further opportunity to “opt-out”, unless the settlement approved by the court provides for further “opt-out” rights beyond those included in the certification order.¹

Footnote(s)

- ¹ Canadian class action statutes are silent with respect to affording class members a second right to “opt-out” of an action following settlement. In *Nunes* at paras. 9, 30, the court approved a settlement, even though class members who did not approve the settlement could no longer “opt-out” because of the expiry of the time period to do so and the settlement agreement’s silence on this point. The court’s decision seems to have been influenced by the determination that reasonable and adequate notice of the terms of the settlement and approval hearing had been given and that there were only two objectors to the settlement. However, in some cases, judicial approval of a settlement has been made conditional upon class members being given a further right to “opt-out”. In the United States, effective December 1, 2003, U.S. Federal Rules of Civil Procedure, r. 23(e)(4) specifically authorizes the court to withhold the approval of a settlement, unless individual class members who have not previously “opted out” of the action are given a new opportunity to request exclusion from the class.