# Class action against private schools: Opt-outs validated and rules for communicating with members

**February 24, 2022**

In *Bernard v. Collège Charles-Lemoyne de Longueuil*, 2022 QCCS 555, the Court confirmed the validity of 24,900 opt-out requests and rendered a leading decision concerning communications between defendants and class members.

## Case summary

Following the authorization of a class action on behalf of parents whose children are enrolled in a private school in the Communauté métropolitaine de Montréal, the schools concerned sent letters to the parents asking them to opt out of the class action and explaining why they disagreed with it.

By the end of the opt-out period – which received significant media coverage[1] – more than 24,900 opt-out notices had been submitted by class members.

The Superior Court has confirmed the validity of these opt-out notices. It has also rendered a leading decision on the rules governing communications between defendants and class members.

## Principles governing communications with members

In a leading decision, Justice Pierre-C. Gagnon rejected a motion to invalidate all the opt-out forms received at the court registry, prohibit the defendants from communicating with the members and order the defendants to send a new notice. This ruling is significant because it clarifies and circumscribes the extent to which defendants may communicate with members in a class action suit.

Acknowledging the limited number of Quebec precedents on this issue, Justice Gagnon nonetheless noted that according to the caselaw, a defendant has the right to address the members as long as the opt-out period has not expired, and may express disagreement with the action brought.

On the basis of a thorough analysis of Quebec caselaw—as well as Ontario caselaw, which is more detailed on this issue—, Justice Gagnon confirmed that:

- Defendants in a class action have freedom of speech and may address the members at any stage of the proceeding;
- This freedom is limited: members must not be intimidated or threatened, or receive disinformation or misrepresentations;
- A party who believes that the limits to this freedom have been exceeded must prove it;
- The court, with its broad discretionary powers in class actions, may intervene to impose remedies in the interests of class members;
- The burden of proof was to prove omissions or wrongful acts that objectively justified a fear. The Court could not draw an inference on the sole basis of the number of opt-out notices, which can be explained by the nature of the class action and the relationship between the members and the schools. No one testified at the hearing or in an affidavit.

On the basis of these principles, and since there was insufficient evidence to justify the orders sought, Justice Gagnon concluded that the defendants had not committed any wrongdoing that would justify cancellation of the notices or a new opt-out period. The Court noted that the general impression that emerges from the defendants' communications must be taken into account.

# Significance of the decision

This decision is significant because it sets out rules for communications between members and defendants in a class action. While the Ontario caselaw is not sparse on this issue, few Québec decisions have dealt with it until now. The Court of Appeal determined back in 2018 that settlement offers could be made prior to the end of the opt-out period, and Judge Gagnon's decision in this case clearly establishes the principles that should guide parties in their communications with members.

It should be noted that the defendants are not held to a standard of objectivity and may encourage members, for example, to opt out of the proposed class action, so long as the above limits are respected. In this case, the defendants were able to share their perspective on the class action with class members—whom they have a special relationship with—and give them the opportunity to opt out.

In short, this judgment clarifies a legal uncertainty and may in future serve as a basis for the implementation of alternative measures for resolving disputes at the authorization stage.

[1] Brian Myles, « Une action collective abusive », *Le Devoir*, November 15, 2021; Yves Boisvert, « L'école comme un ginger ale », *La Presse*, November 11, 2021; Selena Ross, « Some parents sue Quebec private schools for going virtual in pandemic, appalling others » *CTV News*, November 10, 2021; Fannie Bussières McNicoll, « Des parents se dissocient d'une action collective contre les écoles privées » *Radio-Canada*, November 12, 2021.

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