

CITATION: Nardi v. Sorin Group Deutschland GmbH, 2026 ONSC 3891
COURT FILE NO.: CV-17-00579153-00CP
DATE: 20260703

SUPERIOR COURT OF JUSTICE - ONTARIO

BETWEEN: BRUNO NARDI, Plaintiff

AND:

SORIN GROUP DEUTSCHLAND GMBH and LIVANOVA CANADA CORPORATION, Defendants

BEFORE: Justice Glustein

COUNSEL: *Patrick Martin-Ménard and Clara Thériault*, for the moving party Frédéric Roy-Richard and his immediate family members (class members in the present class action)

Jessica Lam, Leah Kelley, S. Gordon Mckee, and Ariane Bisailon, for the defendants

Sean A. Brown and Margaret L. Waddell, for the plaintiff

HEARD: June 15, 2026

REASONS FOR DECISION

NATURE OF THE MOTION AND OVERVIEW

Background

[1] The present motion is brought by Frédéric Roy-Richard (“FRR”) and Ms. Cindy Plante, personally and in their quality as tutor of minor children, Océane Richard, Emma Richard, Camille Richard and Alice Richard (collectively “his immediate family members”). I refer to FRR and his immediate family members as the “Moving Parties”.

[2] The Moving Parties are all plaintiffs in an individual action commenced on November 20, 2025 before the Superior Court of Québec, Court File No. 500-17-136376-251 (the “FRR Action”). That action was brought against the defendants Sorin Group Deutschland GmbH and Livanova Canada Corporation (collectively, “the Defendants”) and the Montreal Heart Institute (“MHI”), arising from FRR’s allegations that he (i) suffered a *Mycobacterium chimaera* infection

contracted during open-heart surgery he underwent on March 16, 2016 at the MHI and (ii) suffered bodily injuries as a result.

[3] The Moving Parties are also class members (as part of the “Patient Class” and the “FLA Class”) in the present class action before the Ontario Superior Court of Justice, Court File No. CV-17-00579153-00CP (the “Class Action”), which was commenced on July 18, 2017 and certified on an unopposed basis on May 21, 2021. The class members allege that the Defendants were negligent in the design, manufacture and post-market duty to warn about defects in the Stockert Heater Cooler System 3T (the “3T Device”) used in the cardiac surgeries, and that as a result, Patient Class members were exposed to (and may have also contracted an infection from) *Mycobacterium chimaera*.

[4] In the Class Action:

- (i) The Patient Class consists of “every person in Canada, who underwent open chest cardiac surgery during which the Sorin 3T Heater-Cooler System was used at one of the institutions listed below after January 1, 2010 and before the end date listed for that institution below.”
- (ii) The FLA Class consists of “all dependents of the Patient Class as defined by s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 and similar legislation in the other Provinces. This may include spouses, children, grandchildren, parents, grandparents, brothers and sisters of the Patient class members.”

[5] On June 27, 2025, at a mediation, the parties in the Class Action agreed to a settlement in principle, which involved a lump sum payment by the Defendants in a fixed amount in exchange for a class-wide release. In reaching the settlement agreement, neither the Defendants nor class counsel were aware that the Moving Parties were contemplating bringing an action outside of the Class Action. The Defendants believed that the Moving Parties had not opted out of the Class Action and as such were class members to be bound by the release.

Overview

[6] The Moving Parties bring this motion under s. 12 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (the “CPA”), for an extension of time to opt out of the Class Action so that they can bring the FRR Action. The Defendants oppose the motion. Class counsel take no position on the motion.

[7] For the reasons that follow, I dismiss the motion. I rely on the test in *Johnson v. Ontario*, 2022 ONCA 725, 164 O.R. (3d) 573, in which the Court held that extensions to permit a person to opt out of a class action after the opt-out deadline has passed are to be granted only where the class member can “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”: paras. 5, 52 (emphasis added).

[8] On the evidence before the court, FRR has established excusable neglect for his delay in opting out. He did not have notice of the Class Action at any time until he retained his counsel Ménard Martin Lawyers (“MML”) on June 17, 2025. There is no evidence of direct notice to FRR. It is excusable that FRR was not aware of the social media or newspaper publications.

[9] MML did not advise FRR of the existence of a class action, let alone the opt-out deadline having expired, when FRR spoke with an associate lawyer at the firm, Marie Malavaud (“Malavaud”), by telephone on September 15, 2023 (the “Introductory Call”). The MML firm (but not Malavaud personally) was aware of the Class Action and the opt-out deadline as the firm had acted for four other individuals who had opted out of the Class Action.

[10] Although the first *Johnson* requirement is satisfied, I find that the Moving Parties have not established that no prejudice would “accrue to ... the defendant, or the integrity of the process, from permitting the late opt-out”: *Johnson*, at para. 52. To the contrary, the uncontested evidence is that:

- (i) The parties in the Class Action reached a settlement in principle at a mediation in late June 2025. Neither the Defendants nor class counsel were aware of the Moving Parties’ contemplated action, which was not issued until five months later. The Defendants had no knowledge of the Moving Parties’ desire to opt out of the Class Action.
- (ii) The settlement includes a lump-sum payment in exchange for a class-wide release and was made by the Defendants in reliance on the opt-out deadline having passed. The Moving Parties are class members who are covered by that class-wide release.
- (iii) If the late opt-out is permitted, the Defendants would be required to either (a) pay the lump-sum for a lesser release than previously negotiated, (b) walk away from the settlement and carry on with the defence of the Class Action, or (c) attempt to renegotiate the agreement after having set out its settlement position during the mediation. All of these options would cause prejudice to the Defendants. Further, these options would vitiate the integrity of the class action process, which requires certainty of opt-out deadlines to avoid “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”: *Johnson*, at para. 51.

[11] Consequently, while the importance of a person’s right to control their own litigation is not in dispute, on the evidence and under the *Johnson* test, that right cedes to the importance of finality through the enforcement of court-ordered deadlines.

FACTS

FRR's heart treatment and the MHI Letter

[12] FRR was diagnosed with Loeys-Dietz syndrome and has been treated at the MHI since 2015.

[13] On March 16, 2016, FRR underwent open-heart surgery at MHI under the care of Drs. Nancy Poirier and Ismail El-Hamamsy, cardiovascular and thoracic surgeons at MHI.

[14] On October 20, 2016, FRR received a letter from MHI (the "MHI Letter") advising that the devices used in his surgery were contaminated by the *Mycobacterium chimaera* bacteria but that:

- (i) only two of 8,458 patients who had open-heart surgery since 2012 had been infected;
- (ii) the risk of infection was low;
- (iii) the bacteria frequently arose in nature; and
- (iv) the bacteria rarely caused illness to those in good health.

[15] In the MHI Letter, patients were warned that symptoms might take months or years to develop, and would require a long period of antibiotics if an infection arose. Patients were advised to look for signs of infection lasting more than one week such as fever, unexplained weight loss, muscular and joint pain, night sweats, and fatigue.

[16] The MHI Letter did not mention the Defendants' names.

[17] FRR was not concerned upon receiving the MHI Letter given the low risks it described. However, despite the reassuring nature of the MHI Letter, FRR stayed alert to the possible signs and symptoms of infection described in the MHI Letter.

The Class Action

[18] The Class Action was issued on July 18, 2017 and, as set out above, alleges that (i) there was a risk of *Mycobacterium chimaera* infection arising from exposure to certain of the Defendants' 3T Devices used during open-chest cardiac surgery, and (ii) the Defendants were negligent in the design, manufacture and post-market duty to warn. The class sought damages both for exposure to *Mycobacterium chimaera* and for those class members who were infected by the bacteria.

[19] The Class Action was certified on an unopposed basis on May 21, 2021. The class definition includes "every person in Canada, who underwent open chest cardiac surgery during

which the Sorin 3T Heater-Cooler System was used at one of the institutions listed below after January 1, 2010 and before the end date listed for that institution below” (previously defined as the “Patient Class”).

[20] MHI is one of the listed institutions in the Class Action, with a corresponding end date of August 31, 2017. FRR is a member of the Patient Class and his immediate family members are members of the *FLA* Class.

[21] Under the certification order, the deadline to opt out of the Class Action was September 27, 2021. The certification order also approved a notice plan which included:

- (i) social media advertising;
- (ii) publication of a national press release in English and French; updates on class counsel’s websites advising of the status of the class action; and publication of a condensed notice in various news publications including the *Globe and Mail*, *The Journal* (Montreal), *the Journal* (Québec City), and *La Presse*;
- (iii) publication on Class Counsel’s website; and
- (iv) delivery of a condensed long form notice to the Canadian Medical Association and hospitals “with a request that it be disseminated to interested persons”.

[22] Following certification, the notice plan was carried out. Notice was first published on May 28, 2021. FRR did not opt out prior to the opt-out deadline.

FRR begins to experience symptoms and seeks legal advice from MML

[23] Between 2016 and 2023, FRR’s medical condition remained stable.

[24] In April 2023, FRR’s medical condition deteriorated. He presented with a fever for several days, dyspnea with effort, loss of appetite and a cough with secretions. He went to seek care on three different occasions during April and May 2023 and underwent various medical investigations to understand the cause of his symptoms.

[25] On May 29, 2023, FRR underwent a blood culture test, which was analyzed by the Maisonneuve-Rosemont Hospital in Montreal. The sample was forwarded to the *Institut national de santé publique du Québec* (“INSPQ”) for identification of mycobacteria in June 2023.

[26] On July 21, 2023, the INSPQ identified the mycobacteriology of the blood sample as *Mycobacterium chimaera*.

[27] On August 9, 2023, FRR was seen and informed by his cardiologist that he had a systemic and chronic infection with *Mycobacterium chimaera* for which there is no curative treatment. He was informed that this infection would require a heavy and long-term antibiotics regimen.

[28] In the months that followed, FRR underwent heavy antibiotic treatments as well as multiple medical follow-ups and monitoring tests in radiology, cardiology, microbiology, infectiology, and nuclear medicine.

[29] On or about September 14, 2023, FRR was seen by Dr. Philippe Demers, cardiac surgeon at MHI. During that consultation, Dr. Demers informed him that MHI bore specific responsibilities regarding his situation. Dr. Demers provided FRR the contact information for the MML law firm, which Dr. Demers advised had expertise in this subject matter.

The Introductory Call between FRR and MML on September 15, 2023

[30] Prior to the Introductory Call, FRR had not become aware of the public notices or information published relating to the Class Action.

[31] The MML law firm acted for four other individuals in actions where the plaintiffs had opted out of the Class Action.

[32] On September 15, 2023, FRR contacted MML. Malavaud then contacted FRR in a 15-minute returned call (previously defined as the “Introductory Call”) to provide what Malavaud describes as informal information.

[33] Malavaud was not aware of the Class Action.

[34] During the Introductory Call, Malavaud discussed (i) general concerns about FRR’s treatment at MHI, (ii) the burden of proof and the elements required to establish medical professional liability in Québec, (iii) the MML firm’s specific methodology for assessing the merits of potential recourse, and (iv) the three-year limitation period.

[35] Malavaud did not discuss the Class Action.

[36] At the conclusion of the Introductory Call, FRR decided to (i) take the necessary time to reflect on the information given and (ii) reach out again if he wished to schedule a formal meeting to further discuss the possibility of opening a file and initiating legal action.

[37] FRR did not retain MML during the Introductory Call.

FRR’s condition worsens

[38] There were no additional discussions between the Moving Parties and MML between September 15, 2023 and April 18, 2025.

[39] In the months that followed the Introductory Call, FRR:

- (i) considered the possibility of instituting legal action, particularly by weighing the financial and emotional implications of such an approach, but decided to focus first

and foremost on his health and the many medical follow-ups he was required to undergo; and

- (ii) underwent two additional surgeries to remove infected cardiac prosthetic material, undertook heavy antibiotic treatments and engaged in multiple medical follow-ups and monitoring tests.

[40] Faced with his deteriorating health and the accumulation of significant damages, FRR contacted MML in April 2025 to schedule a meeting. He wanted to assess the possibility of bringing a civil liability action against MHI.

FRR decides to bring the FRR Action

[41] On April 18, 2025, a call was held between FRR and Malavaud to schedule an initial interview. However, the meeting was deferred to a later date since FRR was scheduled to undergo a third open-heart surgery on April 22, 2025.

[42] On June 17, 2025, FRR attended an initial two-hour consultation with Malavaud and Patrick Martin-Ménard, both lawyers at MML. During this meeting, Martin-Ménard informed FRR, for the first time, of the existence of a national class action instituted in Ontario against Livanova.

[43] The Moving Parties retained Martin-Ménard at the June 17, 2025 meeting. MML was instructed to evaluate the chances of success in a civil liability claim against the Defendants and MHI in Québec. If such a claim had a good chance of success, MML was to file an application for a late opt out of the Class Action.

Steps taken after the June 17, 2025 meeting by FRR and MML

[44] In the following months, MML obtained and analyzed FRR's medical records, comprising over 5,000 pages. The records confirmed the relationship between FRR's chronic *Mycobacterium chimaera* infection and the 3T Device used during his open-heart surgery at MHI in March 2016.

[45] In September 2025, MML advised FRR that he had a good chance of success in a claim against the Defendants and MHI.

[46] Upon MML (i) confirming that FRR had a good chance of success and (ii) advising FRR that he was a probable class member of the Class Action:

- (i) MML discussed with both FRR and Ms. Plante, during three different phone calls, the advantages and disadvantages of participating in the Class Action versus initiating an individual action; and
- (ii) FRR instructed MML on October 31, 2025 to (a) file an individual lawsuit on behalf of the Moving Parties against the Defendants and MHI before the Superior Court

of Québec and (b) take all necessary procedural steps to seek a late opt out from the Class Action.

Mediation and settlement of the Class Action

[47] On June 27, 2025, a mediation took place in which the parties agreed to a settlement in principle of the Class Action. The settlement involved a lump-sum payment by the Defendants in a fixed amount in exchange for a class-wide release.

[48] At the time the settlement was reached, FRR (and his immediate family members) were class members. Neither the Defendants nor class counsel were aware of FRR's alleged *Mycobacterium chimaera* infection or any consideration by FRR to bring an individual action and seek an extension of the opt-out deadline. The Defendants understood that any claims of the Moving Parties, like all class members, would be subject to the settlement agreement and compensated by the lump-sum payment with a class-wide release.

[49] On June 28, 2025, the day after the mediation and settlement, class counsel wrote to the court asking that a judge be appointed for hearing a motion to approve the settlement. A case conference was held before me on August 11, 2025, to discuss the court's availability to hear the settlement approval motion once the settlement materials were finalized.

[50] The settlement agreement has not yet been signed or received court approval. However, the draft of the agreement is at an advanced stage.

The Defendants learn for the first time of the FRR Action

[51] On September 12, 2025, MML advised the Defendants' counsel that MML had been contacted by an individual who claimed to have been infected with *Mycobacterium chimaera* during surgery at MHI. This was the first time that either the Defendants or their counsel were made aware of FRR's alleged infection.

Further steps leading to the present motion

[52] On November 26, 2025, FRR issued the FRR Action, seeking damages of \$1.85 million against the Defendants and MHI.

[53] In the FRR Action, FRR details the damages he suffered as a result of the Defendants and MHI's alleged negligence, including a poor prognosis and reduced life expectancy, two additional open-heart surgeries, lifelong heavy antibiotic treatments with multiple side effects, persistent and incapacitating pain, permanent incapacity to work causing significant loss of income, incapacity to engage in daily activities and leisure, significant psychological harm, significant pain and suffering, diminished quality of life, and damages affecting his loved ones and family unity.

[54] On December 10, 2025, the Moving Parties delivered a Case Conference Memorandum to both class counsel and the Defendants' counsel, formally outlining their position and the procedural steps they intended to take.

[55] On February 20, 2026, the Moving Parties served their notice of motion to opt out of the Class Action.

ISSUES AND THE LAW

[56] I first review the *Johnson* decision at length, given its seminal role on this motion. I then consider the other case law relied upon by the parties. Finally, I apply the law to the evidence before the court.

The *Johnson* decision

Facts

[57] The class action in *Johnson* was a consolidation of three separate class actions commenced in 2013, 2016, and 2017. The first two class actions were certified in 2016 and the third was certified in 2017. The actions were consolidated into a single class action with a consolidated statement of claim filed on January 30, 2018: at paras. 7-8.

[58] Zarnett J.A. set out the nature of the class action as follows, at para. 9:

The class on behalf of whom the consolidated class action is brought consists of all persons who were incarcerated at the Elgin-Middlesex Detention Centre ("EMDC") between January 1, 2010 and May 18, 2017. The consolidated class action seeks declaratory relief and damages for alleged negligence and violations of the *Canadian Charter of Rights and Freedoms* arising from conditions at, and the operation and management of, EMDC during that class period.

[59] In *Johnson*, notice was provided by posting it on class counsel's website and by direct mail to the last known addresses of the class members: at para. 11. The notices were approved by the motion court on March 22, 2018 and published and sent by regular mail in late March 2018. The opt-out deadline was June 20, 2018: at paras. 11-16.

[60] The appellant, Donald Parker ("Parker"), was a class member who was incarcerated during the notice period. A notice was sent by regular mail to his last known address, which was at his father's house. Parker was not informed of the notice: at paras. 17-21.

[61] Zarnett J.A. summarized the notice evidence at para. 21:

The appellant denied actually receiving or seeing either of the Notices, or knowing about the class proceeding, at any time before the opt-out deadline in June 2018, or

indeed, until receiving a letter from Ontario's counsel in June 2020 after he had commenced his own action as described below.

[62] On April 27, 2020, before he was aware of the consolidated class action, Parker commenced an individual action against Ontario and employees of EMDC, as well as against the Attorney General of Canada and employees of the Joyceville Institute, where he had been incarcerated from August 2017 until 2019: at para. 23.

[63] Zarnett J.A. reviewed the claim, which he summarized, at para. 23:

The statement of claim alleges that in December 2016, while at EMDC, the appellant suffered a pressure necrosis injury to his left arm, accompanied by pain and swelling, but despite his complaints and the severity of his symptoms, he was not treated in a timely way. The appellant alleges that he was only taken to hospital approximately three days after the onset of his symptoms, by which time the muscle in his left arm had become necrotic, and he suffered renal failure and chronic kidney injury. He was required to undergo three emergency surgeries. Despite advice on his discharge from hospital that he would require physiotherapy and specialist intervention to regain some of his arm mobility, none were provided either while he was at EMDC or after his transfer to JAU. The appellant asserts that the defendants are liable in tort, for breach of fiduciary duty, and for infringements of his *Charter* rights. Substantial damages are claimed.

[64] After the claim was commenced, counsel for Ontario advised Parker's counsel of the class action. Ontario asked Parker to discontinue his individual action "against Ontario and against any proposed defendants who are employees of Ontario, at least as it pertained to events to the end of the class period (May 18, 2017)": at para. 24.

[65] Parker then brought a motion for leave to extend the opt-out period in the class action.

The decision of the Court of Appeal

[66] Zarnett J.A. first set out the jurisdiction of the court to extend the opt-out deadline, based on s. 12 of the *CPA*. He held, at para. 35:

[Section] 12 of the *CPA*, which confers on the court a power to 'make any order it considers appropriate respecting the conduct of a proceeding under [the *CPA*] to ensure its fair and expeditious determination' embraces a discretion to extend the time to opt out that has been set by court order.

[67] Zarnett J.A. reviewed the importance of the right to opt out under s. 9 of the *CPA*, recognizing that it protects individuals' litigation autonomy. The court held that a class member should be able to choose between bringing an action on their own and at their own risk, or deciding to accept the benefits of a class action which does not pose the same risks but is not under their control: at paras. 47-49.

[68] However, Zarnett J.A. held that litigation autonomy protected by the right to opt-out cannot automatically override the finality imposed by a court-ordered opt-out deadline. Zarnett J.A. adopted the “excusable neglect/no prejudice” test set out by Winkler J. (as he then was) in *Young v. London Life Insurance Co.*, [2002] O.J. No. 5971 (S.C.): at paras. 39, 46.

[69] Zarnett J.A. held that in order to balance the right to opt-out against the importance of certainty, finality, and respect of court-ordered deadlines, the excusable neglect/no prejudice test was appropriate. He held, at paras. 50-52:

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.

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”, 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.

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 added, underlining in original.]

[70] Zarnett J.A. held that Parker satisfied the excusable neglect/no prejudice test. While the court relied on the lack of notice as a factor, Zarnett J.A. noted, at para. 54, that lack of notice was not determinative in applying the test:

... 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” [and] a motion to extend the time to opt out is not the forum to relitigate the adequacy of a Notice Plan that was approved by a court order which has not been appealed.

[71] Zarnett J.A. also held that the fact “that the Notice Plan was adequate does not dispose of the excusable neglect issue”: at para. 54.

[72] Instead, Zarnett J.A. held that Parker had satisfied the excusable neglect requirement. At paras. 58 and 59, Zarnett J.A. relied on the evidence that:

- (i) Parker had not seen the notices;
- (ii) “The long form of notice was sent to an address at which he was not physically present and to which he did not return during the opt-out period, or indeed, until after his release from custody in 2019”; and
- (iii) “[T]here was nothing in the evidence to suggest the appellant should have been aware that he needed to implement a system to ensure that his father monitored his mail and brought to his attention.” Consequently, Parker “demonstrated a reasonable basis in good faith for the delay in seeking to opt out”.

[73] Zarnett J.A. also held that Parker had satisfied the no prejudice requirement. Zarnett J.A. relied on the evidence that there had been no judgment or settlement in the class action. He held, at paras. 56, 57 and 63:

The question is not whether, if the class proceeding had settled or resulted in a judgment before the appellant brought his motion to extend, the appellant would have been bound. 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: *3113736 Canada Ltd. v. Cozy Corner Bedding Inc.*, 2020 ONCA 235, 150 O.R. (3d) 83, at para. 31; *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792, 417 D.L.R. (4th) 467, at para. 86. Had the appellant moved to extend the time for opting out after judgment or settlement, his request would most likely have been denied on the basis of prejudice.

But here, there is no judgment or settlement. The appellant is not trying to escape the binding effect of something that has happened in the class proceeding. He wants to opt out before that happens. The question is whether he should be permitted to do so.

...

There was no evidence of any judgment or settlement of the class proceeding, or even of steps in that direction, that might have been taken in reliance on the appellant being a participating class member or the number of opt-outs not exceeding those who had done so by the June 2018 deadline. Class counsel did not oppose the appeal, a strong indicator that an extension of the time for the appellant to opt out would occasion no prejudice to the class. Ontario did not point to any prejudice it would suffer.

[74] Zarnett J.A. also found that there was no evidence that Parker’s “behaviour shows any flouting of, a cavalier attitude toward, or a strategic wait-and-see approach to, the court-ordered opt-out deadline, such that granting him an extension would cause prejudice to the integrity of the process or the administration of justice”: at para. 64.

[75] For those reasons, the court allowed the appeal and extended the opt-out deadline.

Other cases relied upon by the parties

[76] The Defendants rely on the decision in *Young* which set out the excusable neglect/no prejudice test adopted by the court in *Johnson*. The endorsement in *Young* is brief and does not provide an analysis of the evidence relied upon by the court to dismiss the motion for an extension of the opt-out deadline.

[77] The Defendants also rely on the decision in *Romeo v. Ford Motor Company*, 2019 ONSC 1831, in which the court approved the settlement agreement and refused, at the same hearing, to allow five proposed opt outs from the settlement after the opt-out deadline. The decision in *Romeo* predates *Johnson* and does not apply the excusable neglect/no prejudice test.

[78] However, the decision is consistent with the comments of the court in *Johnson* at paras. 56, 57, and 63 that a settlement could serve as the basis for prejudice to prevent an extension of the opt-out deadline.

[79] All the proposed late opt outs in *Romeo* had “indicated in various ways that the Notice of the settlement did not come to their attention in time for them to exercise their opt-out right in a timely way”: at para. 19. However, while Justice Morgan “sympathize[d] with these individuals”, he dismissed all of the late opt-out requests, regardless of how promptly they sought leave to extend the opt-out deadline after they became aware of the notice of settlement (which was to be approved by the court at the motion): at para. 20. Justice Morgan’s approach was consistent with the analysis of prejudice upon settlement as discussed in *Johnson*.

[80] Finally, the Defendants rely on *Heyder v. Canada (Attorney General)*, 2024 FC 1447, in which Justice Fothergill applied the *Johnson* test and dismissed the motion for leave to opt-out after the expiry of the opt-out period and after court approval of the settlement reached in the class action.

[81] In *Heyder*, the class action was certified on November 25, 2019, in accordance with a Final Settlement Agreement: at paras. 1, 39. The opt-out date was February 24, 2020. In December 2023, the petitioner brought a motion to opt out of the class proceeding.

[82] Justice Fothergill dismissed the motion. The court applied the *Johnson* test and held that permitting an opt-out after settlement will “deprive the Defendants of the finality promised by the” Final Settlement Agreement: at para. 39.

[83] The Moving Parties rely on the decision of the Supreme Court in *Sanis Health Inc. v. British Columbia*, 2024 SCC 40, 479 D.L.R. (4th) 571, in which the court considered the constitutionality of s. 11 of the *Opioid Damages and Health Care Costs Recovery Act*, S.B.C. 2018, c. 35. Section 11 authorized the government of British Columbia to bring an action on behalf of a class consisting of other provincial, territorial and federal governments in Canada to recover their respective health care costs caused by opioid-related wrongs.

[84] The decision in *Sanis Health* reaffirms the importance of litigation autonomy. The Supreme Court referred to the court’s discretion to permit a late opt out when a class member was not aware of the proceeding or the harm they suffered: at para. 69. However, because the issue of prejudice was not before the Court, the Supreme Court did not assess whether prejudice, or any other factors, should be considered in late opt out requests.

[85] The Moving Parties rely on the decision of the Superior Court of Québec in *Fitzsimmons c. Cie matériaux de construction BP Canada*, 2016 QCCS 1446, which was referred to by the Supreme Court in *Sanis Health*, at para. 69. In *BP*, the settlement agreement provided that a class member would have 150 days to bring a claim for damages caused by the allegedly defective roof shingles, starting only from the discovery of damage: *BP*, at para. 34. It was on that basis that the court found, at para. 35:

Il doit en être de même pour le délai d’exclusion. Ce délai ne peut courir avant l’apparition d’un vice. Avant cela, les membres sont dans l’impossibilité d’agir.

[86] Consequently, the court in *BP* did not find that an extension of an opt-out period must always be permitted at any time after settlement if a class member does not know of any damages. That issue was not before the court, and such a conclusion (even if it had been reached) would be inconsistent with *Johnson* which is the settled law in Ontario.

Application of the law to the present case

[87] The Moving Parties make two submissions:

- (i) The *Johnson* test does not apply because it was “impossible” for FRR to take any steps in the Class Action as his symptoms did not occur until April 2023, after the opt-out deadline expired; and
- (ii) The Moving Parties have satisfied the excusable neglect/no prejudice test.

[88] I reject both submissions. I address each of these issues below.

Issue 1: Does the *Johnson* test apply?

[89] I find that the *Johnson* test applies in the present case. Even if FRR could not have known that he would suffer an infection as a result of the 3T Device, he was still a class member upon certification.

[90] In many class actions, a party may not suffer significant damages until well after certification or settlement, if at all. Cases involving defective medical devices, defective consumer products, or design flaws in car parts all raise significant latency issues in the discovery of damages which may not be found for many years, if at all.

[91] Using the present case as an example, the possible infection arising from the 3T Devices only occurs rarely (accepting MHI's notice that *Mycobacterium chimaera* infection only occurred in 2 out of 8,458 patients who had open-heart surgery since 2012). Even if an infection occurred, symptoms may not emerge for "years".

[92] In the present circumstances, it is not "impossible" for a class member who suffered no significant medical damage to take steps in the Class Action. Such a class member has two choices: that class member could avoid potentially significant legal costs and remain in the Class Action, seeking damages for general stress and certain medical procedures to address the risk from exposure. Alternatively, the class member could choose to opt out of the Class Action and later bring an individual action if significant physical damages occurred (subject to any limitations defences which could be raised in the individual action).

[93] Similarly, a class member who suffered significant damage (whether through physical symptoms or general stress and medical procedures to address the risk from exposure) must also decide whether to pursue their claim in a class action (without direct cost for legal counsel) or through an individual action. Again, it is not "impossible" for that class member to act.

[94] In the *BP* case relied upon by the Moving Parties, there was an impossibility to act because the 150-day claim period ran only after the discovery of the damage to the shingles. It was on that basis that the court extended the opt-out deadline by the same 150-day period.

[95] No such discovery-based provision existed in *Johnson*. Nowhere in *Johnson* does the court suggest that the excusable neglect/no prejudice test does not apply to class members who have not yet suffered significant damage (or any damage). Instead, the test considers the class member's knowledge of the class action and the opt-out date, not the extent of injuries suffered.

[96] If the Moving Parties' position was accepted, a person without damages could "wait and see" if significant damages occurred. However, it is not "impossible" for the class members to act. Rather, that class member must make choices based on their knowledge at the time of the opt-out deadline. As the Court held in *Johnson*, at para. 51:

Were there no deadline, or if it could be flouted, cavalierly ignored, or strategically treated as an invitation to “wait and see”, 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.

[97] The basis for the *Johnson* test is to balance litigation autonomy with the importance of certainty and the respect of court orders. Zarnett J.A. held, at para. 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.

[98] Consequently, the test under *Johnson* does not require damages to have occurred. Rather, the court considers (i) whether the class member who seeks a late opt out has acted in “good faith” and with a “reasonable basis” in failing to meet the opt-out date and (ii) the “no prejudice” test.

[99] I therefore apply the *Johnson* test to the facts before the court on this motion.

Issue 2: Application of the *Johnson* test

[100] I find that the Moving Parties have (i) “demonstrated a reasonable basis in good faith for the delay in seeking to opt out” but (ii) not established that there would be no prejudice to the Defendants or to the integrity of the class action process if the late opt-out was permitted. I address each of these requirements below.

(i) Excusable neglect

[101] In the present case, FRR had no notice of the Class Action until he was advised by MML on June 17, 2025. On September 15, 2023, FRR had the Introductory Call with Malavaud, who did not advise FRR of the Class Action. Since FRR did not even know about the Class Action, I cannot impute knowledge of the opt-out date to him.

[102] Further, the evidence is that FRR acted in good faith and reasonably when he did not receive notice of the Class Action under the notice plan. There was no evidence of direct mailing to him, and any failure by FRR to read a particular newspaper on a particular day, or see a particular social media advertisement is “excusable”.

[103] In *Johnson*, the court found that there was “excusable neglect” because “there was nothing in the evidence to suggest the appellant should have been aware that he needed to implement a system to ensure that his father monitored his mail and brought to his attention, while in custody, notices pertaining to matters such as potential class actions or that he had control over whether that would be done”: at para. 59.

[104] In the present case, there is no evidence to suggest that FRR should have taken any further steps to become aware of the Class Action or opt-out deadline. Similarly, after being informed of the existence of the Class Action on June 17, 2025, FRR acted in good faith when he instructed counsel to review evidence relating to his file before deciding whether to opt out and pursue an individual claim.

[105] Consequently, I find that the first branch of the *Johnson* test is satisfied.

(ii) *No prejudice*

[106] The Moving Parties submit that the Defendants did not suffer prejudice by entering into a settlement agreement because the agreement has not been finalized. Put differently, the Moving Parties submit that without a court-approved settlement, the second branch of the *Johnson* test cannot be met. I do not agree.

[107] In *Johnson*, the Court did not limit its prejudice analysis to only finalized or court-approved settlements. In concluding that there was no prejudice, the Court relied on the fact that there was no evidence of a settlement “or even steps in that direction, that might have been taken in reliance on the [moving party] being a participating class member”. Here, the Defendants negotiated a settlement in principle which provided for a class-wide release, and FRR was a member of the class that agreed to provide the release.

[108] By settling the Class Action, the Defendants took significant steps in the direction of settlement, taken in reliance on the number of opt-outs not exceeding those who had done so by the September 17, 2021 deadline: *Johnson*, at para. 63.

[109] In the present case, the Defendants knew which putative class members had opted out of the Class Action. The Defendants had settled, in 2022 and 2023, all four opt-out actions brought under the carriage of MML. The Defendants then had to consider whether to settle all remaining claims in the Class Action. On the basis of the known class members, the Defendants had to decide “how to respond to” the Class Action: *Johnson*, at para. 51. By reaching a fixed amount settlement in exchange for a class-wide release, the Defendants relied on the finality of the opt-outs.

[110] The prejudice to the Defendants is not removed by the fact that the parties need to complete settlement documentation and obtain court approval. A settlement has been reached between the parties. Drafting is at an advanced stage. While the parties need to obtain approval from provincial health authorities, this does not detract from the settlement discussions leading to the agreement, in which the Defendants set out their views as to reasonable compensation and negotiated an amount satisfactory to both sides. That settlement “egg” cannot be “unscrambled” by the removal of FRR from the settlement; the parties cannot be required to start from scratch.

[111] If the late opt out is permitted, the Defendants would either be required (i) to pay the lump sum for a lesser release than previously negotiated, (ii) walk away from the settlement and carry on with the defence of the claim, or (iii) attempt to renegotiate the agreement after having set out

settlement positions during the course of negotiations. All of these options cause prejudice to the Defendants.

[112] Permitting an opt out after a court-ordered settlement, when the Defendants had no notice of the individual claim, deprives the Defendants of the finality promised by that settlement: *Heyder*, at para. 39. The same principle applies once a settlement is reached, regardless of court approval.

[113] Determining whether to extend an opt-out deadline will depend on the facts of each case. In the present case, the Moving Parties did not seek an extension until after the settlement in principle was reached. Had the Moving Parties made the request in September 2023 or shortly thereafter, this case may well have been decided differently under the *Johnson* test.

[114] However, the Moving Parties did not advise the Defendants of their claim until after settlement was reached. Consequently, the prejudice identified by the Court in *Johnson* will occur if the extended opt-out deadline is granted.

[115] Further, granting the extended deadline would be contrary to the integrity of the class action process, which requires certainty of opt-out deadlines to avoid “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”: *Johnson*, at para. 51.

[116] The Moving Parties also rely on the comments of Lauwers J.A. in *Johnson v. Ontario*, 2021 ONCA 650, 158 O.R. (3d) 266, (“*Johnson* Quash Decision”), where the Court dismissed Ontario’s motion to quash Parker’s appeal on the basis that it concerned procedural and not substantive relief.

[117] Given that the issue in the *Johnson* Quash Decision was different from the one in the appeal decision, the proper test on a motion to extend an opt-out was not before the court. That issue was addressed in the appeal decision.

[118] In the *Johnson* Quash Decision, the court recognized the right to opt out as a substantive right, consistent with the importance of litigation autonomy: at paras. 15-17. The Moving Parties rely on the following comment of Lauwers J.A., at para. 25:

For an individual with a major claim like Mr. Parker, a class action is self-evidently not the preferable vehicle. Apart from his inability to control the litigation, he is unlikely to be able to achieve anything like the measure of damages he is seeking for the personal injury he suffered.

[119] However, the ability to seek significant damages in an individual action was not included as a relevant consideration in the *Johnson* excusable neglect/no prejudice test to extend opt-out periods. This consideration only arose in the *Johnson* Quash Decision on the issue of whether the

motion judge's decision to extend the opt-out date should be considered a substantive right or a procedural one. This distinction was made clear by Lauwers J.A., at para. 26:

Mr. Parker lost substantive rights of significant importance when his motion for an extension of time within which to opt out of the class action was denied. In my view, it is reasonable to treat the order under appeal as a final order for the purposes of determining appeal rights.

[120] Consequently, I do not accept the Moving Parties' position that the *Johnson* test should be altered based on Lauwers J.A. recognizing the substantive nature of the opt-out right. The test set out by Zarnett J.A. in the *Johnson* appeal decision remains authoritative and applicable.

[121] Finally, the Moving Parties also appeared to rely on Lauwers J.A.'s comments to raise the argument that they will not be adequately compensated in the settlement. However, that issue can only be considered at the settlement approval hearing, where class members can support or oppose the settlement or distribution protocol.

[122] Settlements of a class action must fall within a zone of reasonableness. If the Moving Parties believe that any limits on their claims (if any) in the settlement agreement are not reasonable, the court can consider the issue in light of the established factors for settlement approval. The comments of Lauwers J.A. do not purport to change long-standing law on settlement approval, and do not address the test to extend an opt-out deadline.

ORDER AND COSTS

[123] For the above reasons, I dismiss the motion. While both parties are seeking approximately \$35,000 (inclusive of HST and disbursements) as partial indemnity costs of this motion, counsel for the Moving Parties asked the court at the end of the hearing to permit written submissions on costs in the event that the Defendants were successful. I agreed to do so even though the quantum of the fees sought is not in issue.

[124] Consequently, if the parties cannot agree on costs, I will allow the Moving Parties to make costs submissions of no more than three pages which shall be delivered by July 31, 2026. The Defendants shall deliver responding costs submissions of no more than three pages by August 14, 2026. The Moving Parties may submit a reply costs submission of no more than one page by August 21, 2026.

GLUSTEIN J.

Date: 20260703

CITATION: Nardi v. Sorin Group Deutschland GmbH., 2026 ONSC 3891
COURT FILE NO.: CV-17-0057915365868-00CP
DATE: 20260703

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BRUNO NARDI

Plaintiff

AND:

SORIN GROUP DEUTSCHLAND GMBH and
LIVANOVA CANADA CORPORATION.

Defendants

REASONS FOR DECISION

Glustein J.

Released: July 3, 2026