

Informational Note: Creating a Notice Plan

This document provides some guidance on preparing a comprehensive notice plan for an Ontario class action. The information in this document is provided as an aide only and does not constitute a summary of the notice requirements in the *Class Proceedings Act, 1992*.

The notice plan for each class action should be tailored to the class members being targeted.

The Requirement to Create a Notice Plan

Class members are entitled to notice of certain steps of a class action (e.g. certification, settlement approval hearings, the claims process, etc.).¹ As part of this process, the plaintiff must present a notice plan for the court's approval. A notice plan sets out how the notice will be disseminated to class members.

The objective of a notice plan is to notify the greatest number of potential class members reasonably possible and provide those class members with the opportunity to see, read, or hear about various stages in the proceeding, understand their rights (including any right to opt out of the class action or to participate in the settlement approval hearing), and understand the process and deadline for applying to receive a portion of any settlement funds or court award.

Considerations when Creating a Notice Plan

Notice plans should answer the basic questions of who is being targeted; how that audience can be reached; and what the message is. The budget is also a main consideration and should not be overlooked; even a perfect notice plan will not be useful if there is no budget to execute it.

Depending on the budget, one may consider retaining a marketing or claims administration firm to assist in developing a notice plan.

1. Who is being targeted?

A successful notice plan keeps its audience central. Different classes will consist of different people, and it is important to consider class members' demographics before deciding on the appropriate way to reach them.

In each case, counsel should identify who they intend to target by answering the following questions:

1. Who are the targeted individuals? This would involve an assessment of class members' demographics. In some cases, the targeted individuals will be narrow (e.g. a case regarding a pharmaceutical device that was used in men or women of a certain age). In other cases, the targeted individuals will be broad (e.g. a consumer product case).
2. Where are the targeted individuals located? In some cases, the geographic scope might be narrow (e.g. in an environmental case), but in other cases the class is provincial or national in scope.

¹ *Class Proceedings Act, 1992*, SO 1992, c 6 at, for example, ss. [17\(1\)](#), [18\(1\)](#), [19\(1\)](#), [20\(3\)](#), [27.1\(8\)](#), [27.1\(9\)](#), [27.1\(12\)](#), [29.1\(2\)](#).

2. How can the targeted audience be reached?

Where counsel publishes the notice depends on the targeted audience.

If direct delivery (either by mail or email) is an option, that will often be most effective. To directly deliver notice to class members, counsel must have access to class members' contact information, for example through the defendants' records. Class member contact information may also be available from a third-party(ies). For example, in certain industries, customer information is maintained for recall or warranty purposes. It may be possible to require the relevant third-party(ies) produce that information pursuant to a court order. In other circumstances, it may be possible to purchase a mailing list of companies participating in the relevant industry(ies). Depending on how current the address information is, counsel may be well advised to run the address information through a change of address software. Further, unless counsel are confident that the direct delivery is comprehensive, counsel will likely want to supplement the direct delivery with other forms of notice.

Again, when considering how the target audience can be reached, it is necessary to look at the demographics. For example, if the notice plan targets an elderly audience in a particular geographic region, the notice may be more likely to reach the intended individuals if it is disseminated through the local newspaper, radio and/or social media ads that are set to deliver only in that geographic region.

Often, the class is made up of a wide spectrum of individuals and will require counsel to provide notice through multiple forms and platforms. For example, some product liability or price-fixing cases will affect a broad group of people across the country. In these circumstances, social media can be an effective means of reaching the target audience. Possible platforms include: Facebook/Instagram, Twitter, Google Search Ads (appear in search results when searching a particular term), Google Display Ads (appear on websites across the Google network), and YouTube ads.

When designing a digital notice plan, it is helpful to include some flexibility in order to move some (or all) of the budget to a platform that is performing better. It can also be helpful to set a flexible budget that can be adjusted depending on claim numbers (for example, \$40,000 to \$60,000). For a claims notice, it can also be helpful to change the messaging when the claims deadline is approaching to highlight the time sensitive nature. This flexibility should be included in the notice plan put before the court, to avoid the delays of seeking court approval for every modification.

The bidding process for online advertisements can be complex and evolving. Counsel may wish to retain a digital advertising firm to implement the digital aspect of the notice plan. However, counsel should ask for ongoing reports and recommendations as to the performance of the ads.

The notice should be posted on class counsel's website and, if a claims notice, the website of the claims administrator. Having information about the distribution included on the claims administrator's website will add to the legitimacy of the notice.

Other forms of notice may include one or more of the following media channels:

- Newspapers (paper and/or electronic)²
- Television
- Press releases
- Radio
- Magazines (paper and/or electronic)
- Medical and social groups
- Special interest groups
- Industry associations and/or publications (paper and/or electronic)

3. What is the budget?

Financial resources should also be considered when creating a notice plan. Counsel should determine who will pay the notice-related expenses and an appropriate budget.

The *Class Proceedings Act, 1992* permits a court to make any order it considers appropriate as to the costs of any notice under sections 17, 18 or 19, including an order apportioning costs among parties. However, the costs of any notice under section 17 may be awarded to the representative plaintiff only in the event the plaintiff is successful in the proceeding, unless the defendant consents to payment of all or a portion of the notice costs at an earlier time. Where notice is given under section 29(2) advising that an action has been dismissed for delay, the solicitor for the representative plaintiff must bear the costs of giving notice and shall not attempt to recoup any portion of the costs from the class or any class member, or from the defendant.³ In the settlement context, the defendants may be required to pay the costs of the notice plan, or it may be paid from the settlement funds.

The amount of the budget will depend on a number of factors, including any previous notice provided in the case and the stage of the proceeding. Often, the claims notice will have a higher budget, as this is when individual class members must step forward to claim their share in a settlement or court award.

In the appropriate case, consideration should be given to hiring a marketing professional to help develop the notice plan. If a marketing professional is used, having them engaged early allows them to think through many of these considerations with counsel.

In all cases, counsel should also consider whether the selected delivery method is an efficient use of resources. There may be another avenue that may cost less or provide a better opportunity for counsel to maximize the reach of the notice.

Content of the Notice

The *Class Proceedings Act, 1992* prescribes various requirements for the notices themselves. For example, they must be written in English and French, unless otherwise instructed by the Court,⁴ and must be written in plain language.⁵ The content to be included in certain notices is also prescribed.

² Counsel may want to place the notice through a marketing firm or claims administration firm. Those firms may receive a volume discount and therefore have access to more favourable pricing.

³ *Class Proceedings Act, 1992* at [ss. 22\(1\)-22\(1.1\)](#). However, see also [s. 29.1\(4\)](#).

⁴ *Class Proceedings Act, 1992* at [s. 20\(2\)](#).

⁵ *Class Proceedings Act, 1992* at [s. 20\(1\)](#).

Parties should review the requirements of the *Class Proceedings Act, 1992* carefully to ensure that all relevant requirements are met. Generally, it should be clear to class members what the notice is asking them to do.

Practically speaking, it is often not possible to include all the required information in a digital advertisement or even a paper advertisement. In practice, counsel may want to include the key information in the digital or paper advertisement (depending on the case, the key information might include the settlement value; hearing date; opt-out deadline; and method for obtaining more information) and direct class members to the long-form notice on counsel's website and/or the claims administrator's website for more detailed information. By doing so, counsel can design the advertisement in a way that is more visually appealing and therefore more likely to capture class members' attention.

If a visual element is being included in the notice, counsel should be careful not to violate copyright and to ensure that the image will not create confusion as to the subject matter of the class action and/or the defendants.

The notice should also be drafted with a view to accessibility. In addition to English and French, thought should also be given to whether the notice plan should be published in other languages, or if there is a need to consider other formats that will ensure that the notice is accessible to class members. To improve accessibility, the notice should be drafted in plain language, headings should be used to help in understanding, and class members should be instructed on who to contact for more information.