(i) the plaintiff, Nancy Zacharias is entitled to compound interest on any arrears of income replacement benefits which may be found to be owing to her; and

(ii) I urge the parties to agree on costs, but should they be unable to do so, the plaintiff shall serve and file written submissions no longer than three double-spaced pages together with her costs outline within 20 days. The defendant shall serve and file written submissions no longer than three double-spaced pages together with its costs outline within 20 days thereafter.

Motion granted.

Lundy et al. v. Via Rail Canada Inc. et al.

[Indexed as: Lundy v. Via Rail Canada Inc.]

2012 ONSC 4152

Superior Court of Justice, Perell J. *July 13, 2012*

Civil procedure — Class proceedings — Communication with putative class members — Defendants in proposed class action sending settlement offers to putative class members who they did not believe were represented by counsel — Defendants disclosing existence of class action in their correspondence — Plaintiffs bringing motion for disclosure of releases signed by putative class members who accepted offer, for order rescinding settlements and for order enjoining communication between defendants and putative class members — Disclosure ordered — Rescission not appropriate as there was no evidence that defendants intended to interfere with proposed class action or that putative class members wanted rescission — No breach of Rules of Professional Conduct which prohibit lawyers from directly contacting represented person taking place — Defendants permitted to communicate with putative class members who were not known to be clients of counsel of record but required to give plaintiffs copy of correspondence seven days before distribution.

In the pre-certification phase of a proposed class action, the defendants communicated with several putative class members, whom they did not know were represented by counsel, and made a settlement offer. The defendants disclosed the existence of the proposed class action and provided contact information for class counsel. When the plaintiffs learned about the communication and the three resulting settlements, they brought a motion for disclosure of the releases signed by the putative class members, an order rescinding the settlements and an order enjoining communication between the defendants and putative class members.

Held, the motion should be granted in part.

The plaintiffs were entitled to disclosure of the releases.

Rescission of the settlements was not appropriate in the circumstances. There was no evidence that the defendants had a hidden agenda of interfering with the proposed class action or that the putative class members wished rescission.

The defendants should be permitted to communicate with putative class members provided that the plaintiffs were provided with a copy of the correspondence seven days before distribution and provided that there were no communications to the putative class members known to be clients of the lawyer of record. An order restricting communication by a defendant to class members is extraordinary. There was no evidence of a breach of the *Rules of Professional Conduct* prohibiting lawyers from communicating with a represented person. The letters to putative class members were sent by the defendants, not by their lawyer, and there was no evidence that the defendants' lawyer was using its clients to circumvent its professional obligations.

Cases referred to

1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada, [2003] O.J. No. 1016, 121 A.C.W.S. (3d) 426 (Master); *Atkinson v. Ault Foods Ltd.*, [1997] O.J. No. 4676 (Gen. Div.); *Attis v. Canada (Minister of Health)*, [2010] O.J. No. 3760, 2010 ONSC 4508, 323 D.L.R. (4th) 309 (S.C.J.); *Bartolome v. Mr. Payday Easy Loans Inc.*, [2008] B.C.J. No. 167, 2008 BCSC 132, 165 A.C.W.S. (3d) 415; *Bywater v. Toronto Transit Commission* (1999), 43 O.R. (3d) 367, [1999] O.J. No. 1402, 83 O.T.C. 12, 28 C.P.C. (4th) 307, 87 A.C.W.S. (3d) 878 (S.C.J.); *Fantl v. Transamerica Life Canada* (2009), 95 O.R. (3d) 767, [2009] O.J. No. 1826, 2009 ONCA 377, 72 C.P.C. (6th) 1, 249 O.A.C. 58, affg [2008] O.J. No. 4928, 66 C.P.C. (6th) 203, 244 O.A.C. 183, 173 A.C.W.S. (3d) 691 (Div. Ct.), affg [2008] O.J. No. 1536, 60 C.P.C. (6th) 326, 166 A.C.W.S. (3d) 1045 (S.C.J.) [Leave to appeal granted [2008] O.J. No. 2593, 169 A.C.W.S. (3d) 710 (S.C.J.)]; *Glover v. Toronto (City)*, [2009] O.J. No. 1523, 70 C.P.C. (6th) 303, 176 A.C.W.S. (3d) 947 (S.C.J.); *Heron v. Guidant Corp.*, [2007] O.J. No. 3823 (S.C.J.) [Leave to appeal refused [2008] O.J. No. 48, 232 O.A.C. 366, 163 A.C.W.S. (3d) 906 (Div. Ct.); *Lewis v. Shell Canada Ltd.* (2000), 48 O.R. (3d) 612, [2000] O.J. No. 1825, [2000] O.T.C. 394, 46 C.P.C. (4th) 378, 97 A.C.W.S. (3d) 395 (S.C.J.); *Pearson v. Inco Ltd.* (2001), 57 O.R. (3d) 278, [2001] O.J. No. 4877, [2001] O.T.C. 892, 16 C.P.C. (5th) 357, 110 A.C.W.S. (3d) 248 (S.C.J.) [Leave to appeal refused [2002] O.J. No. 2134 (S.C.J.)]; *Richard v. British Columbia*, [2008] B.C.J. No. 221, 2008 BCCA 53, 50 C.P.C. (6th) 4, 290 D.L.R. (4th) 336, 164 A.C.W.S. (3d) 212, 77 B.C.L.R. (4th) 341, 251 B.C.A.C. 143, [2008] 6 W.W.R. 670, affg [2007] B.C.J. No. 1645, 2007 BCSC 1107, 284 D.L.R. (4th) 481, 159 A.C.W.S. (3d) 340, [2008] 2 W.W.R. 450, 74 B.C.L.R. (4th) 262; *Smith v. National Money Mart Co.*, [2007] O.J. No. 1507, 156 A.C.W.S. (3d) 1001 (S.C.J.); *Vitelli v. Villa Giardino Homes Ltd.* (2001), 54 O.R. (3d) 334, [2001] O.J. No. 2119, [2001] O.T.C. 420, 11 C.P.C. (5th) 65, 105 A.C.W.S. (3d) 809 (S.C.J.); *Ward-Price v. Mariners Haven Inc.* (2004), 71 O.R. (3d) 664, [2004] O.J. No. 2308, [2004] O.T.C. 474, 3 C.P.C. (6th) 116, 131 A.C.W.S. (3d) 388 (S.C.J.); *White v. IKO Industries Ltd.*, [2010] O.J. No. 2954, 2010 ONSC 3920, 98 C.P.C. (6th) 68 (S.C.J.)

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6 [as am.]

Authorities referred to

Federal Judicial Centre, *Manual for Complex Litigation*, 4th ed. (Washington, DC: Federal Judicial Centre, 2004)

Law Society of Upper Canada, *Rules of Professional Conduct*

MOTION by the plaintiffs in a proposed class action for disclosure of the releases signed by the putative class members, the order rescinding settlements and the order enjoining communications between defendants and the putative class members.

Harvey T. Strosberg, Q.C., and *Ted Charney*, for plaintiffs.
John A. Campion and *Antonio Di Domenico*, for defendants.

PERELL J.: —

A. *Introduction*

[1] These reasons for decision describe the developing legal territory of regulating the communications to putative class members during the period before a proposed class action is certified under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

B. *Factual Background*

[2] In the case at bar, which is a proposed class action, without obtaining court permission, Via Rail Canada Inc. ("Via Rail") and Canadian National Railway Company ("CNR"), the defendants in the proposed class action, communicated with several putative class members, who had been passengers on a train that derailed on route to Toronto. Via Rail and CNR made a settlement offer to the putative class members. Although Via Rail and CNR did not know it, some of the putative class members already had a lawyer and client relationships with proposed class counsel.

[3] The letter from Paul Richings, senior manager of national claims at Via Rail to Deanna Villella is an example of the letter. The letter stated:

> Dear Ms. Villella:
>
> *Re: Derailment on February 26, 2012 in Burlington, Ontario*
>
> We write to you because our records indicate that you were a passenger on VIA Rail Train 92 which derailed on February 26, 2012 in Burlington, Ontario and that our records indicate that you are not currently represented by counsel. We are very sorry that you were affected by the derailment and hope that you are doing well.
>
> VIA Rail would like to deal with any potential claims you may have against it in a fair and reasonable manner. Unfortunately, we do not know your particular situation nor whether you have suffered actual damages arising from the accident. However, in recognition of your patronage of VIA Rail and in the hope that you may choose to travel with VIA Rail in the future, VIA Rail wishes to make a payment to you for any claim arising from the derailment.

In that regard, VIA Rail's offer to settle is as follows:

> (a) VIA Rail will pay you the all inclusive sum of $3,000 CDN;
>
> (b) You will execute the Full and Final Release that is attached to this letter. The Full and Final Release is in favour of VIA Rail and Canadian National Railway Company, and further precludes any potential claims against any person or entity that might make a claim against VIA Rail and/or Canadian National Railway Company (as fully described in the attached Full and Final Release); and
>
> (c) VIA Rail will deliver a cheque made payable to you in the amount of $3,000 CAD within 20 days following the reception by VIA Rail Canada of the properly executed Full and Final Release attached to this letter.

This offer to settle is made with no admission of liability, breach, fault or neglect on the part of VIA Rail or Canadian National Railway Company.

It would be appropriate that you obtain independent legal advice before accepting this offer of final resolution. If, contrary to our records, you are represented by counsel, please bring this letter to your counsel's attention.

Further, while VIA Rail and Canadian National Railway Company are happy to resolve all your claims for damages directly with you, we do wish to inform you that an intended class action arising from the derailment has been commenced. If you wish, you may contact the intended class action law firms: Theodore Charney of Falconer Charney LLP (416-964-3408) or Harvey Strosberg of Sutts Strosberg LLP (519-561-6244). We understand that further information regarding the intended class proceeding may be found at http://www.viaclassaction.com.

We would be happy to expand on the foregoing and/or answer any question you may have.

Paul Richings. Senior Manager, National Claims, VIA Rail Canada Inc. . . . .

cc. Theodore Charney, Falconer Charney LLP

Harvey Strosberg, Sutts Strosberg LLP

[4] When the plaintiffs in the proposed class action learned about the communication and above several settlements, they brought a motion for (a) disclosure of the releases signed by the putative class members; (b) an order rescinding the settlements; and (c) an order enjoining communications between the defendants and putative class members.

C. *Decision*

[5] After the conclusion of argument of the motion, I made the following endorsement (with these reasons to follow):

> The defendants corresponded with the passengers who are the putative class members of this proposed class action following a serious train derailment. The plaintiffs move for disclosure of releases, rescission of the

settlements, and an order enjoining communications of settlement offers by the defendants to the putative class members. For written reasons to follow:

(1) I order the defendants to disclose the releases to the plaintiffs;

(2) I order that the defendants may complete the settlements for which releases have been signed;

(3) I order that the defendants may communicate with the putative class members as the defendants may be advised provided that the plaintiff is provided with a copy of the correspondence 7 days before distribution and provided that there are no communications to the putative class members known to be clients of the lawyer of record.

I make no order as to costs.

[6] I should add that although I was asked to explain my reasons for the order, the terms of the order can, in part, be explained by the willingness of the lawyers of the parties to act in a civil and reasonable manner in accordance with their respective professional responsibilities to their clients and to their opponents.

D. *Reasons for Decision*

[7] Communications between defendants and putative class members are problematic because these communications may interfere with a nascent lawyer and client relationship and may dismember the putative class by persuading putative class members not to participate, and this, in turn, may discourage the representative plaintiff or class counsel from prosecuting the proposed class action.

[8] Class size and class cohesion are factors in the economic viability of a class action and a defendant's pre-certification communication could be a tactic to thwart the class action. On the other hand, communications to putative class members may be lawful, in the normal course of business, appropriate, and the communications may even advance the purposes of the Act, which have the ultimate purpose of obtaining access to justice for the putative class members.

[9] The case at bar is illustrative that communications by defendants to putative class members are not necessarily a bad thing. It seems that three putative class members accepted the defendants' offer to settle and signed releases. The circumstances of these class members were not disclosed on the motion, but it is conceivable that they are adult, intelligent, competent, fully informed putative class members, perhaps assisted by independent legal advice or independent legal representation. It is also conceivable that they survived the train derailment without a significant injury. If those were the circumstances, accepting

VIA Rail's settlement offer would provide these putative class members immediate access to justice and the defendants could be commended for being responsible corporate citizens doing the right thing.

[10] On the motion, since there was no evidence of the actual circumstances of the putative class members that accepted the defendants' offer, there was no evidence that would provide a factual basis to set aside the releases based on the various legal doctrines that might yield the remedy of rescission, including misrepresentation, mistake, duress, mental incompetency or unconscionability.

[11] There was no evidentiary basis to conclude that the defendants had a hidden agenda of interfering with the proposed class action, which they disclose in the letter along with contact information to find class counsel. There also was no evidence that the putative class members wished rescission or that the plaintiffs' lawyer had instructions to seek rescission. All this being the case, explains why I ordered that the defendants may complete the settlements for which releases have been signed but should disclose the releases to the plaintiffs.

[12] I also ordered that the defendants may communicate with the putative class members as the defendants may be advised provided that the plaintiff is provided with a copy of the correspondence seven days before distribution and provided that there are no communications to the putative class members known to be clients of the lawyer of record. This part of the order was my solution for what I regarded as a relatively mild example of the problems of regulating the communications to putative class members during the period before a proposed class action is certified.

[13] In the United States, the Federal Judicial Centre, *Manual for Complex Litigation*, 4th ed. (Washington, DC: Federal Judicial Center, 2004), § 21.12 at pp. 248, 249, describes the problem of pre-certification communications:

> Direct communications with class members, however, whether by plaintiffs or defendants, can lead to abuse. For example, defendants might attempt to obtain releases from class members without informing them that a proposed class action complaint has been filed. . . . .
>
> Misrepresentations or other misconduct in communicating with the class may impair the fairness and adequacy of representation under Rule 23(a)(4), may affect the decision whether to appoint counsel under proposed Rule 23(g), and may be prohibited and penalized under the court's Rule 23(d)(2) plenary protective authority. Defendants and their counsel generally may communicate with potential class members in the ordinary course of business, including discussing settlement before certification, but may not give false, misleading, or intimidating information, conceal

> material information, or attempt to influence the decision about whether to request exclusion from a class certified under Rule 23(b)(3). Ethics rules restricting communications with individuals represented by counsel may apply to restrict a defendant's communications contract with the named plaintiffs.

(Footnotes omitted)

[14] Regulating communications with putative class members is problematic largely for three reasons. First, the legal nature of the relationship between some putative class members and the lawyer for the proposed representative plaintiff is unclear. In many proposed class actions, a putative class member will not even know that there is a proposed class action until after the certification hearing, and, practically speaking, during the pre-certification phase, the putative class member may be a distant stranger to the lawyer. Thus whether and how the traditional rules and privileges about communications between lawyer and client apply pre-certification is unclear in the context of a proposed class action and, accordingly, how to govern those communications is problematic.

[15] Second, although the legal nature of the relationship between putative class members and the lawyer for the proposed representative plaintiff is unclear, some putative class members will have a traditional lawyer-and-client relationship with the lawyer for the representative plaintiff or these putative class members will have independent legal representation from other lawyers. In other words, putative class members may have diverse legal relationships with lawyers during the pre-certification phase and, accordingly, how to govern communications in these circumstances is not clear and is problematic.

[16] Third, the attitude of the putative class member to the proposed class action is also unclear during the pre-certification phase. Some class members may not even know about the proposed class action, and those that do know may have a range of attitudes about participating in the class action. How to regulate communications with a group of persons who might benefit from participating in the class action but who have a widely diverse attitude towards participating is not clear and hence is problematic.

[17] There, however, is case law that has explored the territory of the nature of the relationship between putative class members and putative class counsel and of regulating communications to putative class members during the period before a proposed class action is certified. While the law in this area is still a work in progress, several principles can be extracted from this case law.

[18] At the outset of a class action and throughout, there is a genuine plaintiff who has a lawyer and client relationship with the lawyer of record: *Fantl v. Transamerica Life Canada*, [2008] O.J. No. 1536, 60 C.P.C. (6th) 326 (S.C.J.), at paras. 73-80, leave to appeal granted [2008] O.J. No. 2593, 169 A.C.W.S. (3d) 710 (S.C.J.), affd [2008] O.J. No. 4928, 66 C.P.C. (6th) 203 (Div. Ct.), affd (2009), 95 O.R. (3d) 767, [2009] O.J. No. 1826, 2009 ONCA 377; *Richard v. British Columbia*, [2007] B.C.J. No. 1645, 2007 BCSC 1107, motion to quash appeal dismissed [2008] B.C.J. No. 221, 2008 BCCA 53; *Attis v. Canada (Minister of Health)*, [2010] O.J. No. 3760, 2010 ONSC 4508 (S.C.J.). The plaintiff is a putative class member, and he or she will be the class's representative plaintiff if the action is certified.

[19] In the case at bar, the proposed representative plaintiffs are Sandra Lundy, Allison Kaczmarek and Marc Couroux. The proposed representative plaintiff will have a conventional lawyer-and-client relationship with the lawyer of record, usually formalized by a written contingency fee agreement. There may be some unconventional elements to their relationship with class counsel, such as an indemnity agreement or funding from the Law Foundation or third party funder, but the lawyer and client relationship will be governed by the traditional common law and equity that governs the relationship between a lawyer and his or her client. The Law Society of Upper Canada's *Rules of Professional Conduct* will apply to the relationship.

[20] At the outset of a proposed class action, although the defendants and the defendants' lawyers may not be aware of it, some of the putative class members may have retainers with the plaintiff's lawyer of record. It is not uncommon that several or a group of persons will retain a law firm or be recruited by an entrepreneur class action lawyer to prosecute a class action, but only one or two members of the group will act as the proposed representative plaintiff. The others may sign retainer agreements with the law firm, and in a sense, these clients are standbys to act, if necessary, as a representative plaintiff.

[21] In the case at bar, I am advised that there are a group of approximately 30 passengers of the derailed train that are clients of Sutts, Strosberg LLP, Falconer Charney LLP or Koskie Minsky LLP, the consortium of law firms that are proposed as class counsel.

[22] The Law Society's *Rules of Professional Conduct* have no special provisions for the professionalism and ethical problems of class action litigation. Under the generally applicable rules, rules 6.03(7), (7.1) and (8) of the *Rules of Professional Conduct*

prohibit lawyers from communicating with a represented person. These rules state:

Communications with a represented person

6.03(7) Subject to subrules (7.1) and (8), if a person is represented by a legal practitioner in respect of a matter, a lawyer shall not, except through or with the consent of the legal practitioner,

(*a*) approach or communicate or deal with the person on the matter, or

(*b*) attempt to negotiate or compromise the matter directly with the person.

(7.1) Subject to subrule (8), if a person is receiving legal services from a legal practitioner under a limited scope retainer on a particular matter, a lawyer may, without the consent of the legal practitioner, approach, communicate or deal directly with the person on the matter, unless the lawyer receives written notice of the limited nature of the legal services being provided by the legal practitioner and the approach, communication or dealing falls within the scope of the limited scope retainer. [New — September 2011]

Second Opinions

(8) A lawyer who is not otherwise interested in a matter may give a second opinion to a person who is represented by a legal practitioner with respect to that matter.

[23] The commentary to these rules states:

Commentary

Subrule (7) applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by a legal practitioner concerning the matter to which the communication relates. A lawyer may communicate with a represented person concerning matters outside the representation. This subrule does not prevent parties to a matter from communicating directly with each other.

The prohibition on communications with a represented person applies only where the lawyer knows that the person is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of the other legal practitioner by closing his or her eyes to the obvious.

Where notice as described in subrule (7.1) has been provided to a lawyer for an opposing party, the lawyer is required to communicate with the legal practitioner who is representing the person under a limited scope retainer, but only to the extent of the matter or matters within the scope of the retainer as identified by the legal practitioner. The lawyer may communicate with the person on matters outside of the limited scope retainer.

Subrule (8) deals with circumstances in which a client may wish to obtain a second opinion from another lawyer. While a lawyer should not hesitate to provide a second opinion, the obligation to be competent and to render

competent services requires that the opinion be based on sufficient information. In the case of a second opinion, such information may include facts that can be obtained only through consultation with the first legal practitioner involved. The lawyer should advise the client accordingly, and if necessary consult the first legal practitioner unless the client instructs otherwise.

[24] Rule 2.04(14) of the Law Society of Upper Canada's *Rules of Professional Conduct* regulates how lawyers may communicate with an unrepresented person.

Unrepresented Persons

2.04(14) When a lawyer is dealing on a client's behalf with an unrepresented person, the lawyer shall

(*a*) urge the unrepresented person to obtain independent legal representation,

(*b*) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer, and

(*c*) make clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client and accordingly his or her comments may be partisan.

[25] In the case at bar, there was no evidence of a breach of the above rules of professional conduct. The communications to the putative class members were by the defendants, who are not subject to the regulation of the Law Society. The letters to putative class members were not sent by the defendants' lawyer, and there was no evidence that the defendants' lawyer was using its clients to circumvent its professional obligations.

[26] It was, in part, because of these circumstances of no contraventions, that I ordered that the defendants may communicate with the putative class members as the defendants may be advised provided that the plaintiff is provided with a copy of the correspondence seven days before distribution and provided that there are no communications to the putative class members known to be clients of the lawyer of record.

[27] My concern was less about possible violations of the Law Society's rules and more about the exigencies of communications with putative class members during the pre-certification period.

[28] While there is no doubt that, after certification, there is a lawyer-and-client relationship between the plaintiff's lawyer and the class members (*Ward-Price v. Mariners Haven Inc.* (2004), 71 O.R. (3d) 664, [2004] O.J. No. 2308 (S.C.J.); *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada*, [2003] O.J. No. 1016, 121 A.C.W.S. (3d) 426 (Master); *Glover v. Toronto (City)*,

[2009] O.J. No. 1523, 70 C.P.C. (6th) 303 (S.C.J.), at paras. 89-94), before certification there is, strictly speaking, no lawyer-and-client relationship between putative class members and putative class counsel.

[29] If there is no certification, as Justice Nordheimer observed, there will be no class of claimants for the lawyer to have a relationship with, and it is hardly fair or even feasible before certification to impose the full complement of tort, contract and fiduciary responsibilities on a lawyer: *Pearson v. Inco Ltd.* (2001), 57 O.R. (3d) 278, [2001] O.J. No. 4877 (S.C.J.); *Ward-Price v. Mariners Haven Inc.*, *supra*.

[30] In this last regard, it may also be observed that depending upon the nature of the litigation, before certification, many putative class members may not even know about the proposed class action, and if they do have knowledge of a class action, they may have already decided not to participate or they may be indifferent to participation or they may have decided to go their own way by retaining their own lawyer to sue the defendants.

[31] Although, there may not be a lawyer-and-client relationship between a proposed class member and the lawyer of the representative plaintiff before certification, there is a potential lawyer-and-client relationship, and the needs of the *Class Proceedings Act, 1992* require that there be a *sui generis* relationship between lawyer and potential class members or at least some responsibilities imposed on the lawyer acting for the representative plaintiff that are owed to the potential class members: *Fantl v. Transamerica Life Canada* (S.C.J.), *supra*, at paras. 73-80; *Heron v. Guidant Corp.*, [2007] O.J. No. 3823 (S.C.J.), at para. 10, leave to appeal refused [2008] O.J. No. 48, 232 O.A.C. 366 (Div. Ct.).

[32] Thus, the regulation of communications with putative class members before certification arises in circumstances of some traditional lawyer and client relationships and some *sui generis* lawyer and putative class member relationships. There is case law in Canada and in the United States that is helpful for this context.

[33] Not every communication to members of the class needs to receive court approval: *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.*; *Ward-Price v. Mariners Haven Inc.*, *supra*, at para. 25. The parties are free to communicate to the public about a class proceeding, and a press release that provides information to the media that does not evade or undermine the formal notice requirements is not a notice regulated by the *Class Proceedings Act, 1992*: *Bywater v. Toronto*

Transit Commission (1999), 43 O.R. (3d) 367, [1999] O.J. No. 1402 (S.C.J.).

[34] Both before and after certification, if there is evidence of inappropriate behaviour, the court can exercise its discretion and impose conditions on communications between the parties and putative class members in order to ensure the integrity of the class proceeding: *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.*, *supra*; *Ward-Price v. Mariners Haven Inc.*, *supra*; *Pearson v. Inco Ltd.*, *supra*, at para. 18, leave to appeal refused [2002] O.J. No. 2134 (S.C.J.); *Lewis v. Shell Canada Ltd.* (2000), 48 O.R. (3d) 612, [2000] O.J. No. 1825 (S.C.J.); *Atkinson v. Ault Foods Ltd.*, [1997] O.J. No. 4676 (Gen. Div.).

[35] An order restricting communication by the defendant to class members is extraordinary: *Smith v. National Money Mart Co.*, [2007] O.J. No. 1507, 156 A.C.W.S. (3d) 1001 (S.C.J.); *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada*, *supra*; however, if communication by a defendant to a class member during the opt-out period is inaccurate, intimidating or coercive, or is made for some other improper purpose aimed at undermining the process, the court will, on the motion of a party or class member, intervene to ensure the fair determination of the class proceeding: *Smith v. National Money Mart Co.*, *supra*; *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada*; *Bartolome v. Mr. Payday Easy Loans Inc.*, [2008] B.C.J. No. 167, 2008 BCSC 132, at paras. 63-74.

[36] An order restricting communication by the defendant during the opt-out period should only be granted if it is necessary to prevent a real and substantial risk to the fair determination of a class proceeding, because reasonably available alternative measures will not prevent the risk: *Smith v. National Money Mart Co.*, *supra*.

[37] When there is sufficient evidence of inappropriate behaviour, the court can impose conditions on communications between the parties and putative class members in order to ensure the integrity of the class proceeding: *Vitelli v. Villa Giardino Homes Ltd.* (2001), 54 O.R. (3d) 334, [2001] O.J. No. 2119 (S.C.J.), at para. 38; *Pearson v. Inco Ltd.*, *supra*, at para. 18.

[38] While defence counsel may contact putative class members pre-certification to gather evidence, they may not make misleading statements or try to convince them to act adversely to their interests: *Vitelli v. Villa Giardino Homes Ltd.*, *supra*, at para. 19.

[39] Where the certification of class proceedings is pending and the defendant is communicating with class members in order to negotiate settlements, the court may direct that before

entering into any settlement, the defendant give notice of the commencement and nature of this class proceeding: *Lewis v. Shell Canada Ltd.*, *supra*. The notice may contain a proviso that the class member has a fixed time period to obtain legal advice about the class action and to resile from the settlement: *White v. IKO Industries Ltd.*, [2010] O.J. No. 2954, 2010 ONSC 3920 (S.C.J.).

[40] As it happens, the case law and the approach to the problems of pre-certification communications in Canada is consistent with the approach in the United States. The Federal Judicial Centre, *Manual for Complex Litigation*, 4th ed., § 21.12 at pp. 247-49, states:

> §21.12 *Precertification Communications with the Proposed Class*
>
> Rule 23(*d*) authorizes the court to regulate communications with potential class members, even before certification. Such regulations, however, could implicate the First Amendment. Moreover, restrictions of this type may be difficult to implement given the ease and speed of communicating with dispersed groups. For example, many class actions' attorneys establish Internet Web sites for specific class actions, in addition to using conventional means of communication, such as newspapers. Most judges are reluctant to restrict communications between the parties or their counsel and potential class members, except when necessary to prevent serious misconduct.
>
> . . . If defendants are in an ongoing business relationship with members of a putative class, the court might consider requiring production of communications relating to the case. In appropriate cases, courts have informed counsel that communications during an ongoing business relationship, including individual releases or waivers, must be accompanied by notification to the members of the proposed class that the litigation is pending.
>
> Judicial intervention is generally justified only on a clear record and with specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. Such intervention "should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances." Even if the court finds that there has been an abuse, less burdensome remedies may suffice, such as requiring parties to initiate communication with potential class members only in writing or to file copies of all nonprivileged communications with class members. If class members have received inaccurate precertification communications, the judge can take action to cure the miscommunication and to prevent similar problems in the future. Rule 23 and the case law make clear that, even before certification or a formal attorney-client relationship, an attorney acting on behalf of a putative class must act in the best interests of the class as a whole.

[41] I applied the above law from Canada and the United States to the circumstances of the case at bar, and that law and the co-operation of the lawyers are the explanations for my endorsement.

Motion granted in part.