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) *Linda Phillips-Smith and Kathleen Urdahl,*
) for the defendant Blackmer operating as a
) division of Dover Energy Inc.
)
) *Anne Thompson,* for the defendants,
) Robert Parsons Equipment Trading Inc., and
) Pro-Par (1978) Inc.
)
) **HEARD:** October 1, 2012

C. HORKINS J.

INTRODUCTION

[1] On July 23, 2012, I certified this proceeding as a class action. The proceeding arises out of a series of explosions that occurred on August 10, 2008 at a propane facility ("Sunrise propane facility") located in Toronto. The explosions caused several massive fireballs to be released into the air and over the surrounding neighbourhood. The Toronto Police ordered a non-compulsory evacuation order of everyone within 1.6 km of the Sunrise propane facility. It is alleged that, as a result of the explosions, the plaintiffs and class members suffered property damage and/or personal injury.

[2] As part of the certification, I approved a Notice Program for the class. The Notice Program informed the class that the proceeding was certified, explained the opt out procedure and told the class that November 20, 2012 was the deadline for opting out of the class action.

[3] During the period of the notice program and before the opt out deadline, Martin P. Forget, a lawyer at Forget & Associates communicated with class members in a letter dated August 31, 2012 (the "Forget letter"). Forget & Associates was retained by Wawanesa Mutual Insurance Company ("Wawanesa"). The Forget letter was sent to class members that Wawanesa insured. This letter told the class members that Wawanesa is opting the class members out of the class action.

[4] When class counsel learned about the Forget letter that was sent directly to class members, they brought this motion. They say that the letter interferes with their solicitor and client relationship with class members and contains inaccurate statements which might unduly influence a class member's decision to opt out of the class.

[5] Class counsel request an order restraining Wawanesa and its counsel Forget & Associates from communicating with the class members until November 20, 2012 when the opt out period expires.

[6] At the conclusion of the hearing of the motion, I issued an interim order pending release of my decision. I ordered that Wawanesa and its counsel Forget & Associates have no

communication with the class members unless the communication is approved by the court or consented to by class counsel. My reasons for issuing this interim order and extending it through to November 20, 2012 are set out below.

The Vilarino Action and Stay Order

[7] Mr. Forget's communication with class members is particularly concerning because it ignored reasons that I issued in the Vilarino action in 2011 that I will now review.

[8] The Wawanesa paid monies to its insureds for losses sustained as a result of the explosions at the Sunrise propane facility. As noted above, Wawanesa retained Forget & Associates and an action was commenced in August 2010 seeking recovery of amounts Wawanesa paid to the insureds (CV-10-408251, the Vilarino action). The Vilarino action was stayed by court order on January 11, 2011 ("stay order"). The Vilarino action named numerous Wawanesa insureds as plaintiffs.

[9] In December 2010, the plaintiffs in the class proceeding brought a motion to stay the Vilarino action and other actions that had been started by insurers to seek recovery of subrogated losses. The Wawanesa and other insurers objected to the stay motion. At the last moment, the insurers consented to their actions being stayed. Class counsel had incurred considerable expense to prepare the stay motion and requested costs. Costs were contested.

[10] On January 11, 2011, I granted the stay order and ordered that Wawanesa and other insurers pay the plaintiffs' costs (2011 ONSC 266). I stated in my reasons that it was "unrealistic" for the insurers to assume that the court was not going to stay the individual actions pending certification given two well known legal principles. First, I stated in para. 47 that "a plaintiff has a single cause of action for claims arising from a loss: See *Cahoon v. Franks*, [1967] S.C.R. 455; and *Mayer v. 1314312 Ontario Inc. (c.o.b. Aba Rick Moving & Storage)*, [2002] O.J. No. 457." As a result, I stated the obvious: "the claims are either advanced within a certified class action or in an individual action, not both." Second, I confirmed (at para. 59) that "the insured, not the insurer, controls the litigation until the insured has been indemnified in full for all insured and uninsured losses". It was clear on the stay motion that the insurers had not fully indemnified the insureds for all insured and uninsured losses.

The Forget Letter

[11] In the face of the stay order and the well known legal principles supporting the stay, Martin Forget delivered the Forget letter to class members named as plaintiffs in the Vilarino action. The Forget letter was sent after the action was certified and during the opt out period fixed by the court.

[12] In this letter Mr. Forget told the class member that "[w]e are the solicitors retained on behalf of your insurer, the Wawanesa" and that "Wawanesa will be opting you out of the [class] action so that it may pursue its action, and yours, independent of the class as your uninsured claims will be asserted as part of its subrogated action". As well the Forget letter told the class

member that “[i]n accepting payment under your policy from Wawanesa, you may have signed a contract which assigned rights to Wawanesa to pursue recovery from the wrongdoer.”

[13] The Forget letter requests particulars of information, including all previously unpaid claims covered by insurance and all uninsured claims by no later than September 15, 2012, purportedly so that Wawanesa can include them in the Vilarino action.

[14] The Forget letter created a sense of urgency. It states that the “matter is very time sensitive.” In essence the Forget letter told the class member that Wawanesa, not the insured, controls the litigation.

[15] Although there was an existing solicitor and client relationship between class counsel and class members, Martin Forget did not discuss his letter with class counsel before it was sent and did not send them a copy. Class counsel first learned about the Forget letter in September 2012, when Ernesto Labora, a class member and a Wawanesa insured, contacted Mr. Pitch (a member of the class counsel team). Mr. Labora is one of many plaintiffs named in the Vilarino action. Mr. Labora told Mr. Pitch that he had received a letter from Forget & Associates, on behalf of the Wawanesa.

[16] Mr. Labora is 64 years old, retired and speaks English, but not fluently. He lives two blocks from the site of the explosion. After the explosion, Wawanesa paid part of his claim but refused to pay for the damage to his roof, driveway, front door and equipment or for the contamination of his vegetable garden. Mr. Labora states that he injured his right hip as he fled his home after the explosions. This injury has required surgery. His hip was asymptomatic before the explosions. He has not been compensated for this injury.

[17] Mr. Labora was unhappy with the way Wawanesa handled his claim and refused to sign a “document” that the adjuster asked him to sign. The evidence does not reveal what the document was that he refused to sign. Mr. Labora had no further communication with Wawanesa until he received the Forget letter.

[18] When Mr. Labora read the Forget letter he incorrectly believed that Wawanesa was inviting him to resubmit his denied claims and if he did he would not be able to participate in the class action.

[19] The Forget letter told Mr. Labora that he had to respond by September 15, 2012. He called Forget & Associates on September 14, 2012, and spoke to a legal assistant who asked him for documents to support his repair claims. Mr. Labora told the legal assistant that he did not have any receipts because he could not afford the repairs. He also told her that he wanted to participate in the class action.

[20] When class counsel learned about the Forget letter they sent an email on September 20, 2012 to everyone who had registered on the class counsel database to determine if they had received such a letter from an insurance company. The email states as follows:

It has come to our attention that lawyers from insurance companies sent a letter to some of the Class Members:

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1. Enclosing your proof of loss, and asking you to confirm that it is accurate as soon as possible;
2. Asking you to advise if you have other losses or damages that were not previously provided; and
3. Advising that the insurer intends to "opt you out" of the class action.

If you have received a letter similar to the one described above please reply to this email and provide the details to me

[21] As of September 25, 2012, several people had replied to this email. They notified class counsel that they had received such a letter from an insurer and did not want to opt out of the class action. The replies provide further evidence that Wawanesa has not paid the uninsured claims.

[22] Mr. Charney, a member of the class counsel team, faxed and emailed an urgent letter to Mr. Forget on September 21, 2012. Excerpts from Mr. Charney's letter are set out below:

In our view, the letter constitutes improper communication with the Class during the opt out period which warrants court intervention.

Your client is not entitled to opt people out of the class proceedings. Your client cannot control the litigation without a court order.

....

[P]lease let us know by the end of business Monday September 24, 2012 what steps your client intends to take to rectify this situation and please provide us with copies of all letters sent to the putative class members together with any written communications received by them in response.

Failing [an] agreement on what steps are required to rectify the situation, we intend to serve motion materials returnable before Justice Horkins on October 1, 2012.

[23] Mr. Forget did not reply to this letter. As a result, the plaintiffs served an urgent notice of motion and I heard the motion on October 1, 2012.

[24] Mr. Forget served a responding motion record on September 28, 2012 with an affidavit from Fahreen Kurji, a lawyer at Forget & Associates. The Kurji affidavit states that Forget & Associates "represents several individuals in an action seeking recovery of damages sustained as a result of an explosion at the Sunrise facility" (the Vilarino action.). The "clients" were insured by Wawanesa and "received insurance benefits in accordance with their policy of insurance".

[25] The Kurji affidavit also states that the Wawanesa policy contained the following subrogation clause:

“We” will be entitled to assume all “your” rights of recovery against others and may bring action in “your” name to enforce these rights when “we” make payment or assume liability under this policy. The amount recovered less the costs of recovery will be shared between “you” and “us” in proportion to the loss that each has borne. “You” shall sign and deliver all related papers and cooperate with “us” in any reasonable manner to secure such rights.

[26] The Kurji affidavit states that “some of our clients executed a Proof of Loss” and this provided that “[a]ll rights to recovery from any other person are hereby transferred to the insurer which is authorized to bring an action in the insured’s name to enforce such rights”. The affidavit does not state which “client” signed this Proof of Loss and executed copies are not attached to the affidavit.

[27] The Kurji affidavit states that the Forget letter was sent to three “clients”, Ernesto Labora, Saverio Nocera and Pierina Audaci. They are named, along with others, as plaintiffs in the Vilarino action.

[28] It is unclear exactly who the Forget letter was sent to. The Kurji affidavit states that it was sent to three of the numerous Wawanesa insureds named in the Vilarino action. It seems odd that the Forget letter would only be sent to three of the plaintiffs in the Vilarino action. In fact the affidavit is not correct. During the hearing, Mr. Forget confirmed that Peter Manzo also received the Forget letter. Mr. Manzo is one of the class members that replied to class counsel’s September 20 2012 email. He told class counsel that he did not want to opt out of the class action.

[29] Throughout the Kurji affidavit the insureds are referred to as clients and yet in the first sentence of the Forget letter, Mr. Forget states that his firm was retained by Wawanesa, not the insureds.

[30] The Kurji affidavit does not state that the class members have been fully indemnified for all insured and uninsured losses. It is clear that class members have uninsured losses. In particular, Mr. Labora’s evidence on this motion is that Wawanesa has not reimbursed him for his losses.

[31] Finally the Kurji affidavit describes the purpose of the Forget letter. It states that the “communication was made in the context of updating our client as to the status of the action and as such that communication is protected from disclosure by solicitor-client privilege, subject to being waived by the client”.

[32] On July 25, 2012, Forget & Associates received a copy of my reasons dated July 23, 2012 granting certification of the class action. Forget & Associates also received a letter from Mr. Charney with a copy of the Notice of Certification. This letter was sent to all counsel whose

clients' subrogated actions on behalf of insurers had been stayed. As a result, Mr. Forget knew that the opt out period was in progress when he sent the Forget letter to the class members.

Mr. Forget's Position

[33] Mr. Forget argues that he and his firm are entitled to communicate with the Wawanesa insureds for two reasons. First, Mr. Forget states that the subrogation clause in the Wawanesa policy gives Wawanesa the right to control the litigation and therefore opt the Wawanesa insureds out of the class action. Second, he argues that his firm has a solicitor-client relationship with the Wawanesa insureds and he is entitled to communicate with them.

Communication with Class Members – The Legal Framework

[34] My decision to restrict communication between the lawyers of Forget & Associates (including Wawanesa) and the class members must be viewed through the lens of the *Class Proceedings Act*, 1992, S.O. 1992, C. 6.

[35] The *Class Proceedings Act* requires the court to approve important notices to the class. After a proceeding is certified, s. 17 requires that “[n]otice of certification of a class proceeding shall be given by the representative plaintiff to the class members”. Section 19 states that “[a]t any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.” Finally, s. 20 states that a notice “under section 17, 18 or 19 shall be approved by the court before it is given.”

[36] Pursuant to the *Class Proceedings Act*, this court approved the “Notice of Certification and Opt Out Deadline to the Class”. This notice gave the class members specific instructions on how to opt out of the class action and set a November 20, 2012 deadline.

[37] As stated in *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada* (2002), 62 O.R. (3d) 535 at para. 74, [2002] O.J. No. 4781 (S.C.J.), the “court is charged with the duty of ensuring that the CPA is administered in a manner that is fair to plaintiffs, defendants and more importantly, absent class members. The legislation clearly contemplates that there is an inherent risk in unsupervised communications with class members.”

[38] The right to opt out of a class action is fundamental to the court's jurisdiction over unnamed class members. It is “an important procedural protection afforded to unnamed class action plaintiffs. Taking appropriate steps to opt out and remove themselves from the action allows unnamed class action plaintiffs to preserve legal rights that would otherwise be determined or compromised in the class proceeding.” (*Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 at para. 28, [2005] O.J. No. 506 (C.A.).)

[39] There is a growing body of case law dealing with the issue of when a court should intervene to restrict improper communication between a defendant and a class member (before and after certification). The concern about improper communication is more acute when it occurs during the opt out period.

[40] The court must intervene when necessary to ensure that the integrity of the opt out process is protected. Section 12 of the *Class Proceedings Act* gives the court broad remedial discretion to “make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination”. As stated in *Bywater v. Toronto Transit Commission* (1999), 43 O.R. (3d) 367, [1999] O.J. No. 1402 at para. 26 (Gen. Div.) “the court must retain the power to sanction conduct that undermines its statutory mandate to ensure that class members are given appropriate information when required to make binding decisions in relation to their legal rights in a class proceeding.”

[41] Orders restricting communications during the opt out period are not limited to communications between a defendant and class members. The need to issue such an order can also arise when a non-party improperly communicates with a class member as in *1250264 Ontario Inc. v. Pet Valu Canada Inc.* 2012 ONSC 4317 (“*Pet Valu*”).

[42] The following principles guide my decision to restrict communication in this case:

- An order restricting communication is extraordinary: see *Smith v. National Money Mart Co.*, [2007] O.J. No. 1507 at para. 31 (S.C.J.) (“*Money Mart*”); *Pet Valu* at para. 64; *Lundy v. Via Rail Canada Inc.*, 2012 ONSC 4152 at para. 35 (S.C.J.).
- If the communication is inaccurate, intimidating or coercive, or is made for some other improper purpose aimed at undermining the process the court must intervene (see *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada*, *supra* at para. 77; *Money Mart* at para. 31).
- An order restricting communication 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 (see *Money Mart* at para. 31).

Wawanesa does not control the Litigation

[43] When class counsel brought the motion to stay the individual actions, Mr. Forget consented to this motion, albeit at the last moment. While he argues now that the subrogation clause in the Wawanesa policy transfers control of the litigation to Wawanesa, Mr. Forget never raised this point on the stay motion. Mr. Forget now argues that the subrogation clause is clear and unambiguous. Specifically, Mr. Forget states that Wawanesa controls the litigation regardless of whether it has paid the insured for all insured and uninsured losses and it has the right to opt the insured out of the class action. This position runs contrary to numerous authorities and is simply wrong.

[44] Excerpts of the Wawanesa policy were filed on this motion. Mr. Forget confirmed that the Wawanesa policy in issue is an All Risk policy. For ease of reference, the subrogation clause in the Wawanesa policy is repeated below.

"We" will be entitled to assume all "your" rights of recovery against others and may bring action in "your" name to enforce these rights when "we" make payment or assume liability under this policy. The amount recovered less the costs of recovery will be shared between "you" and "us" in proportion to the loss that each has borne. "You" shall sign and deliver all related papers and cooperate with "us" in any reasonable manner to secure such rights.

[45] I stated in my reasons for the stay order and I will state again, the insured controls the litigation until the insured has been fully indemnified for his insured and uninsured losses. This is a well-known legal principle that governs the relationship between the insurer and its insureds.

[46] There are numerous authorities that confirm this point. Recently, in *Zurich Insurance Co. v. Ison T.H. Auto Sales Inc.*, 2011 ONSC 1870, aff'd 2011 ONCA 663 ("*Zurich*"), Strathy J. provided a detailed and thorough review of the law. In *Zurich*, the insurer argued that the subrogation clause in the policy changed the common law rule that gives the insured control of the litigation. Strathy J. reviewed the common law as follows:

34 "Fully indemnified" means not only indemnified for all losses covered by the policy, but also indemnified for uninsured losses, such as the insured's deductible, losses in excess of the policy limits, and losses (such as business losses) that are not covered by the policy. This principle has been followed, in the case of non-marine insurance, in numerous Canadian cases: see *Globe & Rutgers Fire Insurance Co. v. Truedell* (1927), 60 O.L.R. 227, [1927] O.J. No. 24 (S.C. (A.D.)), rev'g (1926), 59 O.L.R. 444, [1926] O.J. No. 54 (S.C.); *Ledingham v. Ontario (Hospital Services Commission)*, [1975] 1 S.C.R. 332.

35 At common law, it was well-settled that until the insured was fully indemnified for all losses, the insurer had no rights of subrogation. The law on this issue was summarized by the Supreme Court of Canada in *Somersall* at para. 53:

... it has long been the law, in the absence of contractual terms to the contrary, that the insurer's right of subrogation will not arise until the insured has been fully indemnified; *Pacific Coyle Navigation Co. v. Ruby General Insurance Co.* (1954), 12 W.W.R. (N.S.) 715 (B.C.S.C.); *Ontario Health Insurance Plan v. United States Fidelity and Guaranty Co.* (1989), 68 O.R. (2d) 190 (C.A.); *Confederation Life Insurance Co. v. Causton* (1989), 38 C.C.L.I. 1 (B.C.C.A.). The insurer may not control the process of litigation until this full indemnity has been met: *Globe & Rutgers Fire Insurance Co. v. Truedell* (1927), 60 O.L.R. 227 (S.C., App. Div.). Thus, in equity, Scottish & York would not yet be entitled to assert or pursue a subrogated claim in this case since they have not indemnified the insured fully.

36 See also *Kellar v. Jackson*, [1962] O.J. No. 78 at para. 4 (H.C.J.) in which this quote from the 4th edition of *MacGillivray on Insurance Law* was referred to:

The assured is entitled to control any proceedings brought in his name until he has received complete indemnity, that is to say, if the insurer has not paid what is in fact a complete indemnity for all damage insured or uninsured arising from the same cause of action as the damage in respect of which payment has been paid, the assured remains *dominus litis* until he has recovered a complete indemnity and if he undertakes to prosecute his claim for the whole damage, the insurers cannot interfere. The assured must conduct the litigation with the proper regard for the insurer's interest and will be liable in damages for any misconduct for any abandonment of rights.

[47] Strathy J. then considered the extent to which the "rigours" of the above common law are "softened" by the wording of the subrogation clause. It is important to note that the operative words of the subrogation clause in the Zurich policy are the same as those in the Wawanesa policy. In both policies, the subrogation clause states that the insurer is entitled to assume all of the insured's rights of recovery against others and can bring an action in the name of the insured when the insurer makes a payment or assumes liability under the policy. Neither policy contains an express provision about the right of either party to control the litigation.

[48] As Strathy J. noted in *Zurich* at para. 44, there is no provision in the *Insurance Act* applicable to an All Risk policy that gives the insurer the right of control. As a result, the issue is "whether the insurer's entitlement to be 'subrogated to all rights of recovery of the Insured' and to 'bring action in the name of the Insured' to enforce such rights, carries with it the right to control the litigation."

[49] After a thorough and careful review of appellate decisions (*Sommersal v. Friedman*, 2002 SCC 59, [2002] 3 S.C.R. 109 and *Farrell Estates Ltd. v. Canadian Indemnity Co.* (1990), 45 B.C.L.R. (2d) 223, [1990] B.C.J. No. 720, affg (1989), 59 D.L.R. (4th) 67, [1989] B.C.J. No. 889 (B.C.S.C.), Strathy J. concluded at paras. 70-71 "that the insured is in control of the litigation, or *dominus litis*, until it has been fully indemnified for its insured and uninsured losses" and "there is nothing in the plain language of the Subrogation Clause to alter the insured's right to control the litigation until such time as it has been fully indemnified. The Subrogation Clause is simply silent on the issue." As a result, control of the litigation remains with the insured pending full indemnification.

[50] This decision was upheld on appeal (2011ONCA 663) and in particular the Ontario Court of Appeal stated at para. 6:

[W]e agree with and adopt, in their entirety, the analysis and conclusions of the application judge which are, in a word, masterful. In particular, we agree with the application judge's careful discussion of the relationship between the decision of British Columbia Court of Appeal in *Farrell Estates Ltd. v. Canadian Indemnity*

Co. (1990), 69 D.L.R. (4th) 735 and the subsequent decision of the Supreme Court of Canada in *Somersall v. Friedman*, [2002] 3 S.C.R. 109.

[51] Mr. Forget did not provide a single authority to support his argument that Wawanesa controls the litigation when its insureds have not been fully indemnified.

[52] There is no reason to distinguish the facts in this case from *Zurich*. The relevant parts of the subrogation clauses are the same. I adopt and follow the law as stated in *Zurich*. The insured "is in control of the litigation, or *dominus litis*, until it has been fully indemnified for its insured and uninsured losses" (at para. 70).

The Solicitor-Client Relationship Issue

[53] There are two parts to this issue to be considered. Class counsel argue that Mr. Forget's communication with the class members they represent is a breach of the Rules of Professional Conduct. Mr. Forget argues that he has a solicitor-client relationship with the class members and therefore he was entitled to send the Forget letter.

(i) *The Rules of Professional Conduct*

[54] The law is clear that when a proceeding is certified, there is a solicitor and client relationship between class counsel and the class members (see *Ward-Price v. Mariners Haven Inc.*, (2004), 71 O.R. (3d) 664 at para. 7 (S.C.J.); *Glover v. Toronto (City)*, [2009] O.J. No. 1523 at para. 92 (S.C.J.); and *Lundy v. Via Rail Canada Inc.*, at para. 28).

[55] Mr. Forget ignored the obvious solicitor and client relationship between class counsel and the class members when he sent his letter directly to the class members. The uninsured (and insured) claims of the class members are being advanced in the class action by class counsel and yet Mr. Forget kept class counsel in the dark about his communication. The Forget letter asked the class member for proof of "any losses not covered under [the Wawanesa] policy". Mr. Forget was not asking for this information so Wawanesa could pay the uninsured losses. The Forget letter does not state that Wawanesa will pay these uninsured losses. Instead, the letter asks for proof of uninsured losses so they can be "asserted as part of [Wawanesa's] subrogated action".

[56] Class counsel did not have an opportunity to advise the class members on the accuracy of the contents of the Forget letter or to advise on whether the class members should release particulars of their uninsured claims to a lawyer who (on behalf of Wawanesa) is seeking to seize control of the class members' claims and, therefore, their right to participate in the class action.

[57] The Forget letter violates the Law Society's Rules of Professional Conduct that prohibit lawyers from communicating with a represented person. The relevant rule is 6.03 (7) and it states as follows:

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.

[58] The commentary to the above 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.

[Emphasis added.]

[59] This is not a situation where the lawyer was unaware of the existing solicitor and client relationship. The fact that class counsel represent the class is known to all, including Mr. Forget.

(ii) Mr. Forget's Solicitor and Client Relationship

[60] Mr. Forget says that he and his firm are entitled to communicate with Mr. Labora and other insureds because they are his "clients". As I will explain, it is absurd for Mr. Forget to rely on a solicitor and client relationship to justify the misleading and inaccurate statements in the Forget letter.

[61] Assuming for the moment that Mr. Forget and his firm have a solicitor and client relationship with class members who are Wawanesa insureds, this does not authorize the firm to tell the class member that the Wawanesa is opting the class member out of the class action. It is the class member who makes this decision, not Wawanesa.

[62] When the Forget letter was sent, Mr. Forget knew that the court had certified the proceeding as a class action and knew that an opt out process was underway. A copy of the certification order and Notice of Certification was emailed to Mr. Forget and others on August 27, 2012.

[63] Mr. Forget knows that the insured controls the litigation until the Wawanesa fully indemnifies the insured for all insured and uninsured losses. This well-known legal principle was clearly set out in my reasons on the stay motion. As well, in a letter dated July 25, 2012, class counsel reminded Mr. Forget (and other insurers and their counsel) that the insured class members control the litigation.

[64] Mr. Forget knows that Wawanesa has not fully indemnified the insureds because the Forget letter states that Wawanesa is seeking recovery of the insureds losses not covered under the policy.

[65] Mr. Forget was fully aware of these key facts and the applicable legal principles. He chose to ignore them when he sent the Forget letter.

[66] It is wrong in law to tell the class member that Wawanesa is opting the class member out of the class action and that the class member has "assigned rights to Wawanesa to pursue recovery from the wrongdoer".

[67] If as Mr. Forget insists, the insured are his clients, then his communication failed to honour Rule 2 of the Rules of Professional Conduct. This rule states that "[w]hen advising clients, a lawyer shall be honest and candid." The Forget letter is misleading and wrongly directs that Wawanesa is opting the insured out of the class action. Since the insured has not been fully indemnified, Wawanesa has no right to opt the insured out of the class action. In sending this letter, Mr. Forget was not honest and candid with the class members.

SUMMARY

[68] Class members must be "free to exercise their right to participate in or abstain from the class action on an informed, voluntary basis, free from undue influence." (*1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada* at para. 75.) The Forget letter interfered with this right. In essence, the letter told the class members that they had to opt out of the class action. It told them that they had lost the right to participate in the class action because Wawanesa had the power to opt them out of the class action and was doing so. The letter was Wawanesa's attempt to gain control of the litigation.

[69] During the motion, Mr. Forget argued that no order should be issued against Wawanesa because they did not communicate with the insured. I disagree. As stated in the Forget letter, Forget & Associates were retained by Wawanesa. This firm speaks for their client, Wawanesa. It is reasonable to assume that Mr. Forget was acting on instructions from Wawanesa when he told class members that Wawanesa would be opting them out of the class action.

[70] The interim order that I issued following the hearing of the motion will continue until the expiry of the opt out period. Mr. Forget, his firm Forget & Associates and Wawanesa are prohibited from communicating with the class members named as plaintiffs in the Vilarino action unless such communication is approved by the court or consented to by class counsel.


[71] It remains to be seen whether any class members who received the Forget letter have opted out of the class action. The certification order requires that notice of all opt outs be

delivered to the court on or before November 27, 2012. If any of the class members named in the Vilarino action have opted out, I order that counsel attend before the court to address the validity of the opt outs and the appropriate remedy.

[72] I emphasize that the scope of this order is necessary because of the misleading and incorrect statements in the Forget letter that interfere with the integrity of the opt out process. The order is also necessary because Mr. Forget told the court during the motion that he, his firm and Wawanesa will continue to communicate with class members unless ordered not to do so. In these circumstances, an order prohibiting communication during the opt out period is required. There is no reasonable alternative solution.

[73] I recognize that an insurer and sometimes their counsel need to communicate with the insured following a loss. The order that I have made in this case is not intended to interfere with acceptable fair and reasonable communication between insurers and their insureds. When the insured is represented by counsel, that counsel must be involved in the communication unless the parties agree otherwise. The Forget letter does not fall into the category of acceptable communication for the reasons I have stated.

[74] If the parties cannot agree on costs, they must deliver written submissions to the court by November 30, 2012 in accordance with a schedule to be agreed upon by counsel. This schedule must allow for a brief reply from the plaintiffs.


C. Horkins J.

Released: November 7, 2012

CITATION: Durling v. Sunrise Propane Energy Group Inc., 2012 ONSC 6328
COURT FILE NO.: CV-08-363271-00CP
DATE: 20121107

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JAMES DURLING, JAN ANTHONY THOMAS, JOHN SANTORO,
GIUSEPPINA SANTORO, ANNA MANCO,
FRANCESCO MANCO
AND CESARE MANCO

Plaintiffs

- and -

SUNRISE PROPANE ENERGY GROUP INC.,
1367229 ONTARIO INC.,
1186728 ONTARIO LIMITED, 1369630 ONTARIO
INC., 1452049 ONTARIO INC., VALERY BELAHOV,
SHAY (SEAN) BEN-MOSHE, LEONID BELAHOV,
ARIE BELAHOV, 2094528 ONTARIO INC., HGT
HOLDINGS LTD., TESKEY CONSTRUCTION CO.
LTD. and TESKEY CONCRETE CO. LTD., THE
TECHNICAL STANDARDS AND SAFETY
AUTHORITY, FELIPE DE LEON, ONTARIO HOSE
SPECIALTIES LIMITED, PERAFLEX HOSE INC.,
PERAFLEX HOSE INDUSTRIES INC., BLACKMER
OPERATING AS A DIVISION OF DOVER ENERGY
INC., WELDEX COMPANY LIMITED, KEDDCO
MFG. LTD., ROBERT PARSONS EQUIPMENT
TRADING INC. and PRO-PAR (1978) INC.

Defendants

REASONS FOR JUDGMENT RE WAWANESA

C. Horkins J.

Released: November 7, 2012