

CANADIAN BAR ASSOCIATION CLASS ACTION SECTION

INFORMAL COMMUNICATIONS WITH CLASS MEMBERS

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Guidelines for Plaintiff's Counsel

1. Prior to certification, Plaintiff's Counsel can contact any putative class member who is not personally represented by a lawyer.
2. After certification, Class Counsel may communicate with class members for legitimate purposes in a non-abusive way. For example, Class Counsel should not contact class members in an attempt to sell other legal services.
3. Before and after certification, Class Counsel may issue press releases without obtaining prior approval of the Court. However, the press release must be accurate and not easily mistaken by a class member as a formal legal notice.

Guidelines for Defence Counsel

1. Prior to certification, Defence Counsel can contact any putative class member (other than the representative Plaintiff) in order to collect evidence. However, Defence Counsel must not make misleading statements or attempt to convince a putative class member to act adversely to that Class member's interests.
2. After certification, Defence Counsel must direct all communications to Class Counsel.

Guidelines for Defendants

1. Prior to certification, a Defendant should not attempt to contact putative class members to solicit opt-outs or pre-empt class members' recourse to the courts. A Defendant cannot communicate, or otherwise deal, with a class member in manner that would undermine the integrity of the class proceeding.
2. Prior to certification, a Defendant may be able to continue to operate an ADR process, which was put in place prior to the action being commenced. However, before settling a claim with a putative class member, the Defendant should inform the putative class member that a Class Proceeding has been commenced and provide the name of the proposed Class Counsel.
3. After certification, a Defendant should only communicate with class members in its ordinary course of business. A Defendant should not communicate with class members about the class action.

CASE SUMMARIES

Law Society Rules

The position of the Law Society of B.C. is set out in the minutes of the Ethics Committee, November 20, 1995.

[T]he Committee was of the opinion that prior to certification the relationship between the lawyer for the prospective representative plaintiff and members of the class is too remote to consider that the lawyer is “representing” members of the class within the meaning of the rule.

For these reasons the Committee’s view was that prior to certification of a proceeding [Chapter 4, Rule 1.1] does not prevent a lawyer for a defendant from approaching and dealing with a person who is a potential member of a class. The rule, of course, does prevent such contact if the person is personally represented by a lawyer.

Other rules of professional conduct, especially Chapter 4 Rule 1 on dealing with unrepresented persons, constrain the way in which a lawyer may deal with an unrepresented person during the pre certification stage of a proceeding under the *Class Proceedings Act*.

A similar position has been adopted in Ontario, as reflected in Law Society of Upper Canada, “Class Proceedings: Guidelines for Practitioners”, January 1993, Guideline 4:

Prior to certification [a Defendant] communicat[ing] with class members for the purpose of settling individual claims may not be inappropriate. However, after certification all communication should be with the representative plaintiff and his or her lawyer.

Restrictions on Plaintiff’s Counsel

Cotter v. Levy

In *Cotter v. Levy*, [1998] O.J. No. 5841 (Gen. Div.) Plaintiff’s Counsel sought the direction of the Court as to the duty of Plaintiff’s Counsel with regard to notices and contact with potential class members. Mr. Justice Crane’s reasoned, starting at para. 2:

I read and understand S. 19 of the *Class Proceedings Act* to mean as it states:

"At any time in a class proceeding ..."

to mean literally what it says. This is the grammatical and ordinary sense of the words of s. 19.

Further, I interpret the section to mean that the "time" commences with the issuance of the Statement of Claim or the Notice of an Action under the Class Proceedings Act. I find that the literal interpretation of s. 19, is in accordance with the intent of the Legislature, as determined in the reading of the Statute in its entirety; that is, that class proceedings are case managed through this Court.

Accordingly, pursuant to s. 20, a solicitor or his counsel will seek the approval of the Court before any Notice pertaining to the class proceeding is given.

This interpretation ruling is not to be understood that preliminary class group assessment or identification notices will be refused by a Court. This ruling is to be understood as procedural only without comment on what may or may not be approved. [Emphasis Added]

This early decision would appear to provide that almost any communications with putative class members would require approval.

However, as pointed out by Douglas Lennox, *Building A Class*, in *Advocates Quarterly* Vol. 24, Number 4 (2001), the decision in *Cotter v. Levy* "leaves open the possibility that class counsel may advertise for class members prior to issuing a class proceeding without court approval, assuming that such ads comply with the *Rules of Professional Conduct*."

Mangan v. Inco

In *Mangan v. Inco Ltd.* (1998), 16 C.P.C. (4th) 165 (Ont. Gen. Div.) an action was commenced on behalf of persons who suffered injury as a result of sulphur dioxide (allegedly) released from the Defendant's Copper Cliff plant.

A settlement was reached that provided for categories of claimants. Category 1 dealt with claimants whose symptoms were not confirmed by clinical notes or medical reports. Compensation for successful claimants in this category was fixed at a flat rate depending on the severity of the symptoms, ranging from \$250 for mild symptoms to \$1,250 for severe symptoms. Damages for Category 1 claimants who chose not to opt out of the class pursuant to the provisions of the court-approved notice could be randomly audited by a referee, challenged by the Defendant and/or assessed by a mediator or arbitrator. The arbitrator was given the discretion to award solicitor and client costs against any claimant who made a fraudulent misrepresentation or omission. Plaintiff's Counsel would received 20% of any claims made.

After the settlement certification was granted (but before the claims period had expired) Plaintiff's Counsel undertook a major drive in an attempt to get more people to make claims. These efforts included the bulk mail-out of claims kits to everyone in living area. These kits

consisted of an envelope, a covering letter, an eight-page class action settlement guide, a four-page detailed claim form, a notice of claim coupon and a return envelope with Class Counsel's address and a prepaid postage stamp thereon. The material did not mention the provisions for opting out of the class action or the Defendant's rights of challenge and/or random assessment of any claim made, nor did it reveal that Class Counsel's fees depended upon the number of claims submitted into the settlement. Class Counsel also left kits at several businesses in the area; including, convenience stores, coffee shops, and Lotto counters. These kits included a leaflet advertising their law firm personnel and other services provided by the law firm (for a fee) including wills and powers of attorney. As noted by the Court, these efforts were extremely successful in increasing the number of claim forms submitted.

The Defendant objected, arguing that the systematic campaign of Class Counsel constituted notice to that class and therefore should have been approved by the Court. In response, Class Counsel argued that that Act did not prevent "vigorous counsel" from issuing their own notice. Class Counsel further argued that communications between Class Counsel and putative class members was privileged.

Mr. Justice Poupore agreed with the Defendant position that any notice to class members must be approved by the Court, holding:

Section 20 of the *Ontario Class Proceedings Act* provides that notice to class members "shall be approved by the court before it is given". The notice provisions of the Act require all notices to be approved by the court, before and after certification and before and after the opting out period expires. [Emphasis Added]

Of particular concern to the Court was impression giving by Class Counsel's notice that claimants could recover monies without needing to prove actual damage. As noted by the Court:

The unsupervised "drumming up" of business presents a special danger of unfairness in a case like this one, where compensation has been authorized for people who claim completely subjective ailments without any medical backup (Category 1) and consequently where the opportunity for fraud lurks. The Act induces defendants to agree to such settlements with the assurance that the court will review and approve any attempt to give notice. This scheme enables the court to screen for and prevent the issuance of notices that tend to invite fraudulent or abusive claims.

Mr. Justice Poupore did not agree that section 20 limited all communications with class members. As he posited:

Prior court approval for all notices given under the Act does not mean that class counsel may not communicate with members of a class it represents for legitimate purposes in a non-abusive way. The *Act*, however, clearly forbids unilateral efforts to give "notice", and class counsel's mass

solicitation campaign could not be regarded as anything other than a concerted effort to give notice. [Emphasis Added]

In considering Class Counsel's argument that the communications were subject to solicitor client confidentiality, Mr. Justice Poupore held the because "[t]he composition of a class is not fixed or determinable until the opt-out period required by the *Act* has expired [...] potential class members can be regarded as no more than potential clients of class counsel." Note: Mr. Justice Poupore's reasoning on this issue may no longer be good law following the decision in *Ward-Price*(see below).

As a result of providing the unauthorized notice, Mr. Justice Poupore ordered, *inter alia*, that:

1. The Defendant could challenge any claims, which resulted from the notice, made without medical documentation substantiating actual damage.
2. Class Counsel would be responsible to pay the Defendant's costs in making these challenges on a solicitor and client basis.
3. If any of the challenges were successful and the claim found to be fraudulent, then Class Counsel would be responsible to pay the Defendant's and Arbitrator's costs on a solicitor and client basis.
4. Class Counsel could not recover the costs they incurred in sending out the claims kits.

Bywater v. Toronto Transit Comm.

A less restrictive approach was adopted in *Bywater v. Toronto Transit Commission* (1999), 43 O.R. (3d) 367 (Gen. Div.), where Class Counsel sent numerous press releases detailing the certification of the class action which involved a subway fire. Defence Counsel brought a motion to find the Class Counsel in contempt as Court approval of the press releases had not been sought. Defence Counsel raised three concerns with the unapproved notice. First, they argued that because the unauthorised notice incorrectly suggested that all persons affected would be entitled to compensation, exaggerated claims could result. Second, they argued that because the press release indicated that \$30 million was claimed, it would give persons unrealistic expectations. Finally, they argued that the notice would attract new claimants.

Mr. Justice Sharpe dismissed these arguments and distinguished *Mangan v. Inco*, holding:

The press release issued by class counsel in the present case bears no relation to the "claims kit" distributed in the *Mangan* case. The press release issued by plaintiff's counsel is not a formal document, nor does it resemble one. It is impossible to imagine that anyone could read it as constituting legal notice of certification, of the choices available, or the steps to be taken to implement those choices. There was no significant risk that a potential member of the class would read this journalistic

description of the action and the stage it had reached as constituting legal notice of those matters. Nor was there any serious risk that the press release would undermine or evade the requirements of the court-approved notice.

As I read the applicable statutory provisions, they are intended to ensure that at certain critical points in the proceeding, class members are given the information specified by the legislature as being required to make decisions that will affect their legal rights. In this context, the word "notice" takes on a particular meaning. The notice must be approved by the court as it relates to a formal legal step that will affect a class member's rights. A commensurate level of formality is to be expected in the document said to constitute a notice.

It should not be forgotten that at issue here is a press release, a document sent to media outlets to induce them to take an interest in the story and to assist them in covering it. No one issuing a press release, including Ms. Fong, expects the media to publish it verbatim. This was not a document, as in *Mangan*, supra, sent to potential class members, replicating or mimicking in some, but not all respects, the court-approved notice. It was not even a document sent with any thought that it would be seen by a potential class member in the exact form of its release. It merely provided the media with information about the action and the certification order and a name to call if further information was required.

...

I find that the press release did not constitute a notice ... [Emphasis Added]

Ward-Price v. Mariners Haven

In *Ward-Price v. Mariners Haven Inc.*, [2004] O.J. No. 2308 (S.C.J.), after the action was certified, Class Counsel sent an opinion letter to each class member which advised them not to opt-out of the action. The Court considered two issues, first if the opinion letter was privileged and second if the opinion letter undermined the goals and purposes of the *Act*.

In determining whether the communications were privileged, Mr. Justice Nordheimer declined to follow *Mangan v. Inco*. Instead, Mr. Justice Nordheimer held that Class Counsel are in a solicitor-client relationship with members of the class as soon as certification occurs. Furthermore, Mr. Justice Nordheimer held that privilege attaching to such communications belonged to the class as a whole. Thus, one class member could not waive the privilege of the class.

Mr. Justice Nordheimer went on to hold that the letter was neither "notice" under the *Act* nor did it undermine the goals and purposes of the *Act*. As Mr. Justice Nordheimer noted:

There is no doubt that the letter expresses counsel's opinions, in very clear terms, regarding the nature of the claims, the likelihood of success, the weaknesses of the defences offered and, perhaps most importantly for the purposes of this motion, his view that class members ought not to opt out. However, these opinions are all fairly expressed. I also note that the letter expressly invites class members who have their own lawyers to have those lawyers contact class counsel to discuss these matters with him. The fact that the moving parties neither agree with nor like the opinions expressed is not surprising but that, of course, is not the test. Counsel for the class is as obligated to provide his honest and candid opinion as is any other counsel. Members of the class are entitled to nothing less.

The final point to be addressed is the contention of the moving parties that the opinion letter is, in effect, a "notice" under section 17 of the Act and therefore required court approval. I do not agree. While the letter addresses many of the same matters as were covered by the court-approved Notice, that is a necessary consequence of providing advice to the class members. It would be difficult for counsel to provide effective and useful advice to the class members if he or she could not mention the subjects set out in section 17(6) of the Act.

Further, not every communication to members of the class needs to receive court approval - see 1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd., supra, at para. 76. To conclude otherwise would impose an impossible, and unnecessary, burden on class counsel. Indeed, it would effectively preclude any private communication between class counsel and the class. Instead, I am of the view that class counsel is free to communicate with members of the class as long as he or she does so within certain limits. Those limits preclude communications "that would evade or undermine the statutory notice requirements" - see *Bywater v. Toronto Transit Commission*, supra, at p. 377. I do not find that the opinion letter transgresses into that prohibited sphere of communication. In fact, to a very limited degree, it is not unlike the impugned press release in *Bywater* which Mr. Justice Sharpe also found did not constitute a notice. [Emphasis Added]

Restrictions on Defence Counsel

Atkinson v. Ault Foods

In *Atkinson v. Ault Foods Ltd.*, [1997] O.J. 4676 (Gen. Div.); leave to appeal denied [1997] O.J. 5222 (Gen. Div.), the Defendant prior to certification attempted to contact members of the putative class in order to solicit opt-outs. In dealing with the costs on the certification motion, Mr. Justice MacKenzie held at para. 2:

In the ordinary course, the costs of a successful motion should be treated as costs recoverable by the party who is successful on the merits of the litigation. In the present case, it is clear that the Defendant's action in corresponding with class members with a view to solicit opt-outs in the class proceeding were nothing more than a sugar-coated in terrorem device to intimidate class members from exercising their recourse to the courts. Although I am not satisfied that such conduct by the Defendants crosses the threshold to enter the domain of the solicitor and client costs basis, I condemn such conduct by making part of the certification motion costs payable forthwith by the Defendant. In my view, not to require such payment to be made forthwith would be to nullify the court's disapproval of a Defendant's tactics in seeking to pre-empt class members' recourse to the courts. [Emphasis Added]

Williams v. Mutual Life Assurance

In *Williams v. Mutual Life Assurance Co.* (2000), 51 O.R. (3d) 54 (S.C.J.) the Defendant implemented an alternative dispute resolution process under which putative class members could have their claims determined by binding arbitration rather than in the class action. It is unclear from the decision whether the ADR program was created prior to the action being commenced.

The Defendant argued at certification that its ADR process was preferable to the proposed class proceedings. Mr. Justice Cumming agreed holding at 47:

[47] The plaintiffs have identified no other potential claimants beyond the two representative plaintiffs. The defendants have received some 239 complaints over the years with respect to "premium offsets". Of the 107 complaints received about premium offset issues since July 26, 1999, when an Alternative Dispute Resolution Program ("ADRP") was implemented by Clarica, six policyholders have opted for arbitration after receipt of the insurer's offer and five arbitrations have been completed to date. At this time there are two active complaints, one in each of Ontario and Nova Scotia. Prudential also faces four individual lawsuits at present which raise allegations as to misrepresentations relating to premium offsets.

[48] The ADRP was introduced for the specific purpose of evaluating premium offset complaints. The ADRP includes utilization of arm's-length, third party, professional arbitrators, timely disclosure of relevant information to policyholders, the option of written submissions or of an oral hearing and an undertaking of written decisions within a reasonable time frame.

[49] There is a fair formula for determining compensation. The process provides for procedural fairness and transparency. The costs to a claimant are reasonable. The insurer has waived defences such as limitation

periods, the denial of vicarious liability, and the provisions of the *Insurance Act*, R.S.O. 1990, c. I.8 and the Statute of Frauds.

[50] The defendants assert that the ADRP is a "more practical and more efficient" option than a class proceeding. In determining whether a class proceeding is the preferable procedure for the resolution of the common issues, all alternative proceedings put before the court must be considered: *Brimner v. Via Rail Canada Inc.*, [2000] O.J. No. 2747 at para. 7 (S.C.J.); *Bittner v. Louisiana-Pacific Corp.* (1997), 43 B.C.L.R. (3d) 324 at p. 361 (S.C.).

As a result certification was denied. The refusal to certify was later affirmed by the Ontario Court of Appeal ([2003] O.J. No. 1160 per Rosenberg J.A.), which noted that, "the fact that Clarica has established an ADR programme to deal with policyholders' complaints about the premium offset is a relevant, although probably minor, consideration." (Para 54)

Lewis v. Shell

In *Lewis v. Shell Canada Ltd.*, (2000), 48 O.R. (3d) 612, 46 C.P.C. (4th) 378 (S.C.J.) widespread personal injuries and property damage occurred after an accidental toxic "release flare" at the Shell refinery. Shell immediately started contacting the victims in order to negotiate settlements. Approximately one month after the accident, a class action was commenced and plaintiff's counsel brought a motion seeking to restrain any further settlement communications between the Defendant and putative class members. Shell argued that because there was no evidence of impropriety nor had any parties who had settled come forward to complain, there was no justification to require Shell to advise claimants that they may have rights as putative class members in the class action before settling any claim.

Mr. Justice Cumming disagreed, holding at para. 11:

A class action has important differences in its characteristics from an individual action. One distinction with a class proceeding is that there are absent class members, many of whom may very well not be aware of the commencement of the class action until the published notices upon a certification. In the case at hand, the plaintiffs are anxious to proceed to a certification hearing as soon as possible. However, the motion for certification cannot take place until July 6 and 7, 2000, because Shell, quite understandably, will not be in a position to respond until that date. Shell is awaiting the completion of a scientific report relating to the emission of March 16, 2000.

A fair process would be for Shell to make full disclosure to claimants of the class proceeding before entering into settlements with releases. If a claimant wants to settle with Shell after knowing his/her rights as a putative class member then the claimant should, of course, have that freedom of action.

I do not imply any impropriety on Shell's part in respect of its dealings with specific claimants to date. There is no evidence to suggest this. However, in my view, the settlement process chosen by Shell, whereby Shell will settle without being certain that a claimant is aware of her/his rights through the class proceeding, is fraught with dangers. It is unfair as compared to a process which ensures that claimants are expressly aware of all their rights through the class proceeding before settling individually. It is not enough for Shell to say to itself, in effect, that Shell can handle the settlement process fairly and expeditiously and there is no need for a class proceeding.

Shell claims that the settlement process is predicated upon achieving goodwill with the community. However, there is a clear self interest on the part of Shell in obtaining releases with respect to personal injury claims. Crawford is the agent of Shell. Crawford is not in the settlement process to represent the interests of a claimant. There are significant legal ramifications to releases and indemnity agreements. There may be longer-term health issues in respect of some claimants. Shell is seeking to protect its own interests in obtaining releases. Shell is making payment and receiving a release from a claimant in return because of the potential for liability.

While the court has no reason to suspect that Shell or Crawford have attempted to mislead or coerce claimants into settling, simple reality suggests that the danger of misleading and coercion is real in such a process and justifies placing limitations upon the nature of Shell's communications with claimants: see, for example, *Abdallah v. Coca-Cola Co.*, 186 F.D.R. 672 at p. 678 (N.D. Ga. 1999). See also *In re International House of Pancakes Franchise Litigation*, Trade Reg. Rep. (CCH) 73,864 (W.D. Mo. 1972); *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770 at p. 772 (2nd Cir. 1972).

As well, class members, including absent class members who are not representative plaintiffs, are represented by putative class counsel. Plaintiffs' counsel has an obligation to ensure the class members receive legal advice and representation. Counsel will do this for any claimant at no cost prior to any individual settlement with Shell. It is purposeful that claimants receive independent legal advice before settling with Shell. Claimants need to know the alternatives in making decisions that will affect their legal rights: see *Bywater v. Toronto Transit Commission* (1999), 43 O.R. (3d) 367 at p. 376, 28 C.P.C. (4th) 307 (Gen. Div.).

A main policy objective to the CPA is to provide access to justice to persons who would not otherwise pursue their claims. Effective access

includes knowing about your rights through a class proceeding before settling an individual claim when the other party to the proposed settlement has knowledge of the class proceeding.

There are cases where courts in the United States have seen the need to prohibit or restrict communications by defendants with class members. In doing so an order of the court "limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of parties": see *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), [1981] S.C.T. No. 2183 at para. 28, online: QL (SCT).

The court must engage in a weighing and balancing exercise. In my view, the advantage in the achievement of a transparent process that ensures greater fairness to claimants through full disclosure by Shell far outweighs the cost of a minimal intrusion upon Shell's otherwise freedom of action through the requested court order.

As a result, the Court ordered that Shell had to provide the name of the proposed Class Counsel to class members before settling directly with prospective class members prior to certification

Vitelli v. Villa Ciardino Homes

In *Vitelli v. Villa Ciardino Homes Ltd.*, (2001), 54 O.R. (3d) 334 (S.C.J.) a class action was commenced against the developer of a residential condominium building on behalf of purchasers of the condominium units. Prior to certification, Defence Counsel contacted putative class members and asked whether they would be prepared to sign a petition stating that they did not want to be involved in the class action. Defence Counsel also attended a meeting arranged by Class Counsel with putative class members and asked questions meant to discourage the residents from supporting the class proceeding. The Defence Counsel did not disclose that she was counsel for the Defendant.

Mr. Justice Cumming disapproved of the use of the petition, stating at para. 19:

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...In my view, the only purpose of the petition under scrutiny can be to adversely affect the interests of putative class members. A putative class member is not opting-out of this class proceeding, as yet uncertified, by signing this petition. Moreover, in my view, defendants could not assert that a putative class member signing the petition is estopped from being a class member in the event of certification. Nevertheless, the petition tends to, at the least, psychologically inhibit those signing from reversing their declared position in the event of a later certification. [Emphasis Added]

Mr. Justice Cumming ordered the Defendant to refrain from soliciting putative class members to sign the petition. Mr. Justice Cumming was also concerned about the attendance of the Defence Counsel at the meeting. Mr. Justice Cumming noted that it was unethical for a lawyer to deal with an unrepresented party without disclosing that the lawyer is acting exclusively in the Defendant's interests. Mr. Justice Cumming noted that the Defence Counsel's conduct was unacceptable and could not be condoned by the Court.

Pearson v. Inco

In *Pearson v. Inco Ltd.*, [2001] O.J. No. 4877 (S.C.J.), the Defendant sent a package to property owners (putative class members) in an area affected by contamination from the Defendant's facility. The package requested the property owner's consent to allow the Defendant's consultants to enter their premises and test for contamination. The materials made it clear that the rights of the property owners in the proposed class action would not be affected. Plaintiff's Counsel did not object to the packages being distributed. Rather, Plaintiff's Counsel brought a motion seeking production of a list of all persons contacted so that Plaintiff's Counsel could send supplementary material in order to "correct" any misleading information provided by the Defendant.

Mr. Justice Nordheimer refused the Plaintiff's request, holding that the packages did not visit any injustice on the putative class members or otherwise undermine the integrity of the class proceeding. In so holding, the Court noted at para. 18:

[M]embers of the proposed class ought not to be treated any differently [from how] non-parties to any other action would be treated subject to one exception. The exception is where either the plaintiff or the defendant purports to communicate, or otherwise deal, with members of the proposed class in a fashion, and to a degree, that would visit an injustice on those persons or would otherwise undermine the integrity of the class proceeding itself. Intimidating conduct such as occurred in *Vitelli v. Villa Giardino Homes Ltd.*, supra, or seeking to have persons settle their claims without adequate information as to their rights as might have resulted in *Lewis v. Shell Canada Ltd.*, supra, are examples of the application of the exception. The exception, however, should not be made the rule or else the court will inevitably be drawn into a painstaking examination of all pre-trial activity undertaken by the parties -- a clearly undesirable result. To a very large degree, members of a proposed class are like anyone else. They have an obligation to protect their own interests and, in that regard, to seek their own advice. At the same time, they have the right to conduct their affairs as they see fit without interference by this court.

1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada

In *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada* (2002), 62 O.R. (3d) 535, (S.C.J.), a class action was brought against A&P, a supermarket franchisor, for failing to pass on

rebates on grocery items to its franchisees. The Plaintiff brought a motion seeking to restrict the Defendant's communications with the putative class member franchisees. The Plaintiff argued that the Defendant had attempted to subvert the class proceeding process by intimidating the proposed class members. The alleged impugned conduct included (i) monitoring franchisees' payments to their lawyers in respect of the proceeding; (ii) subjecting franchisees who refused to execute releases in respect of the lawsuit to rent increases; (iii) providing to putative class members the statement of defence and counterclaim, without providing the reply and defence to counterclaim; and (iv) stating an intention to deliver to each franchisee and have them execute a release in favour of the Defendant, and a new franchise agreement.

Mr. Justice Winkler granted the Plaintiff's motion, holding that:

[73] The [*Class Proceedings Act*] is remedial legislation and must be given a purposive interpretation, particularly where the integrity of the process is at issue. In consideration of the totality of the evidence, the actions of [the defendant] particularized above lead me to draw the inference that [the defendant] intended to defeat the certification motion by improperly interfering with the class proceeding process.

Mr. Justice Winkler noted that:

[75]...the class members are being asked to effectively "opt out" of the class proceeding by [the defendant] prior to certification, through the execution of the releases, without the benefit of the information that would be provided in a certification notice...

[76]...the [*Class Proceedings Act*] does not prohibit pre-certification communication with the putative class, nor does it require prior court approval for every communication. Where, however, a communication constitutes misinformation, a threat, intimidation, coercion or is made for some other improper purpose aimed at undermining the process, the court must intervene.

...

[92] The conduct evident in the action to date underscores the need for the court to maintain close supervision over class proceedings, even in the pre-certification stages. More importantly the court is, and must remain, the proper arena for disputes between litigants in a class proceeding. Certification motions are not decided by polls among the class. The battle cannot be taken to the individual class members. Conduct aimed at pitting one member of the class against another cannot be condoned. While legitimate defence tactics are acceptable in class proceedings, this court will not permit defendants to undermine the process in the pre-certification period in an effort to bring an end to the class proceeding. [Emphasis Added]

Mr. Justice Winkler ordered that the Defendant was restricted from communicating with class members and could not circulate new franchise agreements to, or enter into releases with, the class members, during the opt out period.

U.S. Experience

In the U.S., a Defendant can communicate with class members after certification in the ordinary course of business as long as the communications do not relate to the claims involved in the litigation. Furthermore, any information gained by the Defendant from the class members in the course of those ordinary business communications cannot be used by the Defendant in the litigation. *High v. Braniff Airways*, 20 Fed. R. Serv. 2d 439 (W.D. Tex. 1975)

A Defendant cannot directly settle with individual class members after certification. *Hawkins v. Holiday Inns* 1978 WL 1293 (W.D. Tenn. 1978)