

Case Name:

**Ward-Price v. Mariners Haven Inc.**

PROCEEDING UNDER the Class Proceedings Act, 1992

Between

Wendy Ward-Price on behalf of herself and all others  
similarly situated, plaintiff, and  
Mariners Haven Inc., William Kaufman, Peggy Kaufman,  
Ernst & Young in its capacity as Trustee in Bankruptcy  
of the Estate of William H. Kaufman Inc., Stuart Snyder,  
Clement, Eastman, Dreger, Martin & Meunier and Sims  
Clement Eastman, defendants

[2004] O.J. No. 2308

Court File No. 96-CU-103518

**Ontario Superior Court of Justice  
Nordheimer J.**

Heard: May 14, 2004.

Judgment: June 2, 2004.

(29 paras.)

**Counsel:**

Robert J. Potts and Mirilyn R. Selznick, of counsel for the plaintiff class.

Charles F. Scott and D. Michael Brown, for the defendants, Mariners Haven Inc., William H. Kaufman, William H. Kaufman Inc. and Stuart Snyder.

Paul Feldman, for Polten & Hodder.

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REASONS FOR DECISION

¶ 1 **NORDHEIMER J.**— The defendants, Mariners Haven Inc., William H. Kaufman, William H. Kaufman Inc. and Stuart Snyder, move to decertify this action as a class proceeding under section 10 of the Class Proceedings Act, S.O. 1992, c. 6 or, in the alternative, for an order removing Polten & Hodder as solicitors of record for the plaintiff and the plaintiff class or for an

order extending the time by which members of the class may opt out or for an order requiring members of the class to be determined on an opt in as opposed to an opt out basis or for certain other relief. The motion arises as the result of a letter which Mr. Hodder, in his capacity as counsel to the representative plaintiff, sent out to the class members.

¶ 2 On November 5, 2002 I released my reasons [See Note 1 below] in which I granted certification of this action as a class proceeding. As noted in those reasons, the number of possible members of the class is quite small, that is, no more than twenty-six people. The limited number of members of the class was of concern to me, as I said in my reasons, in determining whether a class proceeding was the preferable procedure for the determination of the common issues. Indeed, I referred to this case as representing a "knife-edge case on this requirement". I also noted that if it should turn out that, after the number of opt outs were known, the size of the class had been significantly reduced, the defendants had the right to move to decertify the proceeding under section 10 of the Act.

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Note 1: [2002] O.J. No. 4260 (S.C.J.).

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¶ 3 Counsel attended before me on January 17, 2003 to settle the form of Notice to be sent to the members of the class under section 17 of the Act. At this hearing, counsel for the representative plaintiff advised that he intended to send an opinion letter to members of the class concurrent with the distribution of the Notice. At that time, I made it clear to counsel for the representative plaintiff that, if he intended to send out such a letter, it was to be sent out separate and apart from the Notice so that there was no possibility that class members would believe that the letter carried any form of approval by the court. Counsel for these defendants/moving parties made no objection to this proposed course of action.

¶ 4 The Notice was subsequently sent to the members of the class on April 10, 2003. Class counsel sent out the opinion letter on the same day that the Notice was sent out but did so in a manner that was separate and apart from the distribution of the Notice. In other words, each document was separately mailed to the members of the class. The opinion letter began by stating:

"I am writing to you because the Ontario Superior Court of Justice has named you as a member of a class action lawsuit. As a member of the Plaintiff Class, you are my client unless you choose otherwise, and I am writing to you to give you advice about your claim."

The letter then goes on over the next nine pages to respond to a series of posed questions covering a variety of topics including the merits of the claim, the likely quantum of recovery by members of the class and whether class members should opt out.

¶ 5 Some months later, an unknown person forwarded a copy of the opinion letter to the solicitors for the third parties in this proceeding. Those solicitors then sent a copy of the opinion letter to the solicitors for the moving parties here.

¶ 6 The moving parties assert that the contents of the opinion letter represent in essence a "counter-notice" to the court approved Notice. Indeed, the moving parties submit that the opinion letter is not really an opinion letter at all but a solicitation to the members of the class designed to minimize the number of opt outs by discouraging class members from exercising that right. The moving parties further submit that the effect of this letter was to undermine the court approved Notice, that such conduct is improper and that the court must consequently grant relief to the moving parties either by way of decertifying the class proceeding or by providing a further opt-out period or by requiring class members to opt in as opposed to opting out of the class proceeding.

¶ 7 In order to address the issues raised by this motion, it seems to me to first be necessary to determine the nature of the relationship that exists between counsel for the representative plaintiff and the members of the class once certification of the action is granted but prior to the expiration of the opt out period. Simply put, does counsel for the representative plaintiff stand in a solicitor and client relationship with members of the class in this time period? I have earlier expressed the view that there is no solicitor and client relationship between counsel for the representative plaintiff and members of the proposed class prior to the certification of the action as a class proceeding - see *Pearson v. Inco* (2001), 57 O.R. (3d) 278 (S.C.J.). At the same time, it seems to me that it is indisputable that a solicitor and client relationship must exist between counsel for the representative plaintiff and the members of the class once the membership of the class has been fixed. At that point, counsel for the representative plaintiff is clearly counsel to the class as certified with all of the duties and obligations that arise under a solicitor and client relationship with respect to the class members including the obligation to represent the class members "resolutely and honourably" [See Note 2 below]. The question then is which of these relationships prevails during the period between certification and the expiration of the opt out period? I would note in this regard that due to the need to settle and obtain court approval for the Notice, that period may extend over a number of months. For example, in this case the action was certified on November 5, 2002 but the opt out period did not expire until June 10, 2003 - some seven months later.

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Note 2: see rule 4.01(1) of the Rules of Professional Conduct of the Law Society of Upper Canada.

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¶ 8 There is one decision to which I have been referred which makes reference to this issue. In *Mangan v. Inco Ltd.* (1998), 38 O.R. (3d) 703 (Gen. Div.), Mr. Justice Poupore said, at p. 715:

"Thus, no matter how the relationship of class counsel and class members is classified after the opt-out period has expired, during the opt-out period potential

class members can be regarded as no more than potential clients of class counsel." [original emphasis]

¶ 9 While the approach taken in *Mangan* may have reflected the approach taken in the United States at that time, that approach has since changed significantly. The approach currently taken in the United States is reflected in the Manual for Complex Litigation, Fourth (Federal Judicial Center 2004) which states, at section 21.33:

"Once a class has been certified, the rules governing communications apply as though each class member is a client of the class counsel."

¶ 10 The difficulty that arises, as I see it, with the conclusion that members of the class are not the clients of counsel to the representative plaintiff, or are considered only potential clients, during the period between the certification decision and the expiration of the opt out phase, is that members of the class may wish, in this same time frame, to receive advice regarding their participation in the class proceeding including whether they should or should not opt out of the class. The members of the class are certainly entitled to receive such advice before making that decision. The logical source for that advice is counsel for the representative plaintiff. Obviously, he or she will be the lawyer most familiar with all aspects of the case. To require class members to seek advice from another lawyer would undermine one of the fundamental objectives of class proceedings, namely, access to justice. Generally speaking, the amounts involved for individual class members would not justify a class member spending his or her own funds to retain their own lawyer to provide them with such advice.

¶ 11 Another practical reality follows from this situation. Most class proceedings will involve a large number of class members. As a consequence, counsel for the representative plaintiff may well wish to proactively contact members of the class to provide answers to what could easily be identified as basic or obvious questions rather than await inquiries from what may be hundreds, if not thousands, of people. To hold that, if counsel for the representative plaintiff acts proactively, such communications are not subject to solicitor and client privilege would be counterproductive to the objective of providing a readily available source of advice for class members.

¶ 12 Further, if there is no solicitor and client relationship between counsel for the representative plaintiff and the class members in this interim period, it would follow that there would be no protection for advice actually received by a class member from counsel for the representative plaintiff even if that class member actively sought out counsel for the representative plaintiff and obtained advice from him or her.

¶ 13 On this question, I have been referred to my own words in *Pearson v. Inco*, *supra*, where I said, at para. 15:

"In such circumstances, I find it difficult to see the basis for imposing a solicitor and client relationship between the proposed class members and counsel of someone else's choosing, without the knowledge or consent of the proposed class members."

¶ 14 I was, in that case, speaking of the situation prior to certification being granted. The situation after certification has been granted is much different. At the point that certification is granted, the court has determined that an identifiable class exists. As part of the consideration in granting certification, the court will have concluded that the representative plaintiff will fairly and adequately represent the interests of the class. That conclusion involves a consideration of the competence of counsel for the representative plaintiff. As Chief Justice McLachlin said in *Western Canadian Shopping Centre Inc. v. Dutton* (2001), 201 D.L.R. (4th) 385 (S.C.C.), at para. 41:

"In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally)." [emphasis added]

¶ 15 In essence, therefore, by deciding that certification is to be granted, the court has been satisfied that the representative plaintiff has selected competent counsel to represent the class. At that point, the court has, in effect, imposed the selection of that counsel on the members of the class. This follows from the simple fact that there must be counsel for the class. It is a necessary adjunct to the decision to certify an action as a class proceeding for class counsel to be selected in this fashion. It also follows that there is, at that point, a practical requirement for imposing a solicitor and client relationship between counsel for the representative plaintiff and the class members without their knowledge or consent. The consent of class members to this selection is not completely foreclosed, however. If a class member is not satisfied with the counsel that has been selected, at least one option for that class member is to choose to opt out of the proceeding. If a class member does not opt out, they may then be seen as consenting to the selection of class counsel.

¶ 16 Lastly on this point, I would note that the letter in this case satisfies the accepted requirements for a finding that solicitor and client privilege attaches to it as set out in *Wigmore on Evidence*, vol. 8 (McNaughton rev., 1961) at para. 2285:

"Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived."

¶ 17 The legal advice in this situation was technically not "sought" from counsel for the representative plaintiff, it was volunteered. For the reasons I have already mentioned, in the context of a class proceeding, I do not believe that the distinction between seeking advice and being provided with advice can be fatal to the claim of privilege. Save for that distinction, the principles set out in *Wigmore* apply directly to this letter.

¶ 18 Consequently, I conclude that counsel for the representative plaintiff becomes counsel to the class at the time that certification is granted. Therefore, I also conclude that the letter sent by class counsel to the members of the class, in this case, is privileged.

¶ 19 Given that conclusion, I must address the submission of the moving parties that, if the letter is privileged, the privilege has been waived by virtue of the letter having been voluntarily offered up by a member of the class. I do not accept that the privilege can be waived in such a fashion. Privilege in the context of a class proceeding belongs to the class and is only capable of being waived by the class. While it is not the situation here, normally classes consist of hundreds, if not thousands, of people. There is every likelihood that a given class member, for whatever reason, might be willing to share with defendants, their representatives or their counsel, copies of documents they receive in the course of the class proceeding. In that context, to hold that any individual class member could unilaterally choose to waive the privilege would render the privilege virtually meaningless. In my view, if documents of that kind come into the hands of the defendants or their counsel, then counsel have the obligation to deal with such material in the same fashion as ought to happen if, in a normal proceeding, privileged material inadvertently comes into the possession of an opposite party. The material should immediately be returned to opposing counsel or, if there is any doubt regarding the matter, a ruling from the court should be obtained.

¶ 20 The conclusions that the letter is privileged and that the privilege has not been waived, however, does not end the inquiry raised by this motion. The fact that the letter is privileged does not, in and of itself, mean that its contents are immune from examination. If such a letter is used for an improper purpose, then the fact that it is privileged does not preclude the court from reviewing the letter and taking such steps as are deemed necessary to address any such impropriety.

¶ 21 By improper purpose, I refer to the type of communication to which Mr. Justice Winkler made reference in *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.); *aff'd.* [2004] O.J. No. 865 (Div. Ct.) at para. 76:

"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."

¶ 22 I recognize that Mr. Justice Winkler was speaking of pre-certification communications in that case but, in my view, the principle applies with equal force to any communication to the class members whether pre-certification or post certification. Its application is necessary

throughout the process in order to ensure that the court maintains its supervisory role over the conduct of a class proceeding and the protection of the interests of the class members. As Mr. Justice Sharpe stated in *Bywater v. Toronto Transit Commission* (1999), 43 O.R. (3d) 367 (Gen. Div.) at p. 377:

"As these cases hold, 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."

¶ 23 Does the letter in this case cross the line between permissible and impermissible communication with the class? I do not believe that it does. 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 [See Note 3 below]. Members of the class are entitled to nothing less.

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Note 3: see rule 2.02(1) of the Rules of Professional Conduct of the Law Society of Upper Canada.

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¶ 24 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.

¶ 25 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.

¶ 26 There is no doubt that I could point to portions of the opinion letter which I might suggest could have been better expressed. The letter might have contained an explicit statement that the contents of the letter were clearly matters of counsel's opinion and that the class members needed to make up their own minds on whether to be part of the proceeding or not. It might have expressly mentioned that they had the right to seek their own separate advice on the issues canvassed. However, all of these possible criticisms fall into the realm of "wordsmithing", a process in which the court ought not to engage. The bottom line is that the contents of the letter do not offend the statutorily mandated and court approved process and therefore do not warrant intervention by the court.

¶ 27 I will address one final point. One aspect of the relief sought by the moving parties was an order that members of the class would have to opt in, as opposed to opt out, of this class proceeding. In light of the express provision in section 9 of the Act, I question whether the court has jurisdiction to make such an order, whether under section 12 of the Act or otherwise. In any event, given the conclusions that I have reached respecting the opinion letter, it is not necessary to reach a conclusive determination on this point.

¶ 28 In the end result, therefore, the motion is dismissed.

¶ 29 If the parties cannot resolve the issue of costs, the plaintiff and the defendants may make written submissions on the appropriate disposition. The plaintiff's submissions are to be filed within 15 days of the release of these reasons and the defendants' response is to be delivered within 10 days thereafter. No reply submissions are to be filed without leave. The submissions should include a bill of costs or equivalent information that will allow me to fix the costs of the motion should I decide that costs are to be awarded.

NORDHEIMER J.