CITATION: ALS Society of Essex v. City of Windsor, 2018 ONSC 2350
DIVISIONAL COURT FILE NO.: 34/17
DATE: 20180411

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

HARPER, MYERS, NEWTON, JJ.

BETWEEN:	
AMYOTROPHIC LATERAL SCLEROSIS SOCIETY OF ESSEX COUNTY Plaintiff/Appellant	*Brian N. Radnoff and Alex R. Sharpe*, Lawyers for the Plaintiffs/Appellants
– and –	
THE CORPORATION OF THE CITY OF WINDSOR Defendant/Respondent	*Brendan van Niejenhuis and Fredrick R. Schumann*, Lawyers for the Defendants/Respondents
	DIVISIONAL COURT FILE NO.: CV-08-12005 CP/17
BETWEEN:	
BELLE RIVER DISTRICT MINOR HOCKEY ASSOCIATION INC. and ESSEX COUNTY DANCERS INCORPORATED Plaintiffs/Appellants	
– and –	
THE CORPORATION OF THE TOWN OF TECUMSEH Defendant/Respondent	
	HEARD: April 10, 2018

MYERS J.:

REASONS FOR JUDGMENT

Background

[1] The plaintiffs in two related class actions appeal from the decision of Patterson J. dated January 13, 2017. Patterson J. is case managing the two proceedings together.

[2] The actions involve claims that the defendant governments overcharged class member charities for bingo licenses over a number of years. In his order, the case management judge declined the plaintiff charities' request to continue a protective order dated June 9, 2016. That order prohibited the disclosure of the identities of potential class members who have opted-out of the proceedings. The plaintiff charities fear that if the identities of those who have opted-out are known, people will be able to figure out which class members potentially remain part of the proceedings. They submit that in light of the defendants' misconduct at an earlier stage of the process, as found by the case management judge, their charitable enterprises are at risk of real prejudice if the defendant governments are able to identify and target for adverse publicity potential class members who have not opted-out of the two class action proceedings.

This Appeal

[3] The appeal raises a very narrow point. By order dated October 23, 2017, the plaintiff charities were given leave to appeal to this court solely on the question of whether the case management judge "erred in law in failing to consider whether the deemed undertaking and/or implied undertaking rules apply to information regarding the identities of the opt-outs."

[4] It is important to emphasize that there is no issue before this court concerning a protective order or any sealing of the court file. This court is not being asked to enjoin or prohibit anyone from engaging in freedom of expression or to seal any court files from public view. The deemed and implied undertaking rules limit the use that parties in litigation are allowed to make of information that the parties opposite have been compelled to disclose under the discovery procedures applicable in lawsuits. Parties may only use information that they obtain under the implied or deemed undertakings for the purposes of the litigation and for no other ulterior purpose. A breach of undertaking may amount to a contempt of court. The plaintiff charities however, seem to be conflating the notions that there are deemed or implied undertakings applicable to the names of potential class members who have opted-out of these class actions with an injunction against the defendant governments prohibiting the disclosure of those names. Even if we find that opt-out identities are protected by an undertaking, deemed or implied, we are not finding today that the defendant governments or anyone is enjoined from making any lawful use of information to which they may be entitled.

[5] If one or both defendant governments breach an applicable undertaking or revert to an unseemly path of interfering with access to justice in these proceedings, the plaintiffs will have their remedies. We view this case as laying out applicable boundaries. The parties choose their paths whether in-bounds or out-of-bounds themselves.

The Facts

[6] In 2008, the three plaintiffs named in the Titles of Proceedings commenced class action lawsuits against the two municipal governments. The plaintiffs allege that the defendants charged illegal licensing and related fees for issuing bingo licenses.

[7] At this stage, only the three named plaintiffs are parties to the lawsuit. There is a large class of potential class members who may one day choose to participate in the proceedings if they are successful. A list of all charities to whom bingo licenses have been granted was made public some time ago. Other than the three named plaintiffs, all others on that list are not yet plaintiffs in these proceedings. Rather, they are potential class members who have not yet had to decide whether they wish to participate or not. No one other than the three named plaintiffs has yet had to choose to be a plaintiff and seek a payment of money from a defendant.

[8] Under the *Class Proceedings Act, 1992*, SO 1992, c.6, potential class members who positively decide that they do not wish to be part of the lawsuits are entitled to opt-out of the proceedings. There is a process in the statute to provide notice to class members containing information about the proceeding including class members' rights to opt-out. A court order governs the procedure under which a potential class member may opt-out of the process. If a potential class member opts-out, then it will not be a participant in the claims any further. In order to opt-out of these two cases, a potential class member is required to identify itself by providing a form to the plaintiffs' lawyers.

[9] If a potential class member does not opt-out that does not mean that it is automatically a plaintiff. There will be a trial of common issues down the road led by the three named plaintiffs' lawyers. Thereafter, if the defendants are held liable on the issues that are common to all class members, each individual class member who wishes to make a claim will be able to come forward to try to prove its own particular losses and its own entitlement to recovery, if any. For example, if a government is found to have done something illegal in granting bingo licenses, then any potential class member who wants to recover funds will have to make a claim to show how many bingo licenses it bought during the applicable time period and how much loss it claims to have suffered. Each claimant will likely have to deal with its own particular facts and circumstances at that time.

[10] The identity of anyone who makes a claim will typically be disclosed when they make their claim. Prior to that time, they are potential class members only. Until they choose to make a claim, they are just members of the public who have done nothing but learn that someone

else may have involved them in a lawsuit without necessarily having their permission or even having consulted with them.

[11] It should be borne in mind as well that even if the defendants are held liable in the common issues trial, potential claimants can still choose not to make a claim. Just because someone is in the class of potential plaintiffs does not mean that it will ultimately make a claim even if it is entitled to do so.

[12] In this case, when the plaintiffs' counsel sent their initial notice to the potential class members, the defendant municipalities responded with a contemporaneous and very significant media campaign aimed at convincing potential class members that they should opt-out of the class actions even if they have valid claims. The case management judge found that the defendant municipalities wrongfully exercised undue influence over potential class members. The governments sought to convince charities to refrain from seeking judgments against them because, they claimed, the judgments would have to be borne by municipal ratepayers or taxpayers. The governments also called for people to try to convince charities with whom they might be involved to opt-out. Implicitly at least, the defendants governments could be perceived to have been trying to influence charities to opt-out by whipping up taxpayer anger knowing that the taxpayers would then withhold or threaten to withhold donations or volunteer hours to the charities unless they opted-out of the legal proceedings. Charities who were not plaintiffs and may have had nothing to do with the lawsuits found themselves on the receiving end of an aggressive media campaign aimed at them.

[13] The case management judge expressed concern that the defendants sought to pit taxpayers against charities in the public eye and then to pit some charities against others. He found that the defendant municipalities sought to influence the potential class members' opting-out decisions in a manner that crossed the dividing line from simply providing helpful information to interfering with class members' rights to make informed, voluntary choices free from undue influence. The case management judge noted that the government defendants made at least one misrepresentation in their advertising materials as well.

[14] These were significant criticisms especially when directed at government litigants whom one ought to expect to play by the rules and obey the law.

[15] As a result of the case management judge's findings that the defendants used undue influence to improperly obtain opt-outs, he required that there be a fresh opt-out period established so that any potential claimants who had already opted-out would have an opportunity to reconsider their positions free from further undue influence by the defendants. That period ran from August 11, 2016 to October 10, 2016.

[16] Before the new opt-out process began, on June 9, 2016, counsel for all of the parties agreed that the court should impose an interim protective order designed to enable the plaintiff charities' lawyers to share information about opt-outs in the upcoming process with the

lawyers for the defendant municipalities. It was a term of the consent protective order that the defendants' lawyers were not allowed to share with their government clients the information provided by the charities' lawyers about the names or the number of entities who opted-out in the fresh process. Moreover, the court's order prohibited disclosure of any information that could identify charities that have opted-out to anyone other than the defendant municipalities' lawyers.

[17] When the fresh opt-out period ended, the defendant municipalities asked the case management judge to lift the protective order. The plaintiff charities did not oppose *per se*. Rather, they asked the case management judge to confirm that the implied or deemed undertaking rules apply to the information at issue or to otherwise condition his order to protect class members and those who have opted-out.

The Evidence before the Case Management Judge

[18] The plaintiff charities adduced some evidence to the case management judge about their ongoing concerns even though the second opt-out period had ending. The evidence was all contained in lawyers' affidavits and thereby lacked first-hand quality for the most part. The evidence essentially raised concerns with the potential that the defendant governments might release the names of opt-outs to the public and by doing so enable the public to figure out who has not opted-out and to apply economic pressure against them. As noted above, there may yet be times at which potential claimants will be entitled to choose to make a claim or not to do so. The plaintiff charities' lawyers' evidence is that the potential class members fear that improper economic pressure and undue influence may be exerted against them again.

[19] The list of opt-outs is not yet completed as the charities are raising some challenges to the effectiveness of specific opt-out notices that the plaintiffs' counsel received. There has been no list of opt-outs filed with the court. So there is no issue about sealing any court files at this time.

[20] The plaintiffs' lawyers testified to receiving communication from unnamed potential class members who say they felt pressured by the defendants' initial media campaign. The lawyers say that some unnamed charities fear reprisals from the defendant governments or the public if the fact that they have not opted-out becomes known. The lawyers recite publicity pre-dating the fresh opt-out campaign. They say that at least one donor has told ALS Society of Essex Windsor that he or she will no longer donate to it. One organization is said to have revoked its initial opt-out on the basis that it expected that its name would be kept in strict confidence. Counsel concludes with his opinion that if opt-out names become public, there is a "real risk that [potential class members who have not opted-out] will face economic repercussions and undue influence."

The Case Management Judge's Decision

[21] As the judge who has been overseeing these cases for several years, the case management judge has intimate familiarity with the facts and the parties' strategies. He made the original finding that the defendant municipalities engaged in undue influence. He is thus keen to the goals of the *Class Proceedings Act, 1992* concerning the enhancement of access to justice and the enforcement of the behaviour modification.

[22] The argument before the case management judge seems to have turned on issues of confidentiality. The plaintiff charities expressed concern that the names of the opt-outs not be made public so as to protect the names of those potential class members who have not opted-out. There is no real concern with the confidentiality of the names of those who have opted-out. Everyone agrees that each charity that has opted-out is free to make that fact public if it chooses to do so. Rather, the concern is that since there is already an available list of all charities who have bought bingo licenses, if one knows which have opted-out, one can then discern that those who remain on the list have not yet opted-out. It is principally that group of potential class member claimants whom the representative plaintiffs seek to protect.

[23] The defendants' lawyers argued that they should not be required to keep information confidential from their clients any further. The municipalities then argued that they could not keep information confidential due to their own statutory processes including, such things as freedom of information legislation for example.

[24] The judge considered the protective order to be a form a sealing order and balanced concerns between the open courts principle and litigants' (or potential litigants') desires for secrecy. He ultimately ruled that there was insufficient evidence of a serious threat to the potential class members to justify any further prohibition against releasing information in these proceedings. As noted at the outset, these findings are not under appeal.

[25] Rather, the appellants argue that the judge simply did not deal with their arguments that the deemed undertaking and the implied undertaking rules apply to the names of opt-outs and thereby prevent disclosure of the names by the defendants once the protective orders are lifted.

The Deemed and Implied Undertakings

[26] As part of the rules or procedural law applicable to lawsuits, each party is required to produce to the other side all documents in his or her possession, power, or control, that are relevant to the issues in the lawsuit. Subject only to narrow exceptions relating to the law of privilege, confidentiality and privacy concerns generally do not protect or limit the obligation to produce relevant documents in a lawsuit. All of a party's private information must be disclosed to the other side if it is relevant to the issues pleaded in the lawsuit.

[27] The implied undertaking rule developed at common law to protect people who are sued and then required to deliver to the other side their most private records. Parties who receive documents compelled from the other side under the procedural law imposed in lawsuits are therefore implicitly required to undertake to the party opposite and to the court that the information will be used only for the purposes of the litigation and for no ulterior purpose.

[28] The applicability of the rule in Ontario was confirmed by the Court of Appeal in *Goodman v. Rossi*, 1995 CanLII 1888 (ON CA). In that case, Associate Chief Justice Morden explained the key rationales for the rule by quoting from *Matthews and Malek's Discovery* (1992) at p. 253:

> It is in general wrong that one who is compelled by law to produce documents for the purpose of particular proceedings should be in peril of having those documents used by the other party for some purpose other than the purpose of the particular legal proceedings and, in particular, that they should be made available to third parties who might use them to the detriment of the party who has produced them on discovery. A further rationale is the promotion of full discovery, as without such an undertaking the fear of collateral use may in some cases operate as a disincentive to proper discovery. The interests of proper administration of justice require that there should be no disincentive to full and frank discovery.

[29] The deemed undertaking rule was written into the *Rules of Civil Procedure*, RRO 1990, Reg 194 after the Court of Appeal recognized the common law implied undertaking. The deemed undertaking is set out in Rule 30.1.03 (3) as follows:

> (3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

[30] The deemed undertaking however, is limited in that it applies only in circumstances listed in Rule 30.1.01 (1)(a) that are not carved out in the exceptions in Rule 30.1.01 (4) through (7). The important inclusions for this case are in Rules 30.1.01 (1)(a) (i) and (ii) that make subject to the deemed undertaking the documents and evidence that a party is required to be disclosed in the documentary and oral discovery processes of the lawsuit.

[31] The defendant municipalities argue that the case has not yet proceeded to documentary or examinations for discovery. The names of opt-outs is not information belonging to the plaintiffs that they are being required to disclose due to the requirements of the rules applicable to discovery. Rather, the information is being provided to counsel for the defendants for the efficient management of the process under s. 12 of the *Class Proceedings Act, 1992.*

[32] The defendant municipalities argue that the information about the identities of opt-outs is not private information of the plaintiffs. In fact, people who opt-out do not want to be part of the plaintiffs' lawsuit. The plaintiffs concede that they are not seeking to stop individuals who have opted-out from publicly disclosing their own names and actions should they choose to do so. As discussed above, the plaintiffs' concern is that by knowing the names of opt-outs people with the complete list of bingo licensees will be able to figure out who has not opted-out and therefore remains as potential class members who can be susceptible to undue influence.

[33] The defendant municipalities argue that disclosure of the names of people who have opted-out does not intrude on the plaintiffs' privacy. There is little or no privacy interest protected in class actions. As Nordheimer J. (as he then was) wrote in *Fehringer v. Sun Media Corp.*, (2002), 27 CPC (5th) 155 (Ont SC) at para 29:

> Class action should not be used for the purpose of cloaking members of the plaintiff class with anonymity...At some point, all members of the class are going to have to identify themselves because they will have to prove their individual claim for damages.

[34] On the other hand, Strathy J. (as he then was) seemingly said the opposite in *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2012 ONSC 4317 at para. 68:[1]

> One of the great strengths of a class action is that it permits class members to pursue their claims, in relative anonymity of a class, without fear of the consequences, whether real or perceived.

[35] In *Eizenga et al., Class Actions Law and Practice* (2nd ed) (Toronto: LexisNexis, 2008) at §5.75, p. 5-72 the authors note that in various cases opt-out forms may be sent to counsel for the plaintiff, the defendant, or the court. The defendant municipalities argue that it is simply happenstance that they were sent to the plaintiffs' counsel in this case and are then disclosed to the defendants' counsel.

[36] However, in *Markle v. Toronto (City)*, 2004 CarswellOnt 4291 (SCJ) Nordheimer J. (as he then was) ruled that the deemed undertaking did protect class member names and addresses that the defendants were ordered to turn over to counsel for the representative plaintiffs before discovery. His Honour held at para. 6:

> Second, this is information which the defendant will ultimately have to provide through the discovery process. Third, under section 5(3) of the Act each party is obliged to provide the court with its best information on

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[1] Rev'd on other grounds 2013 ONCA 279

> the number of members of the class. It seems to me a very small extension of that obligation to require the defendant to actually identify the members of the class. While I appreciate the defendant's concerns about privacy, the names and addresses are not exactly the most sensitive of information to have to produce. Further, the deemed undertaking under rule 30.1 provides the necessary measure of protection against any misuse of the information.

[37] Therefore, information that is subject to discovery but which is exchanged earlier for the better efficiency of the action remains subject to the deemed undertaking. While the names of opt-outs are not the property of the plaintiffs, neither were the names of customers the property of the plaintiff in *Markle*. In both cases, the plaintiffs are being required to disclose lists in their hands that were properly disclosable in discovery but which were required to be disclosed earlier for efficiency and better case management. It would be contrary to the goals of the civil justice system – to encourage efficient, affordable, proportionate proceedings - if case management rules were held to deprive a party of protections otherwise available under the *Rules of Civil Procedure* that are also designed to protect and enhance the fairness and efficiency of litigation.

[38] In *Robinson v. Medtronic Inc.*, 2011 ONSC 3663 (CanLII), Perell J. noted the particular importance of the deemed undertaking rule in class proceedings. At paras. 41 and 42 of the decision he wrote:

> [41] It is worth noting that in encouraging disclosure by protecting privacy and prohibiting the collateral use of disclosed documents, the deemed undertaking advantages and protects defendants as much as it advantages and protects plaintiffs. The deemed undertaking encourages the respective parties not to abandon their claim or defence out of fear that the potential misuse of their private documents and information would be worse that prosecuting or defending the claim.
>
> [42] In my opinion, the protection offered by the deemed undertaking is particularly important in a class proceeding. The case at bar is illustrative. Proof of the Plaintiffs' case likely depends upon the Defendants making disclosure, but the Defendants should not have to sacrifice their valuable commercial and intellectual property as the price of vindicating themselves from the serious allegations made against them.

[39] In some cases, judges have been concerned that the deemed undertaking may not extend far enough to protect the information in issue. In *Robinson*, Perell J. added to the protections afforded by the deemed undertaking by using his broad case management authority pursuant to s. 12 of the *Class Proceedings Act, 1992.* Leitch J. did the same thing in *Airia Brand Inc. v. Air Canada*, 2016 ONSC 1371 at para. 27.

[40] The court's broad supervisory jurisdiction is engaged throughout class proceedings particularly because there are absent potential class members who may be seriously affected by class action processes that they have not created or even had knowledge of in advance. *Fantl v. Transamerica Life Canada*, 2009 ONCA 377 at paras. 39 – 40. This case is a good example of such concerns. While we are not being called upon to exercise any jurisdiction under the *Class Proceedings Act, 1992*, we remain guided nevertheless by the policies that are especially applicable to this select group of legal proceedings

The Identification of the Issue

[41] The essential process that was at issue before the case management judge was case management. The goals were to simplify the process, enhance access to justice, and maximize efficiency and proportionality. In all of the class action cases discussed above, the overarching goal was to protect the fairness of the process for the parties and putative class members as much as possible balancing the needs of all against the goals of the process.

[42] The motion judge, respectfully, dealt with the matter as if it was a motion for a sealing order under the very narrow test applied where a party seeks to limit public access to legal proceedings set out by the Supreme Court of Canada in *Sierra Club of Canada v. Canada Minister of Finance*, 2002 SCC 41. The judge acknowledged that nothing was being sealed but held that it was nevertheless appropriate to consider the matter only as if it was a sealing order being sought. This was an error.

[43] The Appellants concede that they were not seeking to extend the protective order *per se*. They sought expressly that the court rule that the deemed or implied undertaking applied or that conditions be imposed under s. 12 of the statute. The issue was not whether the public was being excluded from the courthouse but whether documents or information being produced for the fair and expeditious management of the process was or ought to have been entitled to protection in the interests of the potential class members.

[44] The case management judge, respectfully, failed to rule on part of the question that had been submitted to him. In light of the decision by Nordheimer J. in *Markle* discussed above, and, in particular, that the information being conveyed relates to the make-up of the claimant class and as such is relevant and discoverable, the motions judge ought to have held that the deemed undertaking applies to the names and number of opt-outs as disclosed by the plaintiffs' counsel to the defendants' counsel. The submission by the government defendants that the deemed undertaking applies only where a party is compelled to disclose its own private information in discovery is not consistent with the decision of Nordheimer J. Moreover, the approach of Perell J. to the interpretation of the deemed undertaking and the approach of the Court of Appeal to class actions generally mandates a broad and generous interpretation of rules designed to protect the potential class members and to thereby enhance access to justice.

[45] The insufficiency of the evidence to support a protective order as found by the case management judge was just one piece of the puzzle presented by the parties. The deemed undertaking rule applies in any event.

[46] As noted at the outset of these reasons, we are not granting an injunction or a sealing order. In holding that the deemed undertaking applies, we are not assessing the limits of the operation of the rule. There are exceptions to the rule and orders can be made to lift the undertaking in appropriate circumstances. As noted above, we are setting the boundaries rather than telling parties which path to take. Regardless, we would not expect the government defendants to take steps to risk subverting the fairness of the litigation process now that they understand the impropriety of their prior conduct.

[47] The appeal is allowed to the extent that the court orders that the deemed undertaking set out in Rule 30.1.01 (3) applies to the names of opt-outs and the number of opt-outs as disclosed by the plaintiffs' counsel to the defendants' counsel.

[48] Costs are reserved to the panel upon receipt of written submissions of the parties.

Myers J.

I agree

Harper J.

I agree

Newton J.

Release Date: April 11, 2018

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