COURT OF APPEAL FOR ONTARIO

CITATION: Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City), 2019 ONCA 344
DATE: 20190501
DOCKET: C65871, C65870

Lauwers, Pardu and Nordheimer JJ.A.

BETWEEN

Amyotrophic Lateral Sclerosis Society of Essex County

Plaintiff (Respondent)

and

The Corporation of the City of Windsor

Defendant (Appellant)

AND BETWEEN

Belle River District Minor Hockey Association Inc. and Essex County Dancers Incorporated

Plaintiffs (Respondents)

and

The Corporation of the Town of Tecumseh

Defendant (Appellant)

Brendan van Niejenhuis and Fredrick Schumann, for the appellants

Brian Radnoff and Alex Sharpe, for the respondents

Heard: April 11, 2019

On appeal from the order of the Divisional Court (Harper, Myers and Newton JJ.), dated April 11, 2018, with reasons reported at 2018 ONSC 2350, allowing an appeal from the order of Justice Terrence L.J. Patterson of the Superior Court of Justice, dated January 13, 2017, with reasons reported at 2017 ONSC 310.

Nordheimer J.A.:

[1] The defendants appeal, with leave, from the order of the Divisional Court allowing an appeal from the order of the class actions judge, Patterson J., dated January 13, 2017. The Divisional Court ordered that the deemed undertaking in r. 31.1.01(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, applies to the names of the opt-outs, and the number of opt-outs, disclosed by respondents' counsel to appellants' counsel in these class proceedings.

[2] For the reasons that follow, I would allow the appeal and set aside the order of the Divisional Court.

Background

[3] Over many years, charitable and religious groups paid fees to the City of Windsor and the Town of Tecumseh for licenses to hold fund-raising lottery events (e.g. bingo games). In 2008, two companion class actions (one against each municipality) were commenced for the return of those fees. The two class actions have been jointly case-managed by Patterson J.

[4] On December 31, 2012, the class actions were certified. The certification orders were varied by this court on August 12, 2015: *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572, 337 O.A.C. 315. Following that decision, the opt-out period ran for 120 days from January 15, 2016 to May 15, 2016. The court-approved Notices of Certification directed that class members could opt-out by sending an opt-out form to class counsel, by mail, fax, or email, or by completing the opt-out form online.

[5] During the opt-out period, the appellants engaged in a public campaign in an effort to convince class members to opt-out of the class actions. The campaign emphasized the potential harm to municipal finances from the class actions, including that taxes would have to be increased and services cut to pay any damage award. The campaign also encouraged members of the public to urge the charities and religious organizations that they supported to opt-out.

[6] The respondents brought a motion challenging the propriety of the appellants' campaign. On January 29, 2016, the class actions judge, while acknowledging that the appellants had the right to communicate with class members, found that the campaign went over the line and created "undue influence": *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City),* 2016 ONSC 676, 58 M.P.L.R. (5th) 127, leave to appeal dismissed 2016 ONSC 1929, 58 M.P.L.R (5th) 137 (Div. Ct.). Among other things, he ordered that

there would be a reconsideration period for class members who opted-out. The reconsideration period ran from August 11, 2016 to October 10, 2016. Both sides sought to appeal this decision, but the Divisional Court denied leave to appeal.

[7] During the reconsideration period, and on the consent of the parties, the class actions judge made what was described as a protection order preventing the appellants' counsel from passing along, to their clients, the number or identity of the opting-out members. He made the order to prevent undue influence during the reconsideration period.

[8] After the reconsideration period, the appellants moved to lift the protection order. The respondents sought a revised protection order. Alternatively, the respondents sought a declaration that the deemed and/or implied undertaking rules applied to the identities and number of opt-outs.

[9] The class actions judge granted the appellants' motion and lifted the protection order: *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City),* 2017 ONSC 310. He rejected the respondents' submissions in support of a modified protection order. He did not make a declaration, either way, about the deemed and/or implied undertaking issue. In reaching his decision, the class actions judge relied on *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41, [2002] 2 S.C.R. 522 and found that there was "insufficient evidence that there is a serious threat to the commercial interest of the

[respondents] in this case. On the evidence, the risk is not real and substantial and well-grounded": at para. 29. He also concluded that "the open court principle outweighs the potential class members request for confidentiality": at para. 34.[1]

[10] The respondents sought leave to appeal to the Divisional Court. The Divisional Court granted leave "on only the following issue: did the Case Management Judge err in law in failing to consider whether the deemed and/or implied undertaking rules apply to information regarding the identities of the opt-outs?".

The decision below

[11] The Divisional Court pointed out that the class actions judge had failed to address the alternative submission of the respondents that the deemed undertaking rule applied to the information regarding the opt-outs.[2] It also found that the class actions judge had erred in treating the request for a protection order as if it was a motion for a sealing order. While the latter conclusion is arguable, given the very narrow issue upon which leave to appeal had been granted, it was an error for the Divisional Court to have embarked on a consideration of that issue.

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[1] Here the application for a sealing order may have been a misnomer. The parties were not seeking to seal documentary information that had been filed with the court. Rather the parties sought in substance, a confidentiality order: see *Elbakhiet v. Palmer*, 2019 ONCA 333.

[2] Despite the specific wording of the endorsement granting leave to appeal to the Divisional Court, only the issue of the application of the deemed undertaking rule was considered and determined. Consequently, these reasons also only deal with the application of the deemed undertaking rule.

[12] The Divisional Court reviewed the genesis of the deemed undertaking rule and correctly noted that the rule only applies to the specific circumstances set out in r. 30.1.01(1). More specifically, the rule applies only to information obtained through the discovery process: at paras. 26-30.

[13] The Divisional Court concluded that the information regarding the opt-outs was information that would be available through the discovery process and there was no proper basis to distinguish the opt-out information, disclosed earlier in the litigation process, from that class of discoverable information. Thus, the Divisional Court concluded that the deemed undertaking rule applied to the opt-out information: at paras. 37, 44-47.

Analysis

[14] The issue before this court is, as it was before the Divisional Court, a very narrow one. It has only to do with whether the deemed undertaking rule applies to the opt-out information.

[15] In my view, the Divisional Court made two errors in its analysis. First, it incorrectly concluded that, because members of a class are not parties to the litigation, they are entitled, in some fashion, to maintain their anonymity at least up to the stage where they have to individually prove any claim that they may have: see paras. 8-11. Second, the Divisional Court incorrectly concluded that the opt-out information was equivalent to information properly produced pursuant to the

discovery process and thus fell within the scope of the deemed undertaking rule: see paras. 37, 44-47.

(i) Class members as parties

[16] On the first error, I accept that, in the very technical sense, members of a class in a certified class action are not parties to the action: *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal dismissed [1998] S.C.C.A. No 372. However, once the opt-out period has expired, and a putative class member has not opted-out of the proceeding, they become part of the class of plaintiffs who are advancing a claim against the defendant(s). They have submitted to having their rights in relation to the issues raised in the class action determined by the court. I note, on this point, that s. 27(3) of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 ("*CPA*") expressly provides that a judgment on common issues of a class "binds every class member who has not opted out of the class proceeding". I also note the observation in Warren K. Winkler et al., *The Law of Class Actions in Canada* (Toronto: Thomson Reuters Canada, 2014) where the authors say, at p. 194:

> Although a putative class member has certain statutory rights, he or she is not a party to the litigation until the opt-out period has terminated. [Emphasis added.]

[17] While class members may technically not be parties to the action, they are very much akin to parties. For example, they are, potentially, subject to discovery.

The *CPA* permits a party to seek leave, following the examination of the representative party, to examine a class member for discovery: *CPA*, s. 15(2).

[18] This understanding that class members have a status akin to parties is also consistent with the fact that the *CPA* requires, as a condition for certification, that there be a representative plaintiff (or defendant). Axiomatically, the fact that there is a representative plaintiff means that that individual is representing the other plaintiffs, i.e., the other members of the plaintiff class.

[19] Contrary to the respondents' submission, this understanding of class members as akin to parties is not inconsistent with the decision in *Haddad v Kaitlin Group Ltd.,* 2012 ONSC 4515, where Perell J. noted that class members "are not parties to the litigation in the normal sense": at para. 18. I agree. Class members are not parties in the normal sense because they have no right to participate in the underlying litigation – except with the permission of the court under s. 14 of the *CPA.*

[20] However, the fact that the *CPA* creates a distinction between "class members" and "parties" does not change the fact that they should be treated as akin to parties when issues affecting their rights arise in the proceeding. It also does not mean that the actual parties to the litigation – and the public – are not entitled to know the identities of those class members that have submitted their rights for adjudication in the class proceeding.

(ii) The deemed undertaking rule

[21] In terms of the application of the deemed undertaking rule, in my view the opt-out information – largely a simple list - is not, and cannot be, properly characterized as being evidence covered by r. 30.1.01(1). It would be helpful on this question to reproduce the actual wording of the deemed undertaking rule. Rule 30.1.01 reads, in part:

> (1) This Rule applies to,
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> (a) evidence obtained under,
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> (i) Rule 30 (documentary discovery),
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> (ii) Rule 31 (examination for discovery),
>
> (iii) Rule 32 (inspection of property),
>
> (iv) Rule 33 (medical examination),
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> (v) Rule 35 (examination for discovery by written questions); and
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> (b) information obtained from evidence referred to in clause (a).
>
> (2) This Rule does not apply to evidence or information obtained otherwise than under the rules referred to in subrule (1)

[22] The opt-out list is, in essence, statutorily created information. The list is information that is created as a result of the terms of the order upon which the court certifies the class action. As s. 9 of the *CPA* mandates, any member of the class may opt-out, and the terms and conditions of the opt-out process must be set out in the certification order. It is that process that creates the opt-out information.

Consequently, the opt-out information is not the private information of any party. And it is information that all parties are entitled to have.

[23] As the parties here acknowledged, the certification order could have directed that the opt-out forms be sent to the appellants as easily as to the respondents. Indeed, opt-out forms might, in some cases, be directed to a third party: Eizenga et al., *Class Actions Law and Practice,* loose-leaf, 2nd ed. (Toronto: LexisNexis, 2008), §5.75. Regardless, both sides of the action would be entitled to the information, as would the court itself. It is important, on this point, to reiterate that r. 31.01.1(2) expressly provides that the deemed undertaking rule "does not apply to evidence or information obtained otherwise than under the rules referred to in subrule (1)".

[24] The core purpose of the deemed undertaking rule is to protect the use to which the compelled production of a party's private information can be put: *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (C.A.); *Juman v Doucette*, 2008 SCC 8, [2008] 1 SCR 157. The opt-out information is not captured by that purpose. Rather, the opt-out information is information that relates to the identities of the class members who have agreed to be bound by the determinations made in the context of the class proceedings.

[25] Courts in Canada operate on the openness principle. A person who chooses to commence a court proceeding must do so publicly, subject only to exceptional

circumstances where a pseudonym or initials may be used: *C.G. v. Ontario (Health Insurance Plan General Manager),* 2014 ONSC 5392, 327 O.A.C. 53 (Div. Ct.), at para. 7. The overarching principle applicable to all court proceedings is that the public is entitled to know what proceedings are commenced in our courts, along with the particulars of those proceedings, and whose rights are being submitted for adjudication. Any member of the public is entitled to have access to the court file, and to review all of the material that is filed with the court. In the same way, a defendant is entitled to know who is using the court process to advance a claim against it.

[26] The respondents, and the Divisional Court, rely on my endorsement in *Markle v. Toronto (City),* [2004] O.J. No. 3024(S.C.J.) in support of their position. With respect, both mischaracterize my decision along with the nature of the information that was involved. In *Markle*, the information sought by the representative plaintiff was the private information of the City of Toronto. It was a list of the names and addresses of individuals who had been employed by, but were now retired from, the City. If the action proceeded to discovery, it would have been appropriate for counsel for the representative plaintiff to ask the City's representative for a list of the retired persons whose claims would be covered by the class action. This request would be consistent with the requirement that rested on the City as a party, by virtue of s. 5(3) of the *CPA*, to provide its best information on the number of members of the proposed class as part of the certification

process. Because *Markle* was being certified as a class action on consent, in order to ensure that notice of the class action was given in the most effective manner to the members of the class, I ordered that the City produce the detailed information in advance of the discovery process.

[27] In its reasons, the Divisional Court said, at para. 44, that "[t]he 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 inconsistent with my decision in *Markle*. To the contrary, that submission is entirely consistent with the decision, properly understood.

[28] As the class actions judge pointed out in his reasons, at para. 8:

> As a result of an application under the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M56 ("MFIPP") a list of all 850+ potential class members is publicly available on more than one web site.

All that the opt-out information does is permit someone to reduce the publicly known 850+ potential class members to the actual class members. Both the public and the appellants are entitled to know the identities of the class members who are advancing the claims unless a confidentiality order is made pursuant to s. 12 of the *CPA*.

[29] Underlying this appeal is an evident concern that the appellants might misuse the opt-out information because of the earlier issues surrounding the opt-

out process. The class action judge declined to continue the earlier protection order he had made arising out of those earlier issues, although in so doing he applied the stricter test for the granting of a sealing order dictated by *Sierra*, rather than determining whether, at that stage, a confidentiality order should be made pursuant to s. 12 of the *CPA* to preserve the integrity of the class proceedings.

[30] In any event, to the degree that any such concern might arise, s. 12 of the *CPA* gives a class action judge all of the authority that he or she needs to address that issue. Indeed, the section could not be more broadly worded. Section 12 reads:

> The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[31] If such a concern does arise, s. 12 is the proper route to be used to address it. There is no doubt that this class actions judge was well aware of the authority he had under that section as he expressly referred to it in his reasons dealing with the issues that arose over the original opt-out period. To the degree that the respondents feel that the class actions judge did not turn his mind to using that authority to address their expressed concerns regarding the lifting of the protection order, there is nothing that prevents the respondents from returning before the

class actions judge to seek a remedy. That is the proper approach to take. The plain wording of r. 31.01.1 should not be distorted in order to effect such a remedy.

Conclusion

[32] The appeal is allowed and the order of the Divisional Court is set aside. The appellants are entitled to their costs of the appeal fixed in the agreed amounts of $5,000 for the motion for leave to appeal, and $10,000 for the appeal, both inclusive of disbursements and HST.

Released: MAY 01 2019

"G.R.P."

"D.M. Brown j.a."

"I agree K. Lauwers J.A."

"I agree G. Pardu J.A."