CITATION: ALS Society of Essex County v. Corp. of the City of Windsor, CV-08-12004
Belle River District Minor Hockey Assoc. Inc. v. Corp. of Town of Tecumseh, CV-08-12005
2016 ONSC 676
DATE: 20160129

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	**Court File No. CV-08-12004**
Amyotrophic Lateral Sclerosis Society of Essex County Plaintiff	Peter W. Kryworuk, Kevin Ross, and Alex Sharpe, for the Plaintiff
– and –	
The Corporation of the City of Windsor Defendant	Scott C. Hutchison and Nicola Langille, for the Defendant
- and -	**Court File No. CV-08-12005**
Belle River District Minor Hockey Association Inc. and Essex County Dancers Incorporated Plaintiffs	Peter W. Kryworuk, Kevin Ross, and Alex Sharpe, for the Plaintiffs
- and –	
The Corporation of the Town of Tecumseh Defendant	Scott C. Hutchison and Nicola Langille, for the Defendant
	HEARD: January 25, 2016

Proceeding under the *Class Proceedings Act, 1992*

REASONS ON MOTION

PATTERSON J.:

[1] On December 17, 2015, at a case conference, I approved the notice of certification in these two class actions that allege the City of Windsor (the City) and the Town of Tecumseh (the Town) charged illegal bingo licence fees. The notice would be published in the local paper on two occasions and, in addition, there would be a direct mailing to the potential class members. The first of the two notices in the Windsor Star ran on January 16, 2016. On the same day the City and the Town instituted a multi-media opt-out campaign.

[2] The multi-media opt-out campaign by the Town and the City was extensive. A full-page coloured ad was placed in the same Saturday edition as the notices of certification. This ad included the web address for an opt-out website, which also provided information about the lawsuit. It noted that Lerners LLP was acting for the plaintiffs and provided the name of the class action website. It provided factually correct details and it also requested potential class members to opt-out. It also requested people who knew of potential class members to encourage them to opt-out of the action. The ad contained details as to potential damages in the class action being as much as $70 million, that it was an uninsured amount and that the taxpayers of the Town and the City would have to pay this with increases to taxes or by some other method.

[3] The opt-out campaign included the opt-out website, a media release, a Twitter hashtag, a Facebook page, municipal websites, a direct mailing, a direct appeal on the website from the mayors of Tecumseh and Windsor concerning the class action and also billboards in various locations in the city. The plaintiffs submit the multi-media campaign was improper.

[4] The plaintiffs submitted that the multi-media opt-out campaign and its content usurped the function of the judicially approved notice of certification to the class.

[5] The plaintiffs submitted that the opt-out campaign had a purpose to convey misinformation, intimidate, coerce and advance other improper purposes which undermined the notice of certification and the legitimate opt-out process. They also submitted that it posed a real and substantial risk to the fair determination of the class proceedings: see *Smith v. National Money Mart Co.* (2007), 156 A.C.W.S. (3d) 1001, [2007] O.J. No. 1507, at para. 31, Hoy J. (Ont. Sup. Ct.) [*Money Mart*].

[6] The Town and the City had provided to the plaintiffs a mailing list of those individuals or organizations that had applied for bingo licences in the class period. The Town and the City used the same list for their own mailing, some of which were postmarked on January 15, 2016, a day before the notice was published in the paper on January 16, 2016. The defendants submit that this is true, but that the mailings would not reach the recipients until after the January 16, 2016 notice was in the paper.

[7] The opt-out website was started just after midnight on January 16, 2016. The posting of the mayors' opt-out messages was made at 8:00 a.m. on January 16, 2016. On the same day, the full-page, colour opt-out ad was placed in the Windsor Star. Notably, it was significantly larger and more apparent than the official notices of certification contained in the Windsor Star. The defendants submit they were providing information on a fair and balanced basis to potential class members that they would be included in the class action if they did not opt-out within 120 days. This information also provided the possible consequences if the plaintiffs were successful in the action.

[8] Nothing in the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 [*CPA*], prevents the defendants from communicating with class members. They have a constitutional right to do so as long as they do not engage in conduct or communication that is inaccurate, intimidating or coercive or made for some other improper purpose aimed at undermining the process of the court.

[9] There is no dispute that s. 12 of the *CPA* permits the relief requested by the applicant.

[10] In *Money Mart*, Hoy J. (as she then was) summarized the applicable principles as follows:

> [31] I take the following principles from the above cases:
>
> (1) There is no absolute prohibition on communication by the defendants to class members during the opt-out period and the CPA does not require prior court approval for every communication (*Bayard; A&P, supra*).
>
> (2) An order limiting communication is extra-ordinary (*A&P*).
>
> (3) If communication by a defendant to a class member during the opt-out period is inaccurate, intimidating or coercive, or is made for some other improper purpose aimed at undermining the process the court will, on the motion of a party or class member, intervene under s. 12 of the CPA to ensure the fair determination of the class proceeding (*A&P; Kmart, supra*).
>
> (4) An order pursuant to s. 12 of the CPA limiting communication by the defendant during the opt-out period should only be granted if it is necessary to prevent a real and substantial risk to the fair determination of a class proceeding, because reasonably available alternative measures will not prevent the risk (*Dagenais, supra*).

[11] One of the remedies that is being requested by the plaintiffs is that the defendants be restricted in communicating with potential class members. However, as noted in W.

Winkler, P. Perell, J. Kalajdzic & A. Walker, *The Law of Class Actions in Canada* (Toronto: Canada Law Book, 2014) at 206:

> An order restricting communication by the defendant during the opt-out period should only be granted if it is necessary to prevent a real and substantial risk to the fair determination of the class proceeding.

[12] An example of improper conduct in seeking to have class members opt-out is found in *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535, [2002] O.J. No. 4781 (Ont. Sup. Ct.), at para. 2 [*A & P*]. A & P threatened to raise rent if the potential claimant did not opt-out and it was found by the court that this conduct was destructive to the class members' free will. It was therefore improper and A & P's behaviour was found to be "patently intimidating".

[13] Justice Perell stated in *Lundy v. Via Rail Canada Inc.*, 2012 ONSC 4152, [2012] O.J. No. 3264, at para. 33:

> The parties are free to communicate to the public about a class proceeding, and a press release that provides information to the media that does not evade or undermine the formal notice requirements is not a notice regulated by the Class Proceedings Act, 1992.

[14] In the case *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2013 ONCA 279, [2013] O.J. No. 2012, at para. 41, the Court of Appeal accepted the content focus test from *A & P*.

> [The case management judge] stated, correctly, that class members "ought to be free to exercise their right to participate in or abstain from the class action on an *informed, voluntary basis, free from undue influence*", citing *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* [citation omitted], at para. 74 (emphasis added by the motion judge). As explained in *A&P*, at paras. 75-76:
>
> > The primary protection for the absent class members in the class proceeding process is the right to opt out of the class action. It is axiomatic that no class member need participate in a class action against his or her will. However, to ensure the integrity of the opt out process, absent class members must be fully informed of the issues in the proceeding and the impact on them as individuals.
> >
> > Where ... 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.

[15] The Town and the City take the position that their multi-media campaign informing potential class members of their right to opt-out was to fully inform the absent class members of the issues in the proceeding and the impact of a potential award of damages.

[16] It is the position of the plaintiffs that the content and the activities of a multi-media campaign by the Town and the City went over the line and requests that the court intervene.

[17] The proof necessary for the court to intervene has been stated by the Supreme Court of the United States in *Gulf Oil Co. v. Bernard*, (1981), 452 U.S. 89, 101 S. Ct. 2193, at 101, which has been cited with approval in *Smith v. National Money Mart*, at para. 30 and *Lundy v. Via Rail Canada Inc.*, at para. 40:

> An order limiting communication 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 the parties.

[18] The constitutionally protected right to freedom of expressions is also a relevant consideration: see *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835, [1994] S.C.J. No. 104.

[19] The defendants emphasize that there is no specific complaint by any potential class member concerning the opt-out campaign by the Town and the City. They further point out that this action has gone on for approximately seven years and there never has been any concern about any inappropriate conduct by the Town or the City towards potential class members.

[20] Justice Hoy in *Money Mart* made reference to *Bayard c. St.-Gabriel (Ville de)* (2004), J.E. 2004-2134, [2004] J.Q. No. 11134 (Que. Sup. Ct.) [*Bayard*]. That class action lawsuit resulted from a boil water advisory imposed by a municipality. The court certified the action but permitted a six-month opt-out period "in order to permit the municipality to sensitize class members to the financial consequences to them of the class action": see *Bayard*, at para. 27.

[21] The Town and the City argue that it is similar to the case at hand where they wish to inform potential class members of factually correct information, including that their taxes could increase and that there was no insurance to cover any award of damages.

[22] In the *Law of Class Actions in Canada*, Justice Winkler writes at p. 198, "the goals of access to justice and judicial economy will not be achieved if class members do not have effective notice of the rights to opt-out, to support or oppose a proposed settlement".

[23] The plaintiffs believe the multi-media opt-out campaign is a threat to the integrity of the class action process, offending both the notice of certification and the opt-out process. There is no question that the Town and the City's communication must be viewed through the lens of the *CPA* and its underlying aims, namely access to justice, judicial economy and behaviour modification.

[24] Justice Horkin in *Durling v. Sunrise Propane Energy Group Inc.*, 2012 ONSC 6328, [2012] O.J. No. 5260, at para. 39, expressed that "the concern about improper communication is more acute when it occurs during the opt out period."

[25] I have some concerns about the multi-media opt-out campaign.

[26] The media release contains a sentence of concern: "Considering how much revenue these organizations have made from these bingo events, opting out of the lawsuit is a clear sign that they too support our municipalities." It should be noted that liability has not been established and the municipalities believe they have a full answer to the claims being made. However, my concern is that the municipalities are communicating to the potential class members that even though they may have a valid claim, they should not pursue it because to do so would not support the municipality. This sentence has a divide and conquer aspect to it. The non-profit organizations that are raising funds for their particular cause are being pitted against taxpayers. To not opt-out would equate to not supporting the municipality. I acknowledge that the press release provides a link to the class actions website. I also acknowledge that softer language is used in the notice stating that those with potential claims *should consider* opting out and it provides information for them to do so.

[27] I am concerned how that media release information is echoed in the countdown clock website, where it is said: "If you know someone who is part of a club, charity or organization that held a bingo or lottery event please urge them to consider opting out of the bingo lawsuit."

[28] I also have concern with the sentence "we believe that opting out will help ensure we can support our roads and infrastructure, our community services and our parks and recreational facilities".

[29] I understand that if the plaintiffs are successful, the taxpayers of the municipalities will have to pay the same and it is uninsured. But this language appears to me to create a situation that pits taxpayers against each other. In this way, it encourages potential claimants not to pursue a valid claim and the effect of the entire opt-out campaign results in claimants not being "free from undue influence" from the municipalities: see *A & P*, para 74.

[30] The media release and the countdown clock make reference to a potential claim of $70 million. This amount is included in the letter mailing that the two municipalities made to the same list that was provided to the plaintiffs for their notice requirements of the certification. Because the Town and the City are acting jointly on the opt-out campaign, there is a clear misstatement. The $70 million is a total for both municipalities. The potential amount against Tecumseh is $7 million and the potential amount from the Windsor class action is $63 million. This is clear misinformation. This misinformation was repeated by the Town and the City.

[31] I have a concern that the countdown clock website asks representatives of organizations that have raised monies through bingo licences to "spread the word and get other clubs, organizations and charities to join you in opting out". I am concerned that this could be

interpreted as pitting one organization against another. Therefore, any opt-out decision may not be free from undue influence.

[32] The same website also requests taxpayers to contact organizations that they have supported and urge them to opt-out. This appears to me to also go too far when considered within the totality of the multi-media campaign instituted by the Town and the City. Further, it is also significant that even though the class actions websites are noted in the countdown clock website, their script is not hyperlinked to the class actions website. I direct that class actions website be amended to also be hyperlinked.

[33] I acknowledge that the opt-out form link established by the Town of Tecumseh and the City of Windsor clearly identifies on the opt-out form the following: "To understand your options and the consequences of opting out or not opting out please review the Notice of Certification." I also acknowledge that this script is hyperlinked.

[34] The Town and the City indicate that they were merely providing information that they believe non-profit organizations may not know. Specifically, that they are part of a lawsuit. These organizations may not wish to continue if they knew the consequences of a large uninsured damages award. They may otherwise not know that there was a time limit to opt-out.

[35] The plaintiffs' counter argument is that the nature of the multi-media campaign instituted at the same time as the formal court approved notices of certification was disseminated in a way to overwhelm the notice and opt-out provision. They contend that this campaign had the effect of a threat or coercion or intimidation; pitting taxpayer against taxpayer in an attempt to encourage individuals or organizations with a valid claim not to pursue it. The plaintiffs assert such action strikes at the very concept of fairness and access to justice, which are the hallmarks of the *CPA*.

[36] In my opinion, the Town of Tecumseh and the City of Windsor went over the line in instituting its multi-media opt-out campaign that was intended to discourage potential claimants from pursuing their claim. I understand the Town's and City's position that they were merely providing factual information that there would be consequences to the taxpayers of those communities if the uninsured claim was successful. The plaintiffs submit that the defendants timed the opt-out campaign so that it would be foremost in the minds of potential claimants at the same time, or even before, as they would have seen the court approved notice in the paper or received it by direct mailing.

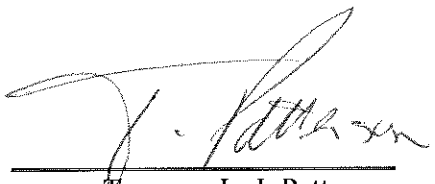
[37] I accept the submission from counsel for the Town and the City that their intent was to inform potential claimants in this class action so that they would know the consequences of a large award being potentially made in favour of the plaintiffs, with the ensuing consequences to the municipality to be obligated to pay the same. I must balance that intent with what appears to be an aggressive multi-media opt-out campaign that in effect pitted one taxpayer against another, or one organization against another, in order for them not to pursue a valid claim. I understand the City and the Town's submission that the consequences of a large award of damages against them will have consequences to taxpayers of the Town and the City but, in my opinion, they went too far and that its effect created "undue influence".

[38] I am also of the opinion that the plaintiffs have also gone too far in their request to restrict communication by the Town and the City. I consider this in light of the defendants' legal right to communicate with potential claimants and the potential consequences of a successful action against them.

[39] I conclude that any potential claimants who opted-out should have an opportunity to reconsider their position at the end of the opt-out period and I direct counsel to contact me in that regard.

[40] I further direct that there be no further information from the Town or the City concerning the opt-out campaign other than what already exists and I further order that all the Town's and the City's websites contain a hyperlink to the class action websites.

[41] Cost submissions shall be made by the plaintiffs within 30 days and a response by the Town and the City within 15 days thereafter.



Terrence L. J. Patterson
Justice

Released: **January 29, 2016**

CITATION: ALS Society of Essex County v. Corp. of the City of Windsor, CV-08-12004
Belle River District Minor Hockey Assoc. Inc. v. Corp. of Town of Tecumseh, CV-08-12005
2016 ONSC 676
DATE: 20160129

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Amyotrophic Lateral Sclerosis Society of Essex County

Plaintiff

– and –

The Corporation of the City of Windsor

Defendant

Proceeding under the *Class Proceedings Act, 1992*

- and -

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

Plaintiffs

- and –

The Corporation of the Town of Tecumseh

Defendant

Proceeding under the *Class Proceedings Act, 1992*

REASONS ON MOTION

Patterson J.

Released: January 29, 2016