

CITATION: ALS Society of Essex County v. Corp. of the City of Windsor, DC-116-ML
Belle River District Minor Hockey Assoc. Inc. v. Corp. of Town of Tecumseh, DC-117-ML
2016 ONSC 5899
DATE: 20160922

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
) **Court File No. DC-116-ML**
)
)
) Amyotrophic Lateral Sclerosis Society of)
Essex County)
) Peter W. Kryworuk, Kevin L. Ross and
) Brian N. Radnoff, for the Plaintiff
)
) **Plaintiff**)
)
) **- and -**)
)
) The Corporation of the City of Windsor)
) Scott C. Hutchison and Brendan van
) Niejenhuis, for the Defendant
)
) **Defendant**)
)
)
) **- and -**)
)
) **Court File No. DC-117-ML**
)
)
) Belle River District Minor Hockey)
Association Inc., and Essex County)
Dancers Incorporated)
) Peter W. Kryworuk, Kevin L. Ross and
) Brian N. Radnoff, for the Plaintiffs
)
) **Plaintiffs**)
)
) **- and -**)
)
) The Corporation of the Town of Tecumseh)
) Scott C. Hutchison and Brendan van
) Niejenhuis, for the Defendant
)
) **Defendant**)
)
)
)
) **HEARD: Written submissions**

REASONS ON MOTION FOR LEAVE TO APPEAL

CAREY J.:

- [1] The plaintiffs in these two class action proceedings seek leave to appeal to the Divisional Court, Patterson J.'s dismissal on April 7, 2016 of their motion for contempt alleging that the defendant City of Windsor breached his order of January 29, 2016. That order limited the City's communication with class members and the City's residents during the established "opt-out" in this proceeding. For reasons set out below, leave to appeal is denied.
- [2] Justice Patterson's reasons are found at tab 3 of the plaintiffs' motion record. Those reasons begin by setting out the history of the order, its appeal and cross-appeal, the allegations of breach and the applicable law. Justice Patterson, the case management judge in this class proceeding, set out the test for a finding of contempt in relation to a court order, at para. 12 through 14 of his decision:

The parties are in agreement as to the legal principles related to an allegation of contempt of an order of the court.

The test contains three parts:

- 1) The order that was breached must state clearly and unequivocally what should and should not be done;
- 2) The person who disobeys the order must do so deliberately and willfully; and
- 3) The evidence must show contempt beyond reasonable doubt, and any doubt must be resolved in favour of the person alleged to have breached the order.

See *Prescott-Russell Services for Children and Adults v. G. (N.)*, 2006 CanLII 81792 (Ont. C.A.).

It is further not disputed that the issuing of a contempt order must be used sparingly and with great restraint and caution and only in circumstances where it is required to protect the rule of law with the onus on the party alleging contempt and that the standard of review is beyond a reasonable doubt: see Morden and Perell, *The Law of Civil Procedure in Ontario*, para. 11.140.

Plaintiffs' Position

- [3] The plaintiffs assert numerous errors in the decision. They argue that the motions judge was in error in regards to the appropriate test to be applied and did not apply the Supreme

Court of Canada's principles in *Carey v. Laiken*, 2015 SCC 17. They further assert that the judge disregarded the evidence and made findings contrary to the evidence. They assert he erred in finding that his order was ambiguous. They argue that there are conflicting decisions in this area, including *Boily v. Carleton Condominium Corporation 145*, 2014 ONCA 574, that require a finding in Divisional Court to rectify his error. That, they say, makes this a case which raises issues of general importance. At para. 59 of their factum, they argue that the judge disregarded relevant evidence:

Moreover, it was an error for Justice Patterson to even consider this "possible" interpretation of his Orders without any evidence from the defendants suggesting that they ever believed this was the correct interpretation. They filed no evidence that they believed this interpretation and immunized themselves from challenge on cross-examination. However, contrary to their asserted interpretation, the defendants admitted in factums filed to appeal the Orders that this was not their interpretation. The defendants' emails and conduct in pulling the February 22 radio advertisement confirmed that the defendants understood that the Orders prevented them from broadcasting any communications that had not been broadcast as of January 29, 2016. In addition, the defendants drafted the form of order that they later claimed was ambiguous.

[4] The precedent set here is both wrong and undesirable they argue:

Justice Patterson disregarded all of this evidence in coming to his conclusion that there were multiple possible interpretations of the Orders. If his decision is not overturned, parties who demonstrate that they understood an order, who fail to file any evidence regarding how they interpreted an order and who advance an unreasonable possible interpretation of an order, will be able to avoid contempt findings by arguing an understanding of an order with no evidentiary basis. This is inconsistent with all of the authorities on civil contempt and provides good reason to doubt the correctness of Justice Patterson's Order dismissing the contempt motion.

[5] The dire consequences predicted by the plaintiffs if the order is not reversed mirrors para. 57 of the plaintiffs' factum:

By finding that the defendants only needed to persuade him there were alternative possible interpretations of his order, Justice Patterson has opened the floodgates to parties breaching court orders. Parties can always advance a "possible" interpretation of a court order. If that is all a party needs to do to avoid a contempt finding, parties will be able with impunity to circumvent orders and make a mockery of them and the administration of justice. [Emphasis added.]

Analysis

- [6] Rule 62.02(4)(a) and (b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, sets out the test applicable on this leave application. Both (a) and (b) must be satisfied:

Leave to appeal shall not be granted unless,

(a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or

(b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

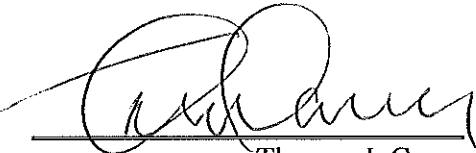
- [7] Patterson J.'s reasons for dismissing the contempt finding are clear and straightforward. Both as the trial management justice and as a judge hearing a motion for contempt, he was entitled and required to exercise his discretion carefully. He was correct that the onus was on the plaintiffs who were alleging contempt. He correctly enunciated the need for restraint and caution in the use of the court's contempt powers (*Carey*, at para. 36). The party alleging the contempt must prove this very serious finding on the criminal standard of beyond a reasonable doubt (*Carey*, at para. 32).
- [8] As the author of the order in issue, Justice Patterson was well positioned to determine if it was ambiguous. This action was commenced in 2008. Justice Patterson has been the only case management justice during the life of this case. He has dealt on a regular basis with the parties and their counsel. He was involved in the discussions that led to the making of the order.
- [9] It is clear that when paras. 17 and 21 of the decision are read together, that Justice Patterson concluded that the defendants' interpretation of the January 29, 2016 order was not unreasonable. He carefully reviewed the evidence before him on the contempt motion. He had an opportunity to listen to the interview with Mayor Dilkens and to the ads that were broadcast both prior to and after his order. He was entitled to conclude on the evidence that his order was "subject to more than one possible interpretation."
- [10] Likewise, his conclusion that the mayor was not attempting to provide information in breach of the order was one that he was clearly entitled to make on the material before him. The onus of proof of contemptible conduct was on the plaintiffs. The defendant City was not required to adduce any evidence of their intentions. In my view, he did not err in concluding that there was no wilful breach of the order. He was entitled to find that the plaintiffs had failed to prove beyond a reasonable doubt that the City was in contempt for breaching the court order.
- [11] Justice Patterson found that his order was not clear. It is obvious that Justice Patterson followed the spirit of the leading case of *Carey v. Laiken* and applied the principles

enunciated there. It was unnecessary for him to cite the case. He took into consideration the defendants' actions as outlined in para. 22 of his decision. He was clearly entitled to do so. While the wording in *Prescott* varies somewhat, the test is the same. *Prescott* is cited and followed in *Carey* at para. 33. While knowledge of the order as set out in part (b) of the *Carey* test is omitted in *Prescott* (as cited), this element of the order was not in issue (see para. 43 of plaintiffs' factum).

- [12] The plaintiffs have not identified any conflicting decisions as required in the first part of the 62.02(4) test. There is, in my view, no serious debate that would arise about the correctness of this decision. His decision accords with the prevailing case law and is not in conflict with any of the leading cases. It is in clear harmony with the spirit of *Boily v. Carleton Condominium*, at p. 56, para. 175:

This is not to say that context is irrelevant to the interpretation of an order for the purposes of contempt proceedings. Given the quasi-criminal nature of the proceedings, any doubt should be resolved in favour of the alleged contemnor.

- [13] As in *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 554, at para. 29, this is “a motion for civil contempt, a motion that is of significant interest to the immediate parties, but does not raise legal issues or issues affecting the administration of justice that warrant the attention of an appellate court.” The decision was based on reasonable findings of fact made by the judge hearing the motion who is entitled to deference in regard to those findings of fact. As a fact-based finding, it has little precedential value that could open any “floodgates.” This case fails to pass the threshold required in rule 62.02(4)(b) for a matter of importance.
- [14] Leave to appeal is denied. Costs submissions from the defendants within 30 days and costs submissions from the plaintiffs within 15 days thereafter.



Thomas J. Carey
Justice

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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

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The Corporation of the Town of Tecumseh
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Carey J.