

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
) Court File No. CV-08-12004
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)
) Amyotrophic Lateral Sclerosis Society of)
) Essex County) Brian N. Radnoff and Rebecca Case, for
) the Plaintiff
) Plaintiff)
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) - and -)
)
)
) The Corporation of the City of Windsor)
) Defendant) Brendan Van Niejenhuis and Scott
) Hutchison, for the Defendant
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) - and -)
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) Court File No. CV-08-12005
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) Belle River District Minor Hockey)
) Association Inc. and Essex County) Brian N. Radnoff and Rebecca Case, for
) Dancers Incorporated) the Plaintiffs
)
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) Plaintiffs)
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) - and -)
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) The Corporation of the Town of Tecumseh)
) Defendant) Brendan Van Niejenhuis and Scott C.
) Hutchison, for the Defendant
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)
) **HEARD: December 21, 2016**
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MOTION BY DEFENDANTS TO LIFT EXISTING PROTECTION ORDER

PATTERSON J.:

- [1] This class action was commenced in 2008 in which the plaintiffs allege that the defendants, City of Windsor and Town of Tecumseh, charged illegal licencing and related fees for the issuing of bingo licences.
- [2] In 2015 the matter was certified as a class action with the opt-out period being from January 15, 2016 to May 15, 2016.
- [3] As a result of the defendants providing information about the action to potential class members during the opt-out period, I determined that they went too far and as a result I ordered that the opt-outs be given a reconsideration period, which was from August 11, 2016 to October 10, 2016.
- [4] During the reconsideration period I ordered no further communication by the defendants. Separately the parties entered into a consent protection order which allowed the defendant's counsel to have the opt-out and reconsideration results but these results could not be released to their clients. The order also provided that any information filed with the court which revealed the identity of opt-outs would be sealed pending further order of the court. Nothing was filed with the court giving rise to the sealing of any material.
- [5] The defendant's counsel submits they are in a difficult position because they have the opt-out and reconsideration information but they are unable to discuss this information with their clients.
- [6] They are of the opinion that the protection order was interim only in relation to the reconsideration period and that they should now be allowed to provide the information to their clients. This would permit them to receive instructions and permit the defendants to set up the appropriate financial reserves for the claims being made.
- [7] It is the plaintiffs' position that they have heard from some potential class members, on a confidential basis, that they are concerned that if their names are revealed it would have an adverse effect on their charitable fund raising. The plaintiffs submit this concern is the result of the aggressive opt-out campaign by the defendants that gave rise to the reconsideration order. It is also why the confidentiality issue is only now being raised for the first time.
- [8] As a result of an application under the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 ("MFIPP") a list of all 850+ potential class members is publicly available on more than one web site.

- [9] During the opt-out period there were several charities that publicly identified that they were opting out.
- [10] The plaintiffs are concerned that even though the list of all potential class members is available to the public, the public does not have the list of opt-outs and if it is revealed the public would be able to determine who remains as potential class members.
- [11] The plaintiffs are requesting that the names of those who have opted out not be revealed unless they individually self-identify.
- [12] The plaintiffs therefore are asking that the protection order to continue to protect the identity of organizations they do not represent because they have opted out, but are doing so in order that the names of the potential class members would not be capable of being determined.
- [13] The plaintiffs indicate that they are willing to permit defence counsel who already have this information to reveal it to their clients but under specific conditions including that any council meeting discussing the issue be in camera and that those members of staff that have the information sign a confidentiality agreement related thereto. The conditions are to prevent this information from being available to the general public.
- [14] The defendant resists any conditions as they indicate that the public has a right to know and this would be an improper use of the *Municipal Act*, 2001, S.O. 2001, c.25, which requires all council meetings to be open to the public (s.229(1)), subject to the in-camera provisions (s.239(2)).
- [15] There is a dispute between plaintiffs and defendants regarding MFIPPA, with the defendant submitting they would have an obligation to be open and to release this information if requested. The plaintiffs counter that the information would be exempted from MFIPPA being confidential information received in the course of litigation.
- [16] The other area of dispute between the plaintiff and defendants is the defendants' submission that given the plaintiffs are asking this information to be sealed, the media should be notified.
- [17] The plaintiffs counter that nothing has been sealed and it is not their request to seal anything. Further, the plaintiffs submit that if the opt out information is to be released to the public then they request an opportunity to bring a motion to seal the information, at which time the media would be notified.
- [18] The defendants submit that the in camera requirements and the confidentially agreements by staff are unworkable. The plaintiff counters by saying that both the town and city have confidential policies and are used to dealing with confidential matters as well as in camera council meetings to discuss litigation including information obtained in the course of litigation.

- [19] I agree with the defendants that the protection order, in effect, acts like a sealing order and that it's appropriate to look at the test for a sealing order which is onerous: See: *Sierra Club of Canada v. Canada Minister of Finance*, 2002 SCC 41, [2002] 2 S.C.R. 522, at paras. 52 and 54.
- [20] Public and media access to the courts is important to the administration of justice; not only must justice be done, it must also be seen to be done. Public scrutiny is fundamental to the open court principle.
- [21] As a general rule civil litigation and class actions are a public matter and litigants cannot choose to conduct themselves in secrecy absent some compelling reason.
- [22] The following is noted by Perell J. in *Iovine v. Toronto Sun Wah Trading Inc.*, 2014 ONSC 6555, 123 O.R. (3d) 494 para 54:

For very good reasons associated with the rule of law, civil litigation is a public not a private matter. Justice is dispensed subject to the scrutiny of the public. Subject to rare confidentiality and sealing orders, litigants forgo privacy and confidentiality, and therefore, depending on the nature of the particular class action, the fact that Class Members retain their privacy and confidentiality rights over personal health information may or may not be a problem to the proper prosecution of class actions, which serve the public purposes of providing access to justice, behaviour modification of defendants, and judicial economy.

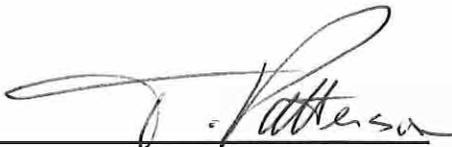
- [23] Further, the following is noted by Nordheimer J. in the *Fehringer v. Sun Media Corp.*, (2002), 27 C.P.C. (5th) 155 (Ont. S.C.) at para. 29:

There is a suggestion that some members of the class are unwilling to pursue individual actions because they do not wish to reveal their identities to the defendants. In my view, that is not a proper basis on which to certify a class proceeding. Class actions should not be used for the purpose of cloaking members of the plaintiff class with anonymity. It is also not a practical objective. At some point, all members of the class are going to have to identify themselves because they will have to prove their individual claim to damages. Whatever concerns there are by putative class members with respect to revealing themselves to the defendants appear to arise irrespective of the mode of proceeding utilized.

- [24] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, holds that a confidentiality order should only be granted where it is necessary to prevent a serious risk to an important interest, which includes the right of a civil litigant to request a confidentiality order to ensure a fair trial, and whether that right outweighs the open court principle.

- [25] Further, as stated in *Sierra Club* at para. 54, it is important that the risk in question must be real and substantial that it is well grounded in the evidence, and that it poses a serious threat to the commercial interests of the party in question.
- [26] The defendants submit that there is not sufficient evidence of a serious threat to the class and that the fear by those who have contacted class counsel is entirely speculative.
- [27] To counter this the plaintiffs' counsel submits that the concern for confidentiality is real and there is a legitimate concern expressed by some potential class members that if their organization is publicly known, it would adversely affect their fundraising activities.
- [28] I have been provided with information about the concern and possible adverse effects but I also have been provided information that there are members of the public who have expressed that the defendants should return fees paid if they were illegally collected. Therefore, there appears to be conflicting information from members of the public as to whether there would be an adverse effect to potential class members.
- [29] In my opinion there is insufficient evidence to establish that there is a serious threat to commercial interest of the plaintiffs in this case. On the evidence, the risk is not real and substantial and well-grounded.
- [30] Further, in respect of the question of whether the protection order being lifted represents a serious threat to the commercial interests of the potential class members, I note that this lawsuit has been ongoing since 2008 and bingos have been continuously run since then. I have not been provided any evidence that there has been any difficulty with any organization continuing their bingo activities.
- [31] Anonymity is a part of class actions because of its collective nature and it is not unusual that a potential class member's identity is not known in the early stages of a class action; however, the time will come when the individuals or organizations who wish to make a claim must be identified.
- [32] I have been informed by plaintiffs' counsel that they will be challenging some potential class members who have opted out of the class action. I have yet to receive this motion but they will have to be identified at that time.
- [33] It is possible under the class action legislation, with leave of the court, that defendants may cross-examine potential class members and therefore their identity would be available to the public.
- [34] In my opinion the open court principle outweighs the potential class members request for confidentiality.
- [35] In my opinion, the plaintiff has not established that it is appropriate that the protection order be continued.

- [36] Further, I am satisfied the consent order was made on an interim basis only related to the reconsideration issue. That issue and the period of time is now over.
- [37] As a result, the defendants' motion is granted. The protective order is lifted effectively immediately.
- [38] Cost submissions from the defendants within 30 days and from the plaintiffs within 30 days thereafter.



Terrence L.J. Patterson
Justice

Released: January 13, 2017

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
2017 ONSC 310
DATE: January 13, 2017

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*

MOTION TO LIFT PROTECTIVE ORDERS

Patterson J.