

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 2445
DATE: 20160414

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Amyotrophic Lateral Sclerosis Society of
Essex County

Plaintiff

– and –

The Corporation of the City of Windsor

Defendant

Court File No. CV-08-12004

Brian N. Radnoff, for the Plaintiff

Scott C. Hutchison and Brendan Van
Niejenhuis, for the Defendant

- and -

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

Plaintiffs

- and –

The Corporation of the Town of Tecumseh

Defendant

Court File No. CV-08-12005

Brian N. Radnoff, for the Plaintiffs

Scott C. Hutchison and Brendan Van
Niejenhuis, for the Defendant

HEARD: April 7, 2016

Proceeding under the *Class Proceedings Act, 1992*

REASONS ON CONTEMPT MOTION

PATTERSON J.:

- [1] This is a contempt motion by the plaintiffs alleging that the defendants did not comply with my order of January 29, 2016, regarding the opt-out campaign by the City of Windsor (the City) and the Town of Tecumseh (the Town).
- [2] I decided that the totality of the opt-out campaign created an undue influence on the potential class members and gave any potential class member who had opted out the right to opt back in at the end of the opt-out period.
- [3] I also acknowledged the Town and the City's right to continue with their opt-out campaign and I directed at para. 40: "[T]hat there be no further information from the Town or the City concerning the opt-out campaign other than what already exists...".
- [4] This sentence was reduced in the settled order as follows:
 3. THIS COURT ORDERS that there be no further information from the City of Windsor concerning the Opt-Out Campaign;
 4. THIS COURT ORDERS that information and communications about the opt-out campaign that already exists may remain in place.
- [5] It is alleged by the plaintiffs that the Town and the City breached these provisions on three different occasions as follows:
 1. That radio advertisements ran from February 1, 2016 to February 7, 2016, that had not run previous to January 29, 2016;
 2. That radio advertisements ran from February 22, 2016 to February 25, 2016, that had not been run previous to January 29, 2016;
 3. The Mayor of Windsor, Drew Dilkens, on February 25, 2016, gave a live interview to the Windsor Star which was recorded and which was run subsequent to January 29, 2016.
- [6] In regard to the first alleged offence, the radio advertisements from February 1 to February 7 were heard and plaintiffs' counsel was informed. Regarding the second incident February 22 to 25, this was heard by the defendants and on realizing these advertisements had not run subsequent to January 29, removed them from the air and in their place an advertisement that had been run prior to January 29 was run.
- [7] In regard to the Dilkens interview on February 25, by its context it appears the mayor was asked about the appeal of my January 29 decision that was being heard that day. He mentioned the opt-out campaign and acknowledged my order. His comments contained no new information that was not available prior to January 29 and continued to be

available on the City and the Town websites but it was a live interview which ran subsequent to January 29, 2016.

- [8] I became aware by correspondence dated February 29, 2016, from solicitor for the plaintiffs there was concern about the three alleged breaches. Defence counsel by letter dated March 1, 2016, referred to the three alleged incidents and raised a possible interpretation of my order that would permit information subsequent to January 29, 2016, so long as it was the same information that was available prior to that date.
- [9] A conference call was set up for March 2, 2016, at which time I indicated that if there was concern about interpretation of my order I would be pleased to clarify it in writing but as both parties had appealed my order, it was the position of counsel that the matter would have to be dealt with by way of a contempt motion.
- [10] The Court of Appeal on February 25, 2016, determined that the matter should be dealt with by Divisional Court and on March 24, 2016, Divisional Court did not grant leave to appeal to either party.
- [11] The two radio advertisements were recorded in advance of January 29, 2016, but they had not been aired by that date. It is the plaintiffs' position that even though recorded prior to January 29, they should not have been aired subsequent to January 29 and that the mayor's live recorded interview of February 25, 2016, breached my January 29, 2016 order.

Legal Principles Applicable to Contempt

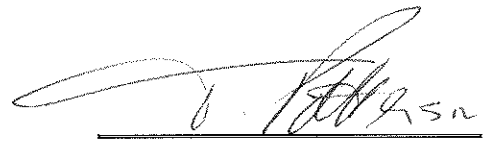
- [12] The parties are in agreement as to the legal principles related to an allegation of contempt of an order of the court.
- [13] The test contains three parts:
 - 1) The order that was breached must state clearly and unequivocally what should and should not be done;
 - 2) The person who disobeys 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.).

- [14] 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.

- [15] It is the defendants' position that the contempt motion must fail because the relevant terms of the order are not clear and unequivocal as to what was to be done or not done and, further, that the evidence presented by the plaintiffs does not show beyond a reasonable doubt that the alleged acts of contempt breached the order of the court or that the alleged breaches were "deliberate and willful".
- [16] When I gave my decision on January 29, 2016, I was not made aware that as part of the opt-out campaign there were recordings made prior to that date and that only one of the advertisements had actually been played prior to January 29. The others had been scheduled to run after January 29.
- [17] It was the defendants' position that a reasonable interpretation of my order would permit those radio advertisements that had been recorded previous to January 29 could be played subsequent to January 29.
- [18] Further, as the mayor's February 25 live interview contained the same content as was made available prior to January 29 and the defendants were authorized to continue on the opt-out websites after that date, they do not believe it breached my order.
- [19] At the case conference on March 2, 2016, I indicated to counsel for the City that it was inappropriate for the mayor to make any further live comment about the opt-out campaign as this, in my opinion, represented a new aspect of the opt-out campaign that was prohibited by my January 29 order and that it should not take place again. I am informed by counsel for the City that my instructions have been carried out in that regard.
- [20] The defendants submit that the countdown clock or the indication of the number of days left that individuals could opt out was in place prior to January 29 and it was only logical that the countdown clock and any indication to the days left for the opt out would not offend the wording, language or spirit of my order.
- [21] In regard to the first test of establishing contempt of the court order, namely whether the order clearly and unequivocally stated what should be done or not done, I acknowledge that the defendants' interpretation was a possible interpretation of the language that I used. That being said, as soon as I was informed there was a concern about the language of my order, I offered to give written reasons to clarify my order in order that there would be no misunderstanding by the parties but my offer was declined as both parties had appealed my order. In my opinion, it is arguable that my order was subject to more than one possible interpretation.
- [22] The City responded to the issues raised by the plaintiffs as to compliance with my order and when they discovered the February 22 to 25 advertisements they stopped the advertisements and replaced it with one broadcast prior to January 29, 2016.
- [23] Concerning the mayor's live conversation about the opt-out campaign on February 25, 2016, it appears to be in the context of the matter going before the Court of Appeal that same day nor does it appear the mayor was attempting to provide information that would breach my order.

- [24] In my opinion, the second part of the test of proving contempt that the City and the Town breached my order has not been satisfied.
- [25] As a result of correspondence and case conference with me, I am satisfied that as soon as they were alerted to a problem of interpretation of compliance with my order, the defendants acted immediately in response to my comments and that they did not deliberately and willfully breach my order.
- [26] Therefore, in my opinion, the plaintiffs have not established beyond a reasonable doubt that the City breached my order.
- [27] The plaintiff has requested further disclosure of the defendants regarding full particulars of the opt-out campaign.
- [28] This request by the plaintiffs is not granted. The campaign was a multifaceted one and was authorized by me to continue with certain restrictions. In my reasons of January 29, I expressed concern of "undue influence". As a result, I gave those who had opted out the right to opt back in at the end of the opt-out period.
- [29] The onus is on the plaintiff to provide information as to non-compliance. The request is not granted as it relates, in my opinion, to some theoretical future non-compliance and would, in effect, reverse the onus.
- [30] Cost submissions from the defendants within 30 days and cost submissions from the plaintiffs within 15 days thereafter.



Terrence L. J. Patterson
Justice

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 2445
DATE: 20160414

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 CONTEMPT MOTION

Patterson J.