# Deemed Undertaking Rule Does Not Apply to Opt Out Information

**July 23, 2019**

In its recent decision in *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, the Ontario Court of Appeal has held that the deemed undertaking rule does not apply to opt-out information in a class proceeding.

During the opt out period of this class action, the defendants embarked upon a public campaign to encourage putative class members to opt out. After the class actions judge held that the defendants had unduly influenced the opt-out process, a reconsideration period was ordered to allow members to opt back in. Concerned that the identity of those who had already opted out could be used by the defendants to convince them to stay opted-out, the class actions judge granted a protection order barring defendants' counsel from divulging the number and identity of class members to their respective clients. After the protection order was lifted, the plaintiffs argued that the deemed undertaking rule prevent defendants' counsel from disclosing to their clients the information which had been the subject of the prior protective order.

Although the class actions judge did not address the issue, the Divisional Court ruled that the deemed undertaking imposed by Rule 30.1.01(3) of the *Rules of Civil Procedure* (which in essence provides that parties may use evidence obtained through the discovery process only for the purposes of the proceeding in which they obtained it) applied to the opt-out information. The Court of Appeal came to the opposite conclusion.

In coming to its conclusion on this issue, the Court of Appeal held that opt-out information (which it described as a "simple list") is not the type of evidence contemplated under Rule 30.1.01(1). The Court noted that opt-out information arises out of a court supervised process pursuant to section 9 of the *Class Proceedings Act, 1992* (CPA) and could not accurately be characterized as private materials of any one party. This was held to be consistent with section 5(3) of the CPA, which requires the moving party to provide an approximation of the number of putative members in the class.

Further support for the court's decision was found in the principle that individuals who commence proceedings must do so openly. The court held that defendants to class proceedings are entitled to ascertain the identities and numbers of members who encompass the action. With respect to the status of class members, the Court noted that

the remaining members following the opt-out period are collectively bound by the resolution of the action, and thus, are akin to parties.

Justice Nordheimer also highlighted the significance of section 12 of the CPA, which grants the court the broad discretion to make any orders it considers appropriate. Notably, this statutory power can be used, as it was done by the class actions judge, to place restrictions and conditions on communications with putative class members. These orders, however, are only warranted in exceptional cases where the communication would rise to the level of injustice on the class.

This case serves as a reminder that, while defendants are generally permitted to communicate with putative class members, they must be cautious to avoid infringements on the relationship between a putative class and class counsel; communications which would visit an injustice upon the putative class; and communications which disparage a putative class or intimidate the putative class to not support the class proceeding. Generally, defendants will only be restrained where there is "clear and sufficient" evidence of inappropriate behaviour. Where concerns exist about disclosing the identities of putative class members, protections may be available under section 12 of the CPA.

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