

**CITATION:** ALS Society of Essex County v. Corporation of the City of Windsor, CV-08-12004  
Belle River District Minor Hockey Association Inc. v. Corporation of Town of Tecumseh, CV-08-12005  
2011 ONSC 91

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

AMYTROPHIC LATERAL SCLEROSIS SOCIETY  
OF ESSEX COUNTY and COMMUNITY GAMING &  
ENTERTAINMENT GROUP LP

Plaintiffs

- and -

THE CORPORATION OF THE CITY OF WINDSOR

Defendant

- and -

BELLE RIVER DISTRICT MINOR HOCKEY  
ASSOCIATION INC., ESSEX COUNTY DANCERS  
INCORPORATED, and COMMUNITY GAMING &  
ENTERTAINMENT GROUP LP

Plaintiffs

- and -

THE CORPORATION OF THE TOWN OF  
TECUMSEH

Defendant

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**REASONS FOR JUDGMENT**

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Patterson J.

63

**CITATION:** ALS Society of Essex County v. Corporation of the City of Windsor, CV-08-12004  
Belle River District Minor Hockey Association Inc. v. Corporation of Town of Tecumseh, CV-08-12005

2011 ONSC 91  
DATE: 20110120

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

AMYTROPHIC LATERAL SCLEROSIS  
SOCIETY OF ESSEX COUNTY and  
COMMUNITY GAMING &  
ENTERTAINMENT GROUP LP

Plaintiffs

)  
)  
) Ian Leach, for the Plaintiffs Amytrophic  
) Lateral Sclerosis Society of Essex County

) Michael Peerless for Community Gaming &  
) Entertainment Group LP

- and -

THE CORPORATION OF THE CITY OF  
WINDSOR

Defendant

)  
) Scott C. Hutchinson, for the Defendant

) Brendan VanNiejehuis, for the Defendant

- and -

) Paul Jonathan Saguil, for the Defendant

BELLE RIVER DISTRICT MINOR  
HOCKEY ASSOCIATION INC., ESSEX  
COUNTY DANCERS INCORPORATED,  
and COMMUNITY GAMING &  
ENTERTAINMENT GROUP LP

Plaintiffs

) Ian Leach, for the Plaintiffs Belle River  
) District Minor Hockey Association Inc., and  
) Essex County Dancers Incorporated

) Michael Peerless for Community Gaming &  
) Entertainment Group LP

- and -

THE CORPORATION OF THE TOWN OF  
TECUMSEH

Defendant

) Scott C. Hutchinson, for the Defendant

) Brendan VanNiejehuis, for the Defendant

) Paul Jonathan Saguil, for the Defendant

**HEARD: December 6, 7 and 8, 2010**

**REASONS FOR JUDGMENT**

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**PATTERSON J.:**

- [1] There are two certification motions on separate files, one with the Corporation of the City of Windsor as defendant and the other with the Corporation of the Town of Tecumseh as defendant. The plaintiffs are non-profit charitable organizations who, as part of their fundraising, ran bingos in their respective communities. Both the City of Windsor and the Town of Tecumseh charged a fee for issuing the bingo license. The proposed claim is that the fees collected by the respective municipalities were illegal taxes for which there was not the requisite authority to impose.
- [2] The defendant municipalities accept that a claim may be certified on some issues which will be discussed later but only for claims arising in specific time periods as determined by the *Limitations Act*, 2002 mainly:
- a) October 24, 2002 until December 31, 2003 (a period preserved by the transitional provisions of the *Limitations Act*, 2002); and
  - b) October 24, 2006 and following.
- [3] It is the defendants' position that these time periods may be determined now on the certification motions based on the pleadings which are deemed to be accepted as true for the purposes of the motion.
- [4] It is the plaintiffs' position that there are issues of discoverability and concealment that should not be determined at the certification stage but more appropriately dealt with by a summary judgment application or at trial. Further the plaintiffs further argue that the Statement of Defence is yet to be filed to which they would reply.
- [5] *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] 1 S.C.R. 3, concerning an alleged illegal payment to the province determined that the limitation period starts to run at the moment the province received the payment. Therefore, the defendants submit that the cause of action for a claimant who alleges an illegal payment of the fee will run from the date the alleged illegal fee payment was made.
- [6] In my opinion the question before the court is not whether they would have not paid the fee if its illegality was capable of discovery or had not been concealed, the question before the court is whether they should be entitled to return of the funds paid on a particular date if it is determined that the fee paid was illegal.
- [7] The plaintiffs argue that the issue of the applicability of the *Limitations Act* to the causal of action should be determined at a later date either on a summary judgment or at trial but I am satisfied that the individual claim starts from the payment of the fee.
- [8] I therefore agree with the defendants' proposal that subject to other comments the claims may be certified for the periods above-mentioned.
- [9] There is no dispute between the parties that the pleadings disclose a cause of action as to whether or not there was an illegal fee paid to the municipalities.

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- [10] Common issue questions were provided by the plaintiff concerning the *Limitations Act, 2002* but I have determined this issue.
- [11] Further, the plaintiffs have proposed common issue questions concerning the equitable defences of laches, waiver and estoppel. It is anticipated that they will be pleaded. The defendants state that these should not represent common issue until such time as the defendant has pleaded but they acknowledge that these potential equitable defences could be appropriately summarized as follows:
- a) Do the statements and/or conduct by or on behalf of from time to time the citizen's advisory group regarding bingo regulation, the bingo advisory committee, the bingo industry group and/or all of the hall charity associations, and/or any or all the bingo sponsor associations, give rise to the defence in the nature of laches, estoppel, waiver or analogous equitable defences that binds the class or binds an identifiable subclass.
- [12] In addition the plaintiffs have provided common issue questions related to the claim for punitive damages. The defendant has submitted that punitive damages are not available given that it is an action for restitution of allegedly unconstitutional taxes which is a matter of law but submits that if this is incorrect, the issue of punitive damages be certified as a common issue subject of the right of the defendant to move under Rule 20 or 21 for determination of this issue before trial.
- [13] The plaintiffs' proposed litigation plans will require amendment as a result of my decision and therefore even though I have no objection to the original plans made by the plaintiffs, it is appropriate that amended litigation plans be provided in accordance with my certification orders.
- [14] In my opinion the identifiable class shall be: "all persons whether natural (including unincorporated associations) or corporate who have paid lottery licensing fees and/or lottery administration fees to the Corporation of the City of Windsor/The Corporation of the Town of Tecumseh on or after October 24, 2006, up to the commencement of this action and paid on or after October 24, 2002, up to December 31, 2003."
- [15] This class is amenable to certification as it is subject to definition on a subjective criteria being those who have paid a fee in a set time period, without reference to the merits of the action. See *Hollick v. Toronto*, [2001] 3 S.C.R. 158 at para. 17 and *Hickey-Button v. Loyalist College* (2006), 267 D.L.R. (4<sup>th</sup>) 601 (Ont.C.A.) at para. 49.
- [16] The class definition identifies persons who have a potential claim for relief against the defendants. It defines the parameters of the lawsuit so as to identify persons who are bound by the result and describes those who are entitled to notice of certification. *Benerjee v. Shire Biochem Inc.*, [2010], O.J. No. 507 S.C.J. at para. 25, and *Brown v. Canada* (2010), 102 O.R. (3d) 493 (S.C.J.) at para. 156. The requirements of an identifiable class have been met in this case, being people who have paid a lottery license fee or lottery administration fee to the Corporation of the City of Windsor/The Corporation of the Town of Tecumseh at a set time period. The payment of the fee does

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not speak to the merits of the action. There is a clear and rational relationship between the class definition proposed common issues.

[17] As I have indicated, the defendants take no issue with this action being certified as a class action subject to the ruling on the limitation period which I have accepted and their proposed common issues to which I also have agreed.

[18] This is the preferable procedure as the class action would be a fair, efficient, and manageable method of advancing the plaintiffs' claim and for the defendant to respond. I agree that it is the preferable procedure for resolving the claims of the class members and there is no dispute that the goal of behaviour modification has added value when directed at a public institution.

[19] I agree that the class members' common issues being resolved by a class proceeding offers numerous benefits including:

- i) It will permit access to justice for claimants who otherwise would be disinclined to individually pursue meritorious claims (as the class is made up of charities whose constitutions and financial circumstances would make litigation of their claims on an individual basis if not impossible very difficult);
- ii) It will permit the effective and efficient use of court resources permitting all common issues to be decided in a single proceeding rather than multiple proceedings;
- iii) It will give class action members access to the procedural and remedial mechanisms of the class proceeding;
- iv) It will permit the aggregate of claims to be dealt with on a contingency fee basis (which has been agreed to) whereas the probable expense in advancing a claim individually would not warrant the bringing of the action because of the potential amount to be recovered for an individual class member; and
- v) The class procedure affords class members to advance the claim free from a risk of adverse cost awards.

[20] I am satisfied that the representative plaintiffs proposed in file CV-08-12004, namely Amyotrophic Lateral Sclerosis Society of Essex County and file CV-08-12005, namely Belle River District Minor Hockey Association Inc., and Essex County Dancers Incorporated have a claim that is a genuine representation of the claim for the class to be represented and I am further satisfied that the representative plaintiffs are capable of asserting a claim on behalf of class members and that they have no conflict of interest.

[21] Subject to my previous comments about the litigation plans, I am satisfied that subject to amendment they disclose a workable method of advancing the claims of the class members.

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[22] The proposed representative plaintiffs in this case have retained Lerner's LLP to be counsel of class; and have met with class counsel regarding the action and are prepared to devote the necessary time to assist the prosecution of the action, having representatives attend for examinations and court appearances; providing instructions to counsel and overseeing any settlement negotiations.

**FILE NO. CV-08-12004: Amyotrophic Lateral Sclerosis Society of Essex County v. The Corporation of the City of Windsor**

[23] It is ordered that this proceeding is certified as a class proceeding as follows:

- i) The proposed class action shall be all persons whether natural (including unincorporated associations) or a corporate who have paid lottery fees and/or lottery administration fees to the corporation of the City of Windsor within the time periods October 24, 2002, until December 31, 2003, and from October 24, 2006, and thereafter.
- ii) The common issues shall be:
  - a. In pith and substance are the lottery license fees and lottery administration fees that have been charged by Windsor to members of the class during the period or any part thereof, taxes imposed in a manner contrary to s.53 of the *Constitution Act, 1867*;
  - b. Do the statements and/or the conduct by and on behalf of the hall charities association and/or bingo sponsors association give rise to a defence in the nature of laches, estoppel, waiver or analogous equitable defences that bind the class or binds an identifiable subclass subject to the defendant's right to move under Rule 20 and/or 21 of the *Rules of Civil Procedure*;
  - c. Having regard to all the circumstances is an award of punitive damages appropriate in this case subject to the defendants' right to move under Rule 20 and/or Rule 21 of the *Rules of Civil Procedure*;

[24] The plaintiffs are to provide an amended litigation plan in accordance with the class definition and the common issues.

[25] The plaintiffs are to bear the cost of any notice to the class that may be required by this court with the said notice to be approved by the court.

[26] The plaintiff Amyotrophic Lateral Sclerosis Society of Essex County and Community Gaming & Entertainment Group LP filed minutes of settlement agreed to by the municipality the terms of which are approved by the court.

[27] Costs of the motion to be determined at trial.

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**FILE NO. CV-08-12005: Belle River District Minor Hockey Association Inc., Essex County Dancers Incorporated v. The Corporation of the Town of Tecumseh**

[28] It is ordered that this proceeding is certified as a class proceeding as follows:

- i) The proposed class action shall be all persons whether natural (including unincorporated associations) or a corporate who have paid lottery fees and/or lottery administration fees to the corporation of the Town of Tecumseh within the time periods October 24, 2002, until December 31, 2003, and from October 24, 2006, and thereafter.
- ii) The common issues shall be:
  - a. In pith and substance are the lottery license fees and lottery administration fees that have been charged by Tecumseh to members of the class during the period or any part thereof, taxes imposed in a manner contrary to s.53 of the *Constitution Act*, 1867;
  - b. Do the statements and/or the conduct by and on behalf of the hall charities association and/or bingo sponsors association give rise to a defence in the nature of laches, estoppel, waiver or analogous equitable defences that bind the class or binds an identifiable subclass subject to the defendant's right to move under Rule 20 and/or 21 of the *Rules of Civil Procedure*;
  - c. Having regard to all the circumstances is an award of punitive damages appropriate in this case subject to the defendants' right to move under Rule 20 and/or Rule 21 of the *Rules of Civil Procedure*;

[29] The plaintiffs are to provide an amended litigation plan in accordance with the class definition and the common issues.

[30] The plaintiffs are to bear the cost of any notice to the class that may be required by this court with the said notice to be approved by the court.

[31] The plaintiff Belle River District Minor Hockey Association Inc., Essex County Dancers Incorporated, and Community Gaming and Entertainment Group LP filed minutes of settlement agreed to by the municipality the terms of which are approved by the court.

[32] Costs of the motion to be determined at trial.



Terrence L.J. Patterson  
Justice