Court File No. CV-08-12004

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*

STATEMENT OF DEFENCE OF THE CORPORATION OF THE CITY OF WINDSOR

Admissions, denials, knowledge

1. The defendant admits the allegations in paragraphs 2, 4-8, and 10 of the Fresh As Amended Statement of Claim.

2. The defendant denies the allegations in paragraphs 9 and 11-25 of the Fresh As Amended Statement of Claim.

Overview

3. As pleaded in more detail below, this claim fails for the following reasons:

(a) The impugned fees are not a tax, because the payment of the impugned fees was voluntary, not compulsory.

(b) In the alternative, the impugned fees are not a tax because they are a regulatory charge:

(i) They are a part of two regulatory schemes: the regulation of gaming in Canada, and the municipal regulations of the City of Windsor; and

(ii) The impugned fees are connected to these regulatory schemes both because the fees have a regulatory purpose, and the revenues generated by the fees are tied to the costs of the regulatory scheme.

(c) In the further alternative, the impugned fees are not a tax because they are a proprietary charge.

(d) The defendant has not been unjustly enriched by the fees, and in the alternative it has changed its position such that it is no longer enriched.

(e) Claims for fees paid outside the basic limitation period are statute-barred.

(f) The equitable doctrines of laches, acquiescence, and estoppel apply because the plaintiffs, the members of the class, and their representatives have acquiesced in the level of the fees and have unduly delayed commencing this action, and the defendant has relied on those implicit representations that the fees were proper and valid.

The parties

4. The defendant, the Corporation of the City of Windsor ("Windsor" or the "City"), is a municipal corporation operating and subsisting under the *Municipal Act, 2001*, SO 2001, c 25, and, before January 1, 2003, under the former *Municipal Act*, RSO 1990, c M.45. The City is the

responsible government with respect to matters within its jurisdiction. It has been given various powers and duties under the laws of Ontario and Canada for the purpose of providing good governance to its citizens.

5. The plaintiff is a sophisticated not-for-profit corporation that raises funds and provides various services to the community. Its activities are based in Windsor and it provides services in Windsor and the surrounding area. To raise funds, it has held gaming events and in connection with those events it has applied for and received licences from the City and from the Province of Ontario. It has represented, in those applications, that it is competent to conduct and manage gaming events and to be responsible for trust funds. While the plaintiff may assist vulnerable persons, it is not itself a vulnerable person (nor, indeed, a natural person at all).

The claim

6. The claim seeks restitution of all amounts paid by class members as lottery licensing fees and lottery administration fees to the defendant on or after October 24, 1993 (being the date fifteen years before this action was commenced, pursuant to Ontario's ultimate limitation period in s. 15(1) of the *Limitations Act, 2002*, SO 2002, c 24, Sch B).

7. In relation to each individual payment of the impugned fees, there is a distinct and independent cause of action. As such, each cause of action may be affected differently by the facts pleaded below depending on what circumstances obtained at or before the time the individual payment was made.

Background: charitable lottery gaming in Ontario

8. Part VII of the *Criminal Code of Canada,* RSC 1985, c. C-46 (the "*Criminal Code*") is the headwaters of a broad interjurisdictional scheme to regulate gambling in Canada. It criminalizes almost all forms of gaming and then provides for certain carefully delineated exceptions. More specifically, s. 206 of the *Criminal Code* makes it a criminal offence to operate a lottery scheme in Canada. The *Criminal Code* then enacts certain carefully circumscribed exceptions in s. 207(1). One such exception, in s. 207(1)(b), allows "religious or charitable organizations" to operate lottery schemes "pursuant to a licence issued by the Lieutenant Governor in Council of the province" or his or her delegate, as long as the proceeds are used only for "charitable or religious object[s] or purpose[s]". Subsection 207(2) allows the licences to contain "such terms and conditions relating to the conduct, management and operation of" the lottery scheme as the granting authority may prescribe. If the terms and conditions are violated, or if the proceeds are not in fact used for a charitable purpose, the person or entity conducting the lottery is committing a criminal offence.

9. Since 1970, when s. 207 of the *Criminal Code* came into force more or less in its present form, Ontario's Lieutenant-Governor-in-Council has put in place several (sometimes overlapping) schemes to delegate the authority to issue charitable gaming licences. At some times, including at the present, the authority has been delegated to two actors simultaneously: municipalities may license lottery events of lower prize value whereas events of higher value (or games with certain characteristics) must be licensed by a provincial entity (now the Alcohol and Gaming Commission of Ontario or "AGCO", previously a Minister of the Crown). However, even with respect to the latter, the municipality plays a role: the licence application to the

AGCO must be supported by a letter from the municipality in which the event is to take place. In deciding which charitable gaming events to permit and which to refuse, and in setting the terms on which they will be permitted, the municipality is pursuing its own regulatory mandate to provide good government for its citizens.

10. For the lower-value events, the City charges a fee for the licence (a "Lottery Licensing Fee"). For the higher-value events, the City charges a flat fee for the letter plus a percentage of the AGCO's fee (together, a "Lottery Administration Fee").

11. From 1970 until 1993, lottery licensing in Ontario was governed by Order-in-Council 274/1970 (the "1970 OIC"). Under the 1970 OIC, municipalities were given the authority to issue licences to conduct lottery events, in which prizes were limited to $3,500.00 per event. During this period, Ontario's Minister of Financial and Consumer Affairs[1] could impose terms on licences, which a municipality could then supplement. The Minister could prescribe the maximum level of licensing fees to be charged.

12. Between 1993 and 2008 (the period covering the bulk of the class), lottery licensing was governed by Order-in-Council 2688/93 ("1993 OIC"). The 1993 OIC delegated to the Director of what was then called the Gaming Control Commission (the "GCC") the authority to issue licences to "conduct and manage" lottery schemes. It also gave municipalities the authority to issue licences to charitable groups to "conduct and manage" any "bingo lottery event where the amount or value of the prize or prizes awarded is no greater than $5,500.00 in value". The 1993 OIC required any lottery event to be conducted in accordance with the *Gaming Control*

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[1] Most of the functions of the Minister of Financial and Consumer Affairs have since devolved to the Minister of Government and Consumer Services.

Act, 1992, SO 1992, c 24[2] and gave the Director the authority to establish "[t]he maximum fees to be charged for the issuance of a licence".

13. In 1998, the Gaming Control Commission was abolished and the Alcohol and Gaming Commission of Ontario (the "AGCO") was established in its place. The functions and powers of the Director of the GCC were effectively transferred to the Registrar of the AGCO (the "Registrar") at that time.

14. The GCC Director (and later the Registrar) established the requirements for lottery licensing during most of the claim period as follows:

(a) The publication of mandatory Terms and Conditions which were set by the GCC and later the AGCO, which were regularly amended from time to time. The Terms and Conditions govern the various financial and record-keeping requirements imposed on charitable organizations, the accounting procedures that must be followed by them, and the rules of play for the game of bingo and other lottery events;

(b) The publication of the Lottery Licensing Policy Manual ("LLPM") to guide municipalities who are responsible for the design and implementation of their own regulatory activities, and to ensure harmonization between municipal regulation and the AGCO's policies, standards and directives; and

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[2] The *Gaming Control Act, 1992* is provincial legislation that creates a system for registration and regulation of participants in the bingo industry other than the actual licensed charities.

(c) The establishment of a Protocol to identify roles and responsibilities of municipal licensing authorities in connection with the administration of charitable gaming.

15. Since 2008, in Ontario the authority to licence has been delegated by the Lieutenant-Governor-in-Council to the Registrar, by virtue of Order-in-Council 1413/2008 (the "2008 OIC"). Under the 2008 OIC, the Registrar has authority to specify the types of lottery events that may be conducted, the eligibility requirements to obtain a licence, and the permissible uses of the funds raised through charitable gaming, as well as to prescribe "the maximum fees to be charged for the issuing of a licence".

16. Under the 2008 OIC, for lottery events where the prize board[3] exceeds $5,500.00, only the Registrar may issue licences. For lower-value events, however, municipalities may issue licences themselves. They must be satisfied that the charitable or religious organization meets the requirements established by the Registrar. Municipalities may also attach additional terms and conditions to the licence, conduct reviews of eligibility by particular licensees at any time, and suspend, cancel or refuse to issue licences.

Charitable gaming in Windsor

17. To exercise the authority delegated to it under the various Orders-in-Council, the City has, from time to time, enacted by-laws governing the licensing of charitable gaming, as follows:

(a) Between 1984 and 1997, By-Law 775;

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[3] The "prize board" for an event is the total value of prizes offered at the event.

(b) From 1997 until 2004, By-Law 12808;

(c) From 2004 until 2006, By-Law 76-2004;

(d) From 2006 until April 30, 2007, By-Law 83-2006;

(e) From April 30, 2007 until present, By-Law 65-2007.

18. The City has set the fees for charitable bingo licences. Between 1990 and 2007, the rate was set at 3.0% of the maximum value of the prize board, consistent with the amount prescribed by the AGCO. In 2007, after consultation with the industry, the "New Revenue Model" was introduced, and the fee level was changed (as authorized by the AGCO) to a flat fee of $165.00, coinciding with 3.0% of a $5,500 prize board.

19. As discussed above, charitable or religious organizations that have been licensed to conduct and manage lottery schemes in Ontario must abide by the licensing requirement, the terms of the licence, the Registrar's Terms and Conditions, and any other requirements that the Registrar may impose. For lottery events that are conducted and managed in Windsor, the City is responsible for administering this regulatory framework and ensuring compliance with the above requirements. This involves, *inter alia*:

(a) reviewing applications for lottery licenses to ensure eligibility or qualifications of the applicant organizations;

(b) reviewing financial statements and other reports from licensed organizations;

(c) reviewing requests to change scheduling or format of licensed lottery events;

(d) conducting inspections and audits of licensed organizations and events to ensure compliance;

(e) monitoring and advising licensed organizations with respect to the permissible uses of funds generated from licensed events;

(f) submitting required reports to the AGCO Registrar regarding licensed lottery events;

(g) providing reports, information, and/or recommendations to its Council about various aspects of regulation of the charitable gaming industry in the City;

(h) maintaining current information on file for licensed organizations;

(i) working with the relevant provincial entity (the GCC or later the AGCO) to coordinate the operation of the overall regulatory scheme; and

(j) meeting and consulting with licensed organizations and industry participants.

20. These functions have required the services not only of the City's Licensing and Enforcement Department, but also many other departments and offices within the City.

Class members have been involved in the setting of the impugned fees

21. Throughout the class period, the City has worked extensively with class members and their representatives to cooperate in the regulation of charitable gaming, including with respect to the level of licence fees and lottery administration fees.

22. One way in which this cooperation has occurred is through entities known as "Bingo Sponsor Associations" or "Hall Charities Associations" ("HCAs"), which are associations of the licensed charitable and religious organizations that conduct and manage lottery events regularly within a particular bingo hall. The Registrar's Terms and Conditions recognize HCAs. There are four bingo halls at present in Windsor, hence there are four HCAs at the moment.

23. Under the Registrar's Terms and Conditions, each HCA is responsible for co-ordinating schedules and various other matters related to the conduct and management of lottery events by its member organizations. HCAs have co-ordinators that act as agents for the individual licensed organizations to handle some administrative aspects of applying for lottery licenses and filing the required reports.

24. Many of the class members in this proceeding are also members of an HCA. Over the years, the HCAs have also played an important role in discussions and negotiations with the City concerning lottery licensing, including licensing fees, on behalf of their members.

25. In addition to dealing with the HCAs, the City has, since the 1980s, engaged in regular and formal consultation with the industry and its stakeholders on municipal policy and the regulation of charitable gaming. Specifically:

(a) From 1986 until 1993, the City maintained the "Citizens' Advisory Group Regarding Bingo Regulations" ("CAG"), a group consisting of one elected Councillor, three or more representatives of bingo halls, three or more representatives of charitable or religious groups operating lottery events (mainly

bingo), and three or more members of the public at large. The CAG made regular reports to City Council on the state of charitable gaming regulation by the City.

(b) From 1993 to 2002, the City maintained the "Bingo Advisory Committee" ("BAC"). The BAC was initially identical in form to the CAG, but beginning in 1995, the composition of the BAC changed to four bingo hall owners, four representatives of charitable groups conducting lottery events, and one member of City Council. The BAC and the charities it represented became well aware of the quantum of revenue generated by the City through licence fees and lottery administration fees.

(c) In 2001-2002, increased border security as a result of 9/11 caused a precipitous decline in the Windsor bingo industry's fortunes. In response, the City established the Bingo Industry Group ("BIG") to replace the BAC. The BIG's membership consisted of one representative from each bingo hall, nominated jointly by the HCA and the hall owner/manager, and approved by the City. The BIG was intended to continue to be a forum for policy input and information-sharing, but also to implement an organized series of steps designed to support the bingo industry in Windsor.

26. This continuous process of consultation has had numerous concrete results, including the following:

(a) On March 3, 1994, the BAC recommended an ***increase*** in the bingo license fee from 3% to 4%, and recommended that the Director of the Gaming Control Commission approve such increase (a recommendation the City did not follow);

(b) The City sought the BAC's input into the draft by-law that became By-Law 12808, which governed bingo licensing in the City from 1997 to 2004. That By-Law included provision for setting the licensing fees in accordance with the schedule approved by the GCC. The BAC recommended that the City enact the By-Law, including its fee schedule;

(c) Beginning in 1997, the City provided the BAC (at the BAC's request) with aggregated monthly industry-wide data maintained by the City. This data included regular reporting on the aggregate quantity of licensing fees paid to the City by charitable groups conducting bingo events.

(d) In July 2000, the BAC considered a report prepared by the Provincial Working Group for the Strategic Review of Bingo and Related Charitable Gaming. The report, adopted by BAC, stated that "the bottom line ... has to be no negative impact on municipal licensing revenues". In July 2001, a follow-up report was prepared by the Bingo Strategy Working Group composed of the Provincial Bingo Charitable Activities Association and the Registered Gaming Suppliers Association. These groups represent charitable groups in Ontario, including class members in this action. In relation to this report, the BAC expressed the view that "there needs to be flexibility for municipalities to manage their licensing

fees within the overall 3% limit, according to local requirements." (emphasis added)

(e) In 2004, the BIG specifically considered whether to adopt the recommendation in one consultant's report that municipal licensing fees be eliminated to support the industry. The BIG advised the City's Council ***not*** to eliminate such licensing fees.

(f) By contrast, in 2006 the BIG recommended that the City waive lottery administration fees associated with provincially-regulated games, again to support the industry. Council agreed and waived lottery administration fees as of September 25, 2006 (ending in 2007).

27. At all material times, it was open to the charities and their representatives to ask the City for information or documentation pertaining to charitable gaming regulation, including with respect to the revenues and expenses associated with licence fees and lottery administration fees. Such a request could be made, most formally, by way of the *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56. Financial information regarding revenue and expenses associated with the fees also appears in the City's annual financial statements, budgets, and other documents, all published on the City's website. All documentation that comes before City Council (including staff reports), as well as minutes, are also available to the public online (save for privileged and *in camera* matters).

28. Despite the availability of information relating to the quantum of fees and expenses, at no time until the commencement of this action has any charitable gaming participant taken issue with the legality of the fees.

29. Since the beginning of the class claims period in 1993, charitable and religious organizations in Windsor have generated tens, if not hundreds, of millions of dollars from gaming.

The impugned fees are not taxes

30. The impugned fees are legally and constitutionally sound, and there is no basis in law to compel their repayment. In particular, the impugned fees are not, in pith and substance, taxes.

31. First, the impugned fees are not compulsory. Part of the legal definition of a tax is that it is compulsory and enforceable by law. Being able to operate a gaming event, pursuant to a licence, is a valuable privilege, not a right: charitable gaming is a highly sheltered, highly regulated industry with a significant potential for economic gain, and it is illegal subject to narrow exceptions. Charitable and religious organizations that do not wish to hold gaming events, or that feel the fees are too high, do not have to do so. They are perfectly free to engage in their charitable activities; they may (and do) raise revenue in countless other ways. They are also free to seek out charitable gaming in jurisdictions that may offer different licensing terms. Charities that chose to hold gaming events have paid money voluntarily in exchange for the valuable right to engage in a lucrative activity that is otherwise illegal (indeed, criminal); this is the very opposite of a tax. No nexus between revenues and costs is necessary in this scenario.

32. Alternatively, even if the fees are compulsory, they are still not taxes, because they are regulatory charges. They are regulatory charges because (1) there is at least one relevant regulatory scheme, and (2) the fees are connected to a regulatory scheme.

33. The fees are a part of two regulatory schemes. First, they are part of the interjurisdictional regulation of gaming in Canada. The *Criminal Code* both criminalizes lottery schemes and enacts certain exceptions, one of which is charitable or religious gaming when licensed by a provincial Lieutenant Governor in Council. The provincial legislature has also regulated gaming. Second, because municipalities either license or facilitate licensing, the licensing is part of the entire scheme of municipal regulation.

34. Both of these schemes meet the legal definition of a regulatory scheme. They are complete, complex, and detailed codes of regulation. They have regulatory purposes that seek to affect behaviour. They have costs of regulation. Both involve a relationship between the person being regulated and the regulating body or bodies under which the person being regulated either benefits from or causes the need for the regulation. Namely:

(a) The federal-provincial regulatory scheme is necessary, in part, because of the presence of charities and religious organizations that wish to hold gaming events;

(b) The municipal regulatory scheme benefits those organizations because any aspect of the operation of the City that makes it more attractive to residents,

workers, visitors, and businesses increases the class members' potential donor base; and

(c) The municipal regulatory scheme further benefits those organizations because it enhances the gaming experience through inspections and other quality control measures.

35. The fees are connected or adhesive to both regulatory schemes. This occurs either where the fees have a regulatory purpose or where they are tied to the costs of the scheme. Both of these individually sufficient conditions are present in this case.

36. First, the fees themselves have a regulatory purpose (in fact, more than one purpose) in each scheme. The fees are part of a scheme to ration gaming and control the level of gaming in society. They also ensure that those who wish to hold lucrative gaming events pay an amount that is a proxy for the value of that benefit. And they ensure that some part of the proceeds of gaming is directed to the public good, which among other things mitigates the social costs and problems associated with the presence of gaming. These are all purposes of both applicable regulatory schemes. Again, no nexus between revenues and costs is necessary in this scenario.

37. Alternatively, the fees are connected to the regulatory schemes because the revenues generated by the fees are tied to the costs of each scheme:

(a) The revenues generated by the fees are far below the total costs of Canada's federal-provincial gaming regulation scheme;

(b) The revenues generated by the fees are also far below the costs of the municipal regulatory scheme. According to the City's 2016 approved operating budget, the City's total expenses in 2015 were approximately $774.5 million. The total revenue for "policy, gaming & licensing" (only part of which comes from charitable gaming) was approximately $2.1 million;

(c) Further and in the alternative, the revenues from the fees do not exceed the costs of gaming (including other forms of gambling such as casino gambling and horse-racing) in Windsor, including its numerous indirect and social costs.

38. In the further alternative, the impugned fees are a proprietary charge. By virtue of the *Criminal Code* and the various orders-in-council, the City has the right to issue licences and to facilitate applications for AGCO licences. It is entitled to dispose of that right on commercial terms.

39. The impugned fees are therefore not compulsory, and they, in any event, constitute a regulatory charge, or alternatively a proprietary charge. In all cases, the fees are not taxes and can be levied without express legislation.

40. The City denies that it or its representatives were ever aware, as is alleged, that the impugned fees were actually in law taxes, or that they were improper in any way. At all times the City and its representatives believed that the impugned fees were legally valid and entirely appropriate, as is the case.

No unjust enrichment

41. The plaintiff makes allegations of unjust enrichment at paragraphs 15-18 of the Statement of Claim. In response to those allegations, the City pleads as follows:

42. **No enrichment**: The City has not been enriched by the impugned fees. Indeed, as pleaded above, there is a nexus between the revenue from the fees and a regulatory scheme.

43. **No deprivation**: There is no corresponding deprivation of the plaintiff. In exchange for the impugned fees, the plaintiff and other class members received a valuable commercial privilege, to which they had no legal entitlement but for the licence granted, and from which they have enjoyed significant financial gains over the years. Moreover, these revenues, when spent by the City, have benefitted the plaintiff and the class members, both directly and indirectly. They have been spent for the general good of the Windsor community, and thereby enhanced the size and quality of the player base and the donor base. They have been spent to better regulate gaming events themselves and thereby attract more gaming dollars. They have also been spent to enhance municipal facilities that many class members use to conduct community activities (e.g. arenas and gyms for children's sports).

44. **Juristic reason**: Even if there is an enrichment and a corresponding deprivation, there is a juristic reason, namely, the statutory and regulatory framework allowing municipalities to charge licensing fees and licensing administration fees. Another eligible juristic reason is the linkage, set out above, between the impugned fees and a regulatory scheme. The plaintiffs voluntarily elected to engage in this activity knowing the fees involved and the economic benefits they would reap.

45. **Change of position**: Even if there was no juristic reason for the enrichment, it would still be unjust to require the City to make restitution. The City received the revenue, in most cases, long before this action was commenced. Since the City operates on a balanced-budget basis, it has adjusted its expenditures to take into account the available revenue. Hence, in each year since the impugned fees were received, the City has changed its position by using the revenue to provide additional municipal services that it would not have provided, had it not received that revenue.

Claims in respect of fees paid outside the basic limitation period are statute-barred

46. This action was commenced on October 24, 2008. As certified, it seeks restitution of fees paid since October 24, 1993.[4] The class has been divided into two subclasses, one consisting of those whose claims are not *prima facie* time-barred by the two-year basic limitation period in the *Limitations Act, 2002* (i.e. in respect of fees paid (a) between October 24, 2002 and December 31, 2003[5] and (b) October 24, 2006, and following), and one consisting of those whose claims are *prima facie* time-barred (i.e. all other claims).

47. The City pleads that claims in the *prima facie* time-barred subclass are, in fact, barred by ss. 4 and 5 of the *Limitations Act, 2002*. The class members are presumed to have discovered their claims when they paid the fees in question, and they cannot rebut that presumption.

48. Class members have always been aware that they were paying a fee. There has always been at least a potential legal question: is that fee properly characterized as a tax or a

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[4] The individual plaintiff also claims in relation to fees paid after January 1, 1990. This claim is barred by the ultimate limitation period in s. 15 of the *Limitations Act, 2002*. The Court of Appeal for Ontario has ruled that the class proceeding cannot raise claims in relation to fees paid before October 24, 1993.

[5] Preserved by the transition provisions in the *Limitations Act, 2002*.

regulatory charge? A reasonable charity would have always been aware of that question, and, thus, of the claim that is advanced in this action.

49. Further, the facts that the plaintiff pleads in its statement of claim in support of its assertion that the impugned fees are actually taxes were all readily ascertainable more than two years before it commenced this action. In particular, the plaintiff's own position in this action is that the dollar amounts of the revenues from the impugned fees and of the costs of operating the licensing scheme were disclosed in documents such as:

(a) A report dated March 17, 2006 entitled "Toward A Sustainable Future: City of Windsor Charitable Bingo Gaming Industry Renewal Study, Final Report"; and

(b) Windsor's approved operating budget for 2005 (and for previous years).

50. In addition, the class members were aware or could have been aware, directly or indirectly, of the facts now said to give rise to the claim through the extensive consultation between the City and the bingo industry about the level of the impugned fees (pleaded above).

51. Even if legal or other expert advice was necessary for the class members to realize that they had a potential claim, they should have obtained such advice promptly.

52. The plaintiff makes the bald allegation that the City "concealed" the true nature of the impugned fees, and this rendered the claim non-discoverable. (Since commencing the action, the plaintiff has disavowed any claim under the equitable doctrine of fraudulent concealment.) However, the acts of which the plaintiff complains cannot be considered to have concealed anything material from the plaintiff and other similarly situated class members:

(a) Simply stating that a fee is authorized by the *Criminal Code*, or by an order-in-council of the Lieutenant-Governor, does not amount to concealment.

(b) Similarly, characterizing the impugned fees as "fees" in by-laws or other publication is not concealment. At most, it is a legal statement (which, in any event, was accurate, as discussed above).

(c) Holding *in camera* meetings at which the impugned fees were discussed does not constitute concealment.

53. Indeed, the City has always been transparent about the circumstances under which the valuable lottery licences were made available. The plaintiffs were either always aware of the facts about which they now complain, or they simply failed to turn their minds to them. The latter cannot constitute concealment or non-discoverability.

Laches, acquiescence, and estoppel

54. The City relies on the equitable doctrines of laches, acquiescence, and estoppel.

55. The plaintiff has not prosecuted its claim without undue delay. The plaintiff and other class members have acquiesced in the current and past levels of the impugned fees, in particular by participating in consultations over the years on the fees themselves. They have implicitly or expressly represented to the City that they accept the fees, both as valid and in their quantum. And the City has reasonably relied on that acquiescence by doing things that it would not have done had it believed that its entitlement to the revenues was in any doubt, namely: (1) making additional expenditures that it would not have otherwise made and (2)

destroying documents pursuant to general document retention and destruction policies that it did not know might be relevant to a potential claim against it. Documents that have been so destroyed include "correspondence and applications pertaining to Lottery", "Lottery reports and licences", and "approval files for lottery organizations".

Standing

56. Many of the class members are unincorporated associations, defunct or non-existent corporations or partnerships, or for other reasons within the knowledge of each such class member, have no legal existence or capacity to sue or be sued. As such, these class members have no standing to commence this action and have no right, in any event, to recover any alleged losses through the mechanism of a class proceeding.

Conclusion

57. The defendant asks that this action be dismissed with costs.

58. The defendant agrees that, if a trial of this action is necessary, it should be held at Windsor.

February 7, 2017

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ONTARIO SUPERIOR COURT OF JUSTICE

Proceeding commenced at Windsor

STATEMENT OF DEFENCE OF THE CORPORATION OF THE CITY OF WINDSOR

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