



PATTERSON J.:

- [1] When this matter came before me in December 2010, the defendants consented to the class action being certified in both matters but only on the basis that the *Limitations Act, 2002*, S.O., 2002, c. 24, Sch. B, would apply. The cause of action involves the payment of bingo license fees which are alleged to be an illegal tax.
- [2] The plaintiffs submitted that the issues of discoverability and concealment on behalf of those individuals who paid the license fee prior to the limitations period should have the right to argue at trial that the limitation period should start when the person who on reasonable inquiry would have been able to discover the alleged illegality and, further, that the actions of the municipalities constitute concealment which would have prevented that discovery from being made.
- [3] I was of the opinion that the Supreme Court of Canada case, *Kingstreet Investments v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, stood for the proposition that an alleged illegal payment to the province determined that the limitation period starts to run when the province received payment.
- [4] This matter has come back to me on the basis including other issues that this is not correct. Further it is not appropriate under s. 5(1)(a) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 to do a merits based evaluation to determine whether there is a cause of action.
- [5] It is understood that a certification motion is not meant as a test of the merits of the claim nor whether the action or any defence is likely to succeed. Rather, the issue is whether the action should be prosecuted as a class action (*Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158). It is a low bar to satisfy the requirement under s. 5(1)(a) that the statement of claim discloses a cause of action because it does not entail any assessment of the merits of the action: *Hollick*, at para. 25.
- [6] I agree that the statement of claim makes allegations concerning discoverability and concealment and that the plaintiffs have shown some basis of fact for these pleadings.
- [7] I am satisfied there is an identifiable class that would be represented by the plaintiffs but an issue has been raised by the defendants that in the event that I determine that the identifiable class includes those individuals who paid the license fee prior to the limitation date that the proposed representatives would not adequately represent the class because there should be a representative of the claimants who are making a claim outside the limitation period.
- [8] I do not agree with the defendants' argument as the representative plaintiffs are permitted to assert claims on behalf of other class members so long as the claims all share common issues of fact or law (*Brown v. Canada (Attorney General)*, 2010 ONSC 3095, 102 O.R. (3d) 493).

- [9] Section 5(1)(b) provides that there be an identifiable class that would be represented by the proposed plaintiffs. The proposed class definition is to identify persons who have a potential claim against the defendants, to define the parameters of the lawsuit so as to identify persons who are bound by the result and to describe who is entitled to notice of the certification (*Banjeree v. Shire Biochem Inc.*, 2010 ONSC 889, [2010] O.J. No. 507 at para 26). There is no requirement that all of the class members have an equal likelihood of success and the class definition should bear a rational relationship to the common issues and not be dependent upon the outcome of the litigation (*Western Canada Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534).
- [10] The class definition proposed by the plaintiffs is "all persons whether natural or corporate who have paid lottery licensing fees and/or lottery administration fees to the Corporation of the City of Windsor (Town of Tecumseh) on or after January 1, 1990". This was the proposed class action definition at the hearing held in December 2010.
- [11] In my decision at that time I limited the class to those people who were not barred by the *Limitations Act*. The divisional court in remitting the matter back to me indicated that I might be justified in making precisely the same order as I did last time but that it would have to be done on grounds other than the very low threshold of showing a "reasonable cause of action" on the "plain and obvious" standard.
- [12] Section 5(1)(b) requires that the court identify the class in a rational and not arbitrary manner.
- [13] The plaintiffs' proposed class is limited to an arbitrary cut off date of January 1, 1990, but in the alternative the plaintiffs have suggested that no time limit be included.
- [14] The plaintiffs acknowledge that the January 1, 1990 date is arbitrary and that by not having a date in their proposed class definition it would permit claims theoretically that could go back to 1969. It is the plaintiffs' position that they do not know when the defendants began regulating charitable gaming and when the defendants started charging lottery fees.
- [15] The defendants have not filed a statement of defence or affidavit of documents. Discoveries have not been held.
- [16] Section 5(1)(c) requires the claim or defence to raise common issues. The plaintiffs propose the following common issues:
1. 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*;
  2. 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*;

3. 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*;
4. Apart from any arguments relating to discoverability and/or concealment, what is the limitation period applicable to such claims arising prior to the coming into force of the *Limitations Act, 2002* on January 1, 2004?
5. Apart from any arguments relating to discoverability and/or concealment, what is the limitation period applicable to such claims arising after the coming into force of the *Limitations Act, 2002* on January 1, 2004?
6. What is the effect, if any, of the transitional provisions contained in the *Limitations Act, 2002* upon the claims of class members?
7. As for discoverability and/or concealment, insofar as they may affect the operation of otherwise applicable limitation periods:

(i) During the period of the claims, what documents were made available to the public by defendants containing information relevant to the plaintiffs' claims, and when were those documents made available to the public?

(ii) Were there any acts of concealment by the defendants relevant to operation of the applicable limitation period vis-à-vis all class members?

(iii) Was the nature, timing and content of the aforesaid public documents, (as determined by the court), sufficient to commence running of the applicable limitation period vis-à-vis all class members, having regard to principles of discoverability and concealment?

7. In the alternative to the above multipart common issues related to discoverability and concealment:

At what time (or times), if any, should the class members ought to have known that they had a claim against the defendants, such that the applicable limitation period began to run against all class members, having regard to the principles of discoverability and concealment.

8. If the said fees are taxes which are *ultra vires* or otherwise illegal, are class members entitled to an accounting and/or restitution of such taxes paid to Tecumseh, subject to any applicable limitation period, laches, waiver and/or estoppel arguments?

[17] The defendants do not object to common issues #1, #2, #3 and #8 but objects to #4 through #7 including the alternative for #7.

- [18] It is understood that in the event that I rule the plaintiffs' proposed class definition to be granted, then questions #4, #5, and #6 would be applicable.
- [19] The major issue between the parties is the discoverability and concealment issue as set out in #7 and alternate #7. In my opinion alternate #7 is an appropriate common issue.
- [20] I believe the plaintiffs' proposed alternate #7 is reasonable and would not be unmanageable. I acknowledged that there are municipal by-laws affecting destruction of documents. At the same time the defendants argue there would be a vast quantity of documents to go through. It cannot be both. Also, it is significant that it is the plaintiffs' position concerning the limitation questions that they only seek to argue the second branch of discoverability which addresses what a reasonable person ought to have known based upon the defendants' public release of documents to all class members on a uniform basis. It is the position of the plaintiffs that they do not seek certification of the other branch of discoverability which would require an inquiry as to what each individual member actually knew. It is acknowledged that there may be individual trials after the common issues trial.
- [21] Regarding concealment, the plaintiffs allege the actions by the two municipalities resulted in a concealment which would prevent an individual from determining whether or not the fees paid were illegal or not. Further it is argued that *Kingsstreet* supports the proposition that the taxpayer is entitled to rely on the presumption of validity of the legislation imposing a charge and is not required to investigate or question the validity of the charge. It appears to me the documentation provided as to discoverability would be the same or overlaps with the documentation concerning the allegation of concealment. At this stage no defence has been filed nor have discovery and affidavit of documents taken place or exchanged.
- [22] In my opinion the issue of the applicability of the *Limitations Act, 2002* on the class definition and the common issues including discoverability and concealment would be an appropriate summary judgment motion once pleadings, discovery and exchange of documents have been completed. A merits based analysis could be done at that time on those issues.
- [23] It was argued by the defendants that pre-*Limitations Act, 2002* claims would overwhelm claims commenced within the *Limitations Act, 2002* term period. I disagree. These claimants have a right to have their day in court either at a common trial or an individual trial. A merits based analysis is not appropriate at this time but would be appropriate on a summary judgment motion which will include the arguments which I have heard on this certification motion by both the plaintiffs and defendants. Based on the information I have at this stage, in my opinion it is not appropriate to deny the right of those individuals who are outside the basic limitation period to have their day in court.
- [24] Section 5(1)(d) of the *Class Proceedings Act, 1992*, requires the court to consider whether a class would be a preferable procedure for the resolution of the common issues. As provided in *Cloud v. Canada*, [2001] O.J. No. 4163 (S.C.J.), this involves viewing the common issues in the context of the entire claim and whether their resolution will significantly advance the action. The fact that there may be individual issues remaining

after the resolution of common issues should not prevent the certification of a class proceeding and will be viewed as being a preferable procedure if the resolution of the common issues will significantly advance the proceedings: *Banjeree*.

- [25] The preferable inquiry procedure involves firstly, whether the class action would be a fair, efficient and manageable method for advancing the claim and secondly, whether the class action would be preferable to other reasonably available means of resolving the class members' claim. In *Fisher v. IG Investments Management Ltd.*, [2010] O.J. No. 343, at para. 28 and as provided in *Hollick*, the preferable inquiry must also keep in mind the three principle advantages of class actions being judicial economy, access to justice, and behaviour modification.
- [26] As I indicated in my previous decision, I felt that this class action satisfied the preferable procedure requirements within the context of the claims that were not statute barred. And now on further analysis I am of the opinion that it is appropriate to permit those individuals who are outside the basic limitation period to have an opportunity to be heard.
- [27] I do not accept the defendants' submissions that claims predating the basic limitation period would make the claims unmanageable. The arguments included issues related to document preservation, document production, changes in regulatory framework and anticipated defences related to estoppel, waiver and laches. As I have stated previously, once the defence is filed, discovery is completed and affidavit of documents are provided, there will be a clearer picture to evaluate those issues on a merits based analysis, either by a summary judgment motion or at the hearing.
- [28] The parties to these actions have settled the issue of who shall bear the cost of providing notice to the classes of any certification order on the following terms, subject to judicial approval:
1. The defendants shall bear the cost of posting a copy of the notices on their websites, on their webpages where matters of lottery licensing are addressed.
  2. The plaintiffs shall bear the cost of posting a copy of the notices on the website of class counsel (Lerners LLP) on the webpage for these actions.
  3. The defendants and plaintiffs shall share equally in the cost of publishing the notices in the Windsor Star newspaper on two consecutive Saturdays. The defendants' contribution shall not exceed \$5,000 (\$2,500 each).
  4. Within 30 days of the date of the certification order the defendants shall, to the best of their ability, provide a list of all charitable and religious organizations who have obtained lottery licenses from them and paid associated fees, to counsel for the plaintiff classes together with the last known contact information for these organizations.
  5. Class counsel, after receiving the lists referred to in clause 4, shall mail a copy of the notice to each class member. The plaintiffs shall bear the cost of mailing these notices.

6. The form and content of the notices shall be determined after release of Justice Patterson's reasons regarding the motions for certification.

[29] In due course the parties are to provide an amended litigation plan in accordance with the class definition and common issues together with the procedure to account for the defendants' likely summary judgment motion or cross motion to dismiss the claims brought outside the limitation period. Further procedure will have to be determined regarding potential individual issues and trials, including a procedure for adjudicating the issues of discovery and concealment.

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

[30] It is ordered that:

- 1) This proceeding be certified as a class proceeding.
- 2) The proposed class action shall be all persons whether natural (including incorporated associations) or a corporate who have paid lottery fees and/or lottery administration fees to the corporation of the City of Windsor on or after January 1, 1990.
- 3) The common issues are as follows:
  1. 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*;
  2. 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*;
  3. Apart from any arguments relating to discoverability and/or concealment, what is the limitation period applicable to such claims arising prior to the coming into force of the *Limitations Act, 2002* on January 1, 2004?
  4. What is the effect, if any, of the transitional provisions contained in the *Limitations Act, 2002* upon the claims of class members?
  5. At what time (or times), if any, should the class members ought to have known that they had a claim against the defendants, such that the applicable limitation period began to run against all class members, having regard to the principles of discoverability and concealment

6. If the said fees are taxes which are *ultra vires* or otherwise illegal, are class members entitled to an accounting and/or restitution of such taxes paid to Windsor subject to any applicable limitation period, laches, waiver and/or estoppel arguments?
7. Having regard to all the circumstances is an award of punitive damages appropriate in this case?
- 4) The nature of the claims asserted on behalf of the class, and the relief claimed on behalf of the class, are as follows:

The class is made up of non-profit charitable and religious organizations who, as part of their fundraising, managed and conducted licensed lottery events in the City of Windsor. The City of Windsor charges a fee to the class members for issuing the licenses, and charges administrative fees to the class members who obtain lottery licenses issued by the provincial licensing authority. It is claimed that the fees collected by Windsor were in fact illegal taxes which Windsor did not have the requisite authority to impose. The plaintiff claims, on behalf of the class, restitution of the fees paid to Windsor, related declaratory relief, and punitive damages.

- 5) The costs regarding the notice to be given to the class shall be as the parties have agreed.
- 6) The form of the notice referred to in paragraph 5 of this order shall be in the form as agreed between the parties or as approved by the court.
- 7) Any member of the class wishing to opt out of this action must do so in writing within the time period as agreed by the parties or as approved by the court.
- 8) Amyotrophic Lateral Sclerosis Society of Essex County is appointed to be the representative plaintiff of the class described in paragraph 2 above, and that Lerner LLP are appointed to be the lawyers for the class.
- 9) An amended Litigation Plan is to be provided to the court.
- 10) Costs of this motion, including the previous hearing of this motion held on December 6 and 7, 2010, shall be addressed in a separate order after the parties have made submissions with respect to costs.



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

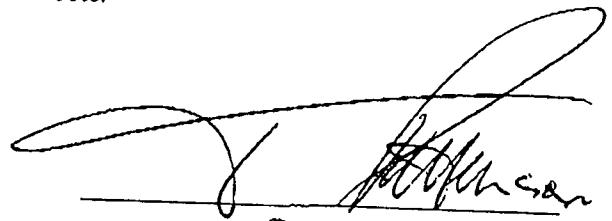
[31] It is ordered that:

- 1) This proceeding be certified as a class proceeding.
- 2) The proposed class action shall be all persons whether natural (including incorporated associations) or a corporate who have paid lottery fees and/or lottery administration fees to the corporation of the Town of Tecumseh on or after January 1, 1990.
- 3) The common issues are as follows:
  - 1. 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*;
  - 2. 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*;
  - 3. Apart from any arguments relating to discoverability and/or concealment, what is the limitation period applicable to such claims arising prior to the coming into force of the *Limitations Act, 2002* on January 1, 2004?
  - 4. What is the effect, if any, of the transitional provisions contained in the *Limitations Act, 2002* upon the claims of class members?
  - 5. At what time (or times), if any, should the class members ought to have known that they had a claim against the defendants, such that the applicable limitation period began to run against all class members, having regard to the principles of discoverability and concealment
  - 6. If the said fees are taxes which are *ultra vires* or otherwise illegal, are class members entitled to an accounting and/or restitution of such taxes paid to Tecumseh subject to any applicable limitation period, laches, waiver and/or estoppel arguments?
  - 7. Having regard to all the circumstances is an award of punitive damages appropriate in this case?

- 4) The nature of the claims asserted on behalf of the class, and the relief claimed on behalf of the class, are as follows:

The class is made up of non-profit charitable and religious organizations who, as part of their fundraising, managed and conducted licensed lottery events in the Town of Tecumseh. The Town of Tecumseh charges a fee to the class members for issuing the licenses, and charges administrative fees to the class members who obtain lottery licenses issued by the provincial licensing authority. It is claimed that the fees collected by Tecumseh were in fact illegal taxes which Tecumseh did not have the requisite authority to impose. The plaintiff claims, on behalf of the class, restitution of the fees paid to Tecumseh, related declaratory relief, and punitive damages.

- 5) The costs regarding the notice to be given to the class shall be as the parties have agreed.
- 6) The form of the notice referred to in paragraph 5 of this order shall be in the form as agreed between the parties or as approved by the court.
- 7) Any member of the class wishing to opt out of this action must do so in writing within the time period as agreed by the parties or as approved by the court.
- 8) Belle River District Minor Hockey Association Inc. and Essex County Dancers Incorporated is appointed to be the representative plaintiff of the class described in paragraph 2 above, and that Lerner LLP are appointed to be the lawyers for the class.
- 9) An amended Litigation Plan is to be provided to the court.
- 10) Costs of this motion, including the previous hearing of this motion held on December 6 and 7, 2010, shall be addressed in a separate order after the parties have made submissions with respect to costs.



Terrence L. J. Patterson  
Justice

Released: December 31, 2012

**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  
2012 ONSC 6753  
DATE: 2012123

**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*

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**REASONS**

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Patterson J.

Released: December 31, 2012