

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

AMYOTROPHIC LATERAL SCLEROSIS SOCIETY OF ESSEX COUNTY

Plaintiff

- and -

THE CORPORATION OF THE CITY OF WINDSOR

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**FRESH AS AMENDED STATEMENT OF CLAIM
AS OF NOVEMBER 17, 2016**

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiffs does not have a lawyer, serve it on the plaintiffs, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date "October 24, 2008"

Issued by "Karen Bisson"

Local registrar

Address of court office 245 Windsor Avenue
Windsor, Ontario
N9A 1J2

TO: The Corporation of the City of Windsor
400 City Hall Square East
Windsor, Ontario
N9A 7K6

CLAIM

1. The plaintiff claims on its own behalf and on behalf of the other members of the class as described below:

- (a) an order pursuant to the provisions of the *Class Proceedings Act, 1992* S.O. 1992, c. 6 certifying this action as a class proceeding and appointing the plaintiff as the representative plaintiff of a class of persons described as follows:

All those persons, whether natural or corporate, who have paid lottery licensing fees and/or lottery administration fees, (as described herein), to the Corporation of the City of Windsor either directly or indirectly on or after January 1, 1990 (or such other time period as the court may find appropriate);

- (b) a declaration that the lottery licensing fees and lottery administration fees paid by the plaintiff and the other Class Members to The Corporation of the City of Windsor ("Windsor") are taxes which have been levied without the authority of the Legislative Assembly of the Province of Ontario or the House of Commons and in wrongful breach of s. 53 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 reprinted in R.S.C. 1985, App. II, No. 5;
- (c) a declaration that the by-laws pursuant to which Windsor has charged and demanded lottery licensing fees and lottery administration fees from the plaintiff and other members of the class are *ultra vires* Windsor and are of no force and effect;
- (d) an accounting of all lottery licensing fees and lottery administration fees paid to Windsor by the plaintiffs and other class members on or after January 1, 1990;

- (e) restitution of all such lottery licensing fees and lottery administration fees charged to the plaintiff and other members of the class in accordance with the aforesaid accounting;
- (f) punitive damages in the amount of \$2,000,000.00;
- (g) interest on the aforesaid sums in accordance with the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, on a compounded basis or otherwise;
- (h) the costs of this action on a full indemnity basis and, pursuant to s. 26(9) of the *Class Proceedings Act, 1992, supra*, the costs associated with publication of any and all court-ordered notice to the class and/or costs associated with administration of any court approved plan of distribution redirecting amounts recovered in the action to class members; and
- (i) such further and other relief as counsel may request and this Honourable Court may deem just and appropriate.

The parties

2. The plaintiff, the Amyotrophic Lateral Sclerosis Society of Essex County, (hereinafter "ALS Society"), is a not-for-profit corporation carrying on charitable pursuits in the municipality of Windsor and surrounding area. The ALS Society offers information on Amyotrophic Lateral Sclerosis, (also known as "ALS" or "Lou Gehrig's disease"). ALS is a progressive neurodegenerative disease that attacks nerve cells in the brain and the spinal cord. The disease is progressive and sufferers eventually become totally paralyzed. The disease is ultimately fatal and there is no known cure. The ALS Society provides patient services, as well as support to patients suffering from ALS, their families, physicians and other health care providers.

3. The defendant Windsor is a municipality incorporated pursuant to an Act of the Legislative Assembly of the Province of Ontario.

Background: Lottery Licensing Fees

4. Pursuant to the provisions of s. 207(1)(b) of the *Criminal Code of Canada*, R.S.C., 1985, c. C-46 and Order in Council 2688/93 issued by the Lieutenant Governor in Council of Ontario, Windsor is permitted to issue licences to charitable and religious organizations to conduct and manage lottery schemes within the municipality. In accordance with the provisions of the *Municipal Act*, R.S.O. 1990, c. M.45, the *Municipal Act, 2001*, S.O., 2001 c. 25 and Order in Council 2688/93, the defendant is permitted to charge a fee, (within the limits of the authority provided to the defendant by the applicable legislation and the Constitution of Canada), for the issuance of a licence to those charitable and religious organizations who conduct and manage charity lottery events; (herein referred to as a “lottery licensing fee”).

5. Pursuant to the authority provided by Order in Council 2688/93, (and pursuant to the authority of predecessor Orders in Council, namely Orders in Council numbers 70/70, 274/70, 2639/73, 2797/82, 1671/88 and 1804/89), the defendant has issued licences to charitable and religious organizations to conduct and manage lottery schemes, (including bingo lottery events, raffle lottery events, and “break open ticket lottery” events), and has levied lottery licensing fees for the issuance of those licences.

Background: Lottery Administration Fees

6. Pursuant to the aforementioned Orders in Council, the *Alcohol and Gaming Regulation and Public Protection Act 1996*, S.O. 1996, c.26 and the *Gaming Control Act, 1992*, S.O. 1992, c.24, the Alcohol and Gaming Commission of Ontario (“AGCO”) is also permitted to issue licences to charitable and religious organizations who conduct and manage charity lottery events. The lottery events licensed by the AGCO have higher potential prize values than the lottery events that can be licensed by municipalities such as Windsor.

7. When a charitable or religious organization applies for a lottery event licence from the AGCO, the charity or religious organization is required to obtain a letter from

the municipality in which the lottery event will be conducted, written to the AGCO, attesting to the suitability and qualification of the charity or religious organization to conduct and manage the lottery event. In exchange for providing this service, Windsor has charged an administration fee calculated as both a flat fee for each letter written, as well as an additional fee calculated as a percentage of the licensing fee charged by the AGCO for the issuance of its licence for the provincially regulated and licensed lottery event; (herein referred to as a “lottery administration fee”).

Precise quantum of payments

8. The lottery licensing fees and lottery administration fees have been paid, either directly or indirectly, by ALS Society and the other class members as demanded and required by the defendant. The precise total amount of fees paid by the plaintiff and other class members, and received by the defendant, is presently unknown to the plaintiff but within the knowledge of the defendant. An accounting is required to determine the precise amount of lottery licensing fees and lottery administration fees paid to Windsor by the plaintiff and other class members, and received by the defendant.

Lottery Licensing Fees and Lottery Administration Fees as Illegal Tax

9. The lottery licensing fees demanded and levied by the defendant have been demanded pursuant to municipal by-laws which have based the amount of the fees at varying times upon either a percentage of the prize available to be won in the lottery event, or as a flat fee for each individual lottery event. The lottery administration fees demanded and levied by the defendant have been demanded pursuant to municipal by-laws and policies which have based the amount of the administration fees upon a percentage of the licensing fee charged by the AGCO for provincially licensed lottery events, and/or a flat fee for each letter written.

10. The plaintiff pleads that the revenue thus collected by the defendant from the plaintiff and other class members by way of lottery licensing fees and lottery administration fees has greatly exceeded the costs and expenses incurred by the

defendant in licensing charitable lotteries and providing the services described in paragraph 8 herein, *supra*. As such, the plaintiff pleads that the purported lottery licensing fees and lottery administration fees demanded and levied by the defendant are, in fact and in law, taxes rather than fees. Without limiting the generality of the foregoing, the plaintiff pleads that the lottery licensing fees and lottery administration fees are direct taxes being levied under the colourable guise of licensing fees and administration fees.

11. The plaintiff further pleads that the aforesaid fees are taxes which have been demanded and levied without authority, or due legislative enactment from and/or by either the House of Commons or the Legislative Assembly of the Province of Ontario, directing the taxes and permitting them to be levied.

12. As such, the aforesaid lottery licensing fees and lottery administration fees have been levied by the defendant in violation of section 53 of the *Constitution Act, 1867*. The fees, and the by-laws and policies pursuant to which the fees have been and are being levied, accordingly are unconstitutional and *ultra vires* Windsor.

13. The plaintiff further pleads that the lottery licensing fees and lottery administration fees levied by the defendant also are *ultra vires* as a matter of administrative law, as they are in fact taxes which have been demanded and levied without the legislative authority necessary to levy such taxes.

Unjust Enrichment - Entitlement to Restitution

14. The defendant's unconstitutional levy and imposition of taxes through the vehicle of lottery licensing fees and lottery administration fees, without proper legislative authority, constitutes and has resulted in a substantial enrichment of the defendant, and a corresponding deprivation to the plaintiff and the other class members, in the absence of any juristic reason for the defendant's enrichment.

15. Without limiting the generality of the foregoing, the by-laws and policies pursuant to which the defendant wrongfully has levied taxation under colour of its authority to levy lottery licensing fees and lottery administration fees are *ultra vires*

and of no force and effect, and as such do not provide any basis in law for the levy of those fees, or provide any juristic reason for the defendant's enrichment.

16. The plaintiff and other class members accordingly are entitled to restitution of the full amount of the lottery licensing fees and lottery administration fees paid to the defendant which are in fact illegal taxes. The plaintiff presently does not know when the defendant first began imposing illegal taxes through the vehicle of lottery licensing fees and lottery administration fees. However, it appears that the defendant's wrongful conduct has been ongoing since at least January 1, 1990. The duration of the defendant's wrongful conduct, as well as the amount of the taxes collected through the vehicle of lottery licensing fees and lottery administration fees, nevertheless lies within the knowledge of the defendant, and can be determined through an examination of the defendant's records and corresponding accounting, which also will serve to determine the precise quantum of restitution to which the plaintiff and other class members are entitled.

17. In the alternative, the plaintiff pleads that, to the extent that the aforesaid lottery licensing fees and lottery administration fees levied by the defendant have exceeded the costs and expenses incurred by the defendant in licensing lotteries and providing the services described in paragraph 8 herein, *supra*, that excess revenue or surplus constitutes illegal taxation, which is unconstitutional and *ultra vires* the defendant. The excess or surplus represents an enrichment of the defendant, with a corresponding deprivation sustained by the plaintiffs and other members of the class. For the reasons pleaded above, there is no juristic reason for the defendant's enrichment. The plaintiffs and other class members accordingly are entitled to restitution of the excess or surplus revenue wrongfully collected and received by the defendant through its illegal taxation.

Discoverability

18. The plaintiff pleads that Windsor has been wrongfully levying taxation under the colourable guise of lottery licensing fees and lottery administration fees, on an

ongoing basis, since at least January 1, 1990. The plaintiff seeks restitution of all such sums on behalf of themselves and the other class members.

19. The plaintiff pleads and relies upon the common law doctrine of discoverability, and the *Limitations Act, 2002*, S.O. 2002, c. 24. The plaintiff pleads that the conduct of Windsor, and the plaintiff's and the class's losses suffered as a consequence, were not discoverable at the time that Windsor's conduct occurred for reasons that include, but are not limited to the following:

- (a) Windsor's by-laws and policies imposing impermissible taxation under the guise of its authority to collect licensing fees and administration fees concealed from the plaintiff and the other class members the fact that the lottery fees were in fact taxes;
- (b) the by-laws pursuant to which the lottery fees were imposed explicitly stated that the lottery fees were authorized by the *Criminal Code* and Orders in Council of the Lieutenant Governor in Council of Ontario, which concealed, from the plaintiff and other class members, the defendant's wrongful conduct;
- (c) Windsor consistently referred to the lottery licensing fees and lottery administration fees as "fees", which concealed from the plaintiff and other class members that the fees were in fact a tax;
- (d) Windsor knew that its lottery licensing fees and lottery administration fees were impermissible taxation because the revenue generated therefrom, (fully known to the defendant but unknown to the individual plaintiff and other class members), greatly exceeded the costs of licensing and providing the services described above, but Windsor nonetheless continued its unlawful practices and actively concealed the unlawfulness of its conduct from the plaintiff and other class members; and

- (e) complete details of the steps taken by Windsor to actively and knowingly conceal its unlawful activities are fully known to the defendant and unknown to the plaintiff and other class members, but included “in camera” meetings of the defendant’s City Council in which the City Council was informed of the unlawfulness of Windsor’s conduct, but nonetheless resolved to continue with its practices.

Punitive Damages

20. The plaintiff pleads that the conduct of the defendant has been highhanded, callous, arbitrary and highly reprehensible, such that it departs to a marked degree from the ordinary standards of behaviour of a reasonable and responsible municipality. An award of punitive damages is therefore appropriate to sanction the defendant for its conduct and give effect to the goals of retribution, deterrence and denunciation.

21. In particular, the conduct of the defendant which makes an award of punitive damages appropriate in this case includes, but may not be limited to, the following:

- (a) the defendant knew that its lottery licensing fees and lottery administration fees were unauthorized taxation in fact and in law, but consciously and deliberately continued with its unlawful practices;
- (b) the defendant took active steps to conceal its wrongful and unlawful conduct from the plaintiff and class members, such as:
 - (i) holding “in camera” meetings from which the public, including the plaintiff and the other class members, as well as media representatives, were excluded, wherein the defendant’s City Council discussed the unlawfulness of the defendant’s conduct, but nonetheless resolved to continue with its practices;
 - (ii) continuing, despite its knowledge of the unlawfulness of its conduct, to describe the charges it knew to be taxation as “fees”

in order to mislead and conceal from the plaintiff and other class members the true nature of the charges; and

- (iii) continuing, despite its knowledge of the unlawfulness of its conduct, to represent that the purported fees were properly authorized by the *Criminal Code* and Orders in Council of the Lieutenant Governor in Council of Ontario in order to mislead and conceal from the plaintiff and other class members the true nature of the charges;
- (c) the defendant knew that it was unlawfully profiting from the purported “fees”, but willfully continued with its unlawful activities under the colourable guise of legislative and executive authority in order to secure further unlawful profits;
- (d) the defendant knew or ought to have known that its unlawful taxation would have a serious adverse effect upon the resources and activities of the charities and religious organizations who are members of the class, with a corresponding detrimental impact upon the members of the community served by those charities and religious organizations; and
- (e) in particular, the defendant knew or ought to have known that it was wrongfully diverting funds from charities and religious organizations serving individuals amongst the most afflicted and/or vulnerable in our society, (e.g., those suffering from the terminal illness ALS), but knowingly and deliberately continued with its unlawful activities.

22. The plaintiff pleads that an award of punitive damages therefore is just and appropriate in the circumstances of this case, and should be in the amount of \$2,000,000.00; an amount proportionate to the level of harm caused by the defendant, the degree of the defendant’s misconduct, the vulnerability of the class

members and the persons they serve through their charitable activities, and the amount of the revenue or profit unlawfully appropriated by the defendant.

Certification

23. The plaintiff pleads that the within action is amenable to certification as a class proceeding in accordance with s. 5 of the *Class Proceedings Act, 1992, supra*. Without limiting the generality of the foregoing:

- (a) the statement of claim herein discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;
- (c) the claims of the class members raise common issues of fact and/or law;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) the plaintiff, ALS Society, would fairly and adequately represent the interests of the class as the representative plaintiff, does not have an interest in conflict with the other class members in respect of the common issues, and in due course will produce a plan for advancing the proceeding on behalf of the class, (including procedures for court ordered notice to the class).

24. The plaintiff pleads and relies upon the *Class Proceedings Act, 1992, supra*, section 207 of the *Criminal Code of Canada, 1985, c. C-46*, Order in Council 2688/93, and sections 53 and 90 of the *Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3* reprinted in R.S.C. 1985, App. II, No. 5.

25. The plaintiff proposes that this action be tried in the City of Windsor.

“October 24, 2008”

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Amyotrophic Lateral Sclerosis Society of
Essex County and The City of Windsor
Plaintiff Defendant

Court File No: CV-08-12004

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Windsor

**FRESH AS AMENDED STATEMENT OF CLAIM
AS OF NOVEMBER 17, 2016**

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