

**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*

REPLY

1. The plaintiff, Amyotrophic Lateral Sclerosis Society of Essex Country (“ALS Society”) denies the allegations made in the Statement of Defence unless expressly admitted herein.

Nature of the Plaintiff Organization and Class Members

2. The plaintiff is a not-for-profit corporation which relies on volunteer support for the conduct of the majority of its operations and management. The ALS Society is a local entity conducting charitable activities in Windsor and the surrounding area, and the vast majority of individuals who carry out its activities, including bingos and lottery licensing applications, have no knowledge or expertise with regard to taxation, gaming regulations, governance, accounting, or the legal duties of municipalities.

3. The Class Members are various other not-for-profit charitable and religious organizations; on the whole, the Class Members do not generally have legal or business acumen.

4. Neither ALS Society nor the Class Members had any role in setting lottery licensing fees. They did not consent to the validity or quantum of the licensing or administration fees; they simply paid the fee charged, assuming it was valid and that they were compelled to do so. To the extent the defendant consulted with either ALS

Society or any Class Member, there was no discussion or consideration of the legal validity of the licence fee being charged by the defendant.

5. Any proceeds earned by ALS Society or the Class Members from bingos or other lottery schemes (“charitable lotteries”) are irrelevant to the legitimacy and legality of the lottery licensing fees and lottery administration fees and their knowledge of the illegitimate nature of the fees. ALS Society and the Class Members lawfully conducted and managed charitable lotteries and were entitled to earn proceeds to be used for a charitable or religious object or purpose. Parliament intended charitable and religious organizations and those who they serve to benefit from charitable lotteries, not municipalities such as the defendant.

Hall Charity Associations and Administrators

6. Currently, a bingo hall must be registered by the Alcohol and Gaming Commission of Ontario. Three bingo halls are currently operational in Windsor and one additional registered hall is not currently operating. Each hall has a Hall Charity Association composed of licensed individual charity and religious organizations which conduct and manage lottery events in the hall. Each Hall Charity Association, its representatives and Administrator handle, among other things, administrative aspects of licensing applications. Although some representatives of the Hall Charity Associations and Class Members were appointed by the defendant as members of the Bingo Advisory Committee and its predecessor, none of them were elected by the Class Members to represent their interests.

7. Neither the Hall Charity Associations, their representatives, Administrators nor any Class Member had any role in determining the level of licence fees and administration fees. If any were involved in discussions regarding the level of fees, none of them any role or responsibility in considering the appropriateness of the amount of the fees. The defendant did not cooperate with the Hall Charity Association, its representatives, the Administrator or individual Class Members. The defendant imposed lottery licence fees and lottery administration fees upon each individual charity and religious organization without negotiation.

The Defendant's Knowledge

8. The defendant was aware of its legal obligation to ensure that there was a nexus between the quantum charged for a charitable lottery licence and the cost of the service provided in order for a fee to be considered constitutionally valid. The defendant made no reasonable attempts, if it made any attempts at all, to match the fee revenues with the administrative costs of the regulatory scheme, notwithstanding its obligation to do so. The defendant knew or ought to have known its revenues from lottery licensing fees and lottery administration fees far exceeded the costs of the services provided to regulate charitable lotteries within its jurisdiction.

9. The defendant never disclosed to the plaintiff or any other Class Member that it did not make any attempts to ensure a nexus, and that it knew or ought to have known its revenues grossly exceeded its administrative costs with respect to the regulation of charitable lotteries in Windsor. The defendant did not make public its knowledge of the excess or of its failure to make reasonable attempts to match the revenues to the costs.

The Plaintiff and Class Members' Reliance

10. ALS Society and the Class Members reasonably relied on the defendant to ensure the validity of the lottery licensing fees and lottery administration fees, properly assumed the propriety of the amounts charged by the defendant, and considered themselves obligated to pay.

11. In respect of the relevant governing instruments, the plaintiff and Class Members rely on the actual wording and form of those instruments. The plaintiff and Class Members plead that it was not the intention of the legislative and regulatory scheme that a municipality would always charge the maximum fee.

12. The plaintiff and the Class Members had no reason to believe or suspect the amounts charged were anything other than valid fees for the licence issued pursuant to the authority provided for by Parliament in the *Criminal Code* and the Orders-in-Council of the Lieutenant-Governor in Council. No one, including the defendant, advised the plaintiff or any other Class Member that the defendant had perpetually failed to make reasonable attempts to match the fee revenues with the administrative costs of the regulatory scheme. The plaintiff and Class Members were not advised that the

defendant's revenues were grossly disproportionate to its administrative costs, nor was it reasonably discoverable.

Practical Compulsion

13. The lottery licensing fees and lottery administration fees were compulsory, not voluntary. The plaintiff and Class Members were under practical compulsion to pay the sum of money levied by the defendant in exchange for the right to conduct and manage charitable lotteries. For the following reasons, amongst others, the proceeds of these charitable lotteries were, and remain, so essential to the existence of the plaintiff and Class Members that the fees were, in reality, compulsory:

- (a) Without proceeds from charitable lotteries, the plaintiff and Class Members could not continue or maintain their charitable pursuits;
- (b) In order to obtain these proceeds from charitable lotteries, the plaintiff and Class Members are compelled to obtain a licence or an authorization from the defendant to conduct and manage charitable lotteries;
- (c) In order to obtain a licence to conduct and manage a charitable lottery, the plaintiff and Class Members are required to pay the fee to the defendant for the issuance of the licence or authorization; and,
- (d) If the plaintiff and Class Members conduct and manage a charitable lottery without a licence, this would constitute a criminal offence.

14. The sum of money paid in exchange for the right to conduct and manage charitable lotteries is compulsory and enforceable by law.

Not a Commercial Exchange

15. The payment of money for the right to conduct and manage a charitable lottery is not a commercial exchange:

- (a) The regulation of charitable lotteries is an exercise of the defendant's public authority not its private law rights. The defendant does not own the right to conduct and manage charitable lotteries and the exchange is not for its benefit. Ontario's charitable lotteries licensing scheme is also not

for the benefit of the municipalities in which the charitable lottery events take place. Finally, the amount that can be charged for the licences was (and remains) established under the authority of Orders-in-Council pursuant to the Lieutenant-Governor in Council's narrow authority as an exception to the *Criminal Code* prohibition against gaming; it is not mutually negotiated between the parties; and,

- (b) The plaintiff and Class Members did not enter into any agreements with the defendant in exchange for a commercial right or advantage. The plaintiff and Class Members are not-for-profit charitable and religious organizations. They are not commercial entities. Finally, the proceeds of the charitable lotteries must, by law, be used for charitable or religious, not commercial, objects or purposes.

16. Further, the plaintiff and Class Members did not have any knowledge regarding the lawfulness of the fee charged by the defendant. They presumed, as they were entitled to do, that the sum of money being levied in exchange for the right to conduct and manage charitable lotteries was lawful. Payments made pursuant to an unconstitutional law or the incorrect application of a law are not voluntary but compulsory.

Regulatory Charges

17. The lottery licensing fees and lottery administration fees are not connected to any form of regulatory scheme. In particular, the fees are not connected to either: (a) the federal-provincial interjurisdictional regulation of gaming in Canada; or (b) the entire scheme of municipal regulation. The primary purpose of the fees charged by the defendant is to raise revenue for general municipal purposes.

18. The federal-provincial interjurisdictional regulation of gaming in Canada is not a regulatory scheme because, among other reasons, the costs of the regulation have never been ascertained or properly estimated.

19. The entire scheme of municipal regulation is also not a regulatory scheme because, among other reasons, it does not seek to regulate behaviour. In any event, the scheme is not sufficiently related to the plaintiff or Class Members as it does not

benefit them, nor do the plaintiff or the Class Members create the need for the regulation, except in a very indirect manner.

20. Even if either the federal-provincial interjurisdictional regulation of gaming in Canada and/or the entire scheme of municipal regulation are regulatory schemes, neither scheme has a relationship with the impugned fees because: (a) the fees themselves do not have a regulatory purpose; and, (b) the fees are not connected to either regulatory scheme.

21. The fees do not have a regulatory purpose for the following reasons, amongst others:

- (a) The *Criminal Code* rations gaming and controls the level of gaming in society; the fees themselves do not modify, or seek to modify, behavior. In fact, the defendant municipality has supported and promoted charitable lotteries within its jurisdiction;
- (b) The fees paid by the plaintiff and Class Members are not a reasonable proxy for the value of the benefit they received. The defendant does not confer access to a highly restricted commercial industry by granting the licences; any charity or religious organization that meets the requirements and pays the fee is granted a licence or authorization; and,
- (c) Finally, restricting the defendant to defraying the costs of the regulatory scheme in these circumstances is crucial in order to avoid rendering s. 92(2) of the *Constitution Act, 1867* meaningless.

22. The revenues generated by the fees are not, and were never, tied to the cost of the federal-provincial interjurisdictional regulation of gaming in Canada because, amongst other reasons:

- (a) The fee revenues generated in the defendant municipality are not allocated to the federal-provincial regulation of gaming. The fees are paid to and expended entirely by the defendant;
- (b) There is no direct link between the fee revenues and costs of the federal-provincial interjurisdictional regulation of gaming in Canada. The

defendant did not make reasonable efforts to estimate or budget the costs that were to be recovered. Nor did it select the characteristics of the impugned fee such that it would produce revenues that are approximately equal to the amount of the anticipated costs. No efforts were made to match in advance such revenues to the total costs of the regulatory scheme; and,

- (c) There is no link between the fee revenues and costs of the federal-provincial interjurisdictional regulation of gaming in Canada. If all other charges and levies collected in respect of the regulatory scheme are considered, together with the lottery licencing fees and lottery administration fees, then the amount of revenues greatly exceeds the amount of the regulatory costs. The revenues generated could not reasonably be anticipated to be materially less than the related regulatory costs.

23. The revenues generated by the fees are not, and never were, tied to the cost of the entire scheme of municipal regulation because, amongst other reasons:

- (a) The fee revenues generated in the municipality are not expended entirely within or exclusively for the benefit of the municipality;
- (b) There is no direct link between the fee revenues and costs of the municipal regulatory scheme. The defendant did not make reasonable efforts to estimate or budget the costs that were to be recovered. Nor did it select the characteristics of the impugned fee such that it would produce revenues that are approximately equal to the amount of the anticipated costs. No efforts were made to match in advance such revenues to the total costs of the regulatory scheme; and,
- (c) There is no link between the fee revenues and costs of the scheme. If all other charges and levies collected in respect of the regulatory scheme are considered, together with the lottery licencing fees and lottery administration fees, then the amount of revenues greatly exceeds the amount of the regulatory costs. The revenues generated could not

reasonably be anticipated to be materially less than the related regulatory costs.

24. The lottery licensing fees and lottery administration fees are not connected to any form of regulatory scheme. As a result, the fees are in pith and substance not regulatory charges but taxes.

Proprietary Charges

25. Neither the lottery licensing fees nor the lottery administration fees are proprietary charges because they are not levied by the defendant in the exercise of proprietary rights over public property. The defendant is not disposing of its property nor is it supplying goods or services in a commercial way.

No Juristic Reason for the Excess Charges

26. As pleaded in the Fresh as Amended Statement of Claim, there is no juristic reason for the enrichment of the defendant and corresponding deprivation of the plaintiff and the Class Members in relation to the lottery licensing fees and lottery administration fees, which were grossly in excess of the costs of the services provided. It was not within the reasonable expectations of the plaintiff or the Class Members that the defendant would improperly charge amounts far greater than necessary to cover the expense of administering the lottery licensing regime within the defendant's jurisdiction. Rather, the plaintiff and the Class Members reasonably expected that the fees charged by the defendant were valid and lawful.

27. The plaintiff pleads that it would be contrary to public policy to allow a municipality which ignored its obligation to ensure that there was a nexus between the quantum charged for a lottery licence and the cost of the service provided, and in effect, charged the plaintiff and the Class Members unconstitutional taxes, to retain a benefit to the detriment of law-abiding organizations.

No Change of Position

28. The defendant cannot resist repayment of unconstitutional taxes on the basis that it has spent the money it demanded and received illegitimately. The defendant has not materially and irreversibly changed its position as a result of the receipt of the *ultra*

vires taxes. The defendant has had use of the moneys collected as illegal taxes, over the entire class period, without any obligation to pay interest. While the defendant may have spent the money based on its balanced-budget operational approach, it did not undertake any special projects or any special financial commitments it would not have undertaken but for the receipt of illegal taxes. The amounts in issue were received in increments over the class period. The defendant may have spent the money on normal day-to-day municipal operations and services, but it did not specifically allocate the illegal taxes collected to any projects it would not otherwise have undertaken but for the collection of those illegal taxes.

29. In the alternative, any irreversible change of position occurred after the defendant knew the facts entitling the plaintiff and Class Members to restitution – namely, that the defendant made no attempts to match its fee revenues with its administrative costs, and its revenues were far in excess of its expenses.

Discoverability

30. Shortly before this action was commenced, the plaintiff first learned that the defendant was improperly charging licensing fees which may have exceeded the amount of its actual costs to regulate and license bingo halls and lotteries. At that time, the plaintiff first had reason to believe the quantum of the fees charged by the defendant had no nexus to the costs of the services provided to license and regulate the charitable lottery industry within the defendant's jurisdiction.

31. Prior to that time, the plaintiff and the Class Members did not believe or suspect an injury, loss or damage had occurred. As the plaintiff had no basis to believe it might have had a claim against the defendant for restitution of illegal taxes or that the defendant breached its obligation to ensure that there was a nexus between the quantum charged for a lottery licence and the cost of the service provided, there was nothing to investigate or about which to seek legal or expert advice.

32. Having regard to the nature of the injury, loss or damage, neither the plaintiff nor any Class Member knew or had any way of knowing a legal proceeding would be an appropriate means to seek a remedy until such time as they had reason to suspect the defendant had never performed a proper analysis of what quantum was reasonably

linked to the defendant's expenses to administer the regulatory scheme within its jurisdiction.

33. The plaintiff did not and was not required to examine the defendant's reports, financial records, or budget documents in search of a cause of action. The plaintiff and the Class Members had no reason to doubt the validity and legality of the fees charged by the defendant. Even if the plaintiff had carefully examined available public documents, there is no information or analysis in any of the documents relating to the rationale for setting the lottery licensing fees or the lottery administration fees or how that compared to the expenses incurred in regulating the charitable lottery licensing regime.

34. Even if the plaintiff and other Class Members participated in consultations between the defendant and the bingo industry, the defendant was not forthcoming during these consultations with respect to its actual costs of administering and regulating the charitable lottery licensing scheme in the city. During consultations, the defendant did not explain how the costs of administering the regulatory scheme compared to the far greater profits it stood to collect. The defendant did not disclose it had never made reasonable attempts to match the fees charged to its actual costs. The plaintiff and the Class Members reasonably relied upon the defendant to act lawfully and constitutionally. The defendant's conduct during the consultations removed from the plaintiff's and the Class Member's minds that they were suffering damage caused by the defendant's illegal taxation by way of overcharging for lottery licensing and lottery administration fees.

No Acquiescence to Unconstitutional Taxation or *Ultra Vires* Fees

35. The plaintiff and other Class Members have not acquiesced to the defendant's charging of unconstitutional taxes or *ultra vires* fees. Participation in consultations about the fee levels, without any discussion regarding the validity or legality of those fees, does not amount to acquiescence when the plaintiff and other Class Members did not know the defendant had never made reasonable attempts to calculate the costs of administering the charitable lottery licensing scheme or to ensure a nexus between those costs and the proposed fee levels under discussion.

Standing

36. The plaintiff denies that the Class Members lack standing to recover their losses. Class Members have not commenced this action as alleged by the defendant but they are entitled to recover their losses in this class proceeding.

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Court File No.: CV-08-12004

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REPLY

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