SCC File No. _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

PETER AUBREY DENNIS AND ZUBIN PHIROZE NOBLE

Applicants
(Appellants)

– and –

ONTARIO LOTTERY AND GAMING CORPORATION

Respondent
(Respondent)

APPLICATION FOR LEAVE TO APPEAL
PETER AUBREY DENNIS AND ZUBIN PHIROZE NOBLE
(Pursuant to S.40 and 58 of the *Supreme Court of Canada Act*, R.S. 1985, c. S.26 and Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, as amended)
VOLUME I OF II

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ORIGINAL TO: **THE REGISTRAR OF THE SUPREME COURT OF CANADA**
Supreme Court of Canada Building
Ottawa, ON K1A 0J1

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IN THE SUPREME COURT OF CANADA
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NOTICE OF APPLICATION FOR LEAVE TO APPEAL
OF PETER AUBREY DENNIS AND ZUBIN PHIROZE NOBLE
(Pursuant to S.40 and 58 of the *Supreme Court of Canada Act*, R.S. 1985, c. S.26 and Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, as amended)

TAKE NOTICE that the Applicants, **PETER AUBREY DENNIS AND ZUBIN PHIROZE NOBLE**, hereby apply for leave to appeal to the Court, pursuant to S.40 and 58 of the *Supreme Court of Canada Act*, R.S. 1985, c. S.26 and Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, as amended, from the judgment of the Court of Appeal for Ontario, Court File No. C55923 made July 31, 2013, and such further or other order that the Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

1. The proposed appeal raises issues of public importance that ought to be decided by the Supreme Court of Canada.

Dated at Toronto, Ontario this 26th day of September, 2013.

SIGNED BY:

Louis Sokolov

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Counsel for the Respondent

NOTICE TO THE RESPONDENT: A respondent may serve and file a memorandum in response to this application for leave to appeal within 30 days after service of the application. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration pursuant to section 43 of the *Supreme Court Act*.

SCC File No. _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

PETER AUBREY DENNIS AND ZUBIN PHIROZE NOBLE

Applicants
(Appellants)

– and –

ONTARIO LOTTERY AND GAMING CORPORATION

Respondent
(Respondent)

CERTIFICATE OF COUNSEL FOR THE APPLICANTS
PETER AUBREY DENNIS AND ZUBIN PHIROZE NOBLE
(Pursuant to Rule 25(1)(c) of the *Rules of the Supreme Court of Canada*, SOR/2002-156, as amended)

I, Louis Sokolov, agent for counsel for the Applicants, hereby certify that:

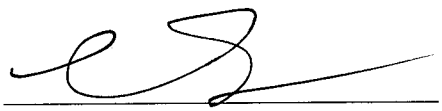
(a) there is no sealing or confidentiality order in effect in the file from a lower court or the Court, and no document filed includes information that is subject to a sealing or confidentiality order or that is classified as confidential by legislation;

(b) there is no ban pursuant to an order or legislation on the publication of evidence or the names and identity of a party or witness, and no document filed includes information that is subject that ban;

(c) there is no information pursuant to legislation that is subject to limitation on public access, and no document filed includes information that is subject to those limitations.

Dated at Toronto, Ontario, this 26th day of September, 2013.

SIGNED BY:



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Counsel for the Respondent

CITATION: Dennis v. OLG, 2010 ONSC 1332
COURT FILE NO.: CV-08-00356378-000
DATE: 2010-03-15

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
PETER AUBREY DENNIS and ZUBIN PHIROZE NOBLE Plaintiffs/Moving Parties	*Jerome R. Morse* and *Hassan A. Fancy*, for the Plaintiffs/Moving Parties
– and –	
ONTARIO LOTTERY AND GAMING CORPORATION Defendant/Respondent	*James Doris, Matthew Milne-Smith* and *Shelby Z. Austin*, for the Defendant/Respondent
	HEARD: January 13, 14 and 15, 2010

CULLITY J.

[1] The plaintiffs, Mr Dennis and Ms Noble, moved for certification of this action under the *Class Proceedings Act, 1992*, S.O. 1992, c. C. 6 ("CPA"). They seek to represent a primary class of approximately 10,428 individuals who signed "self-exclusion" forms provided by the Ontario Lottery and Gaming Corporation ("OLGC") between December 1, 1999 and February 10, 2005 (the "class period"). The action is brought to recover gambling losses subsequently incurred as a result of OLGC's alleged failure to exercise its best efforts, and to take care, to exclude them from its gambling venues. There is a secondary class consisting of family members who have claims under section 61 of the *Family Law Act*, R.S.O. 1990, c. F. 3 that are dependent on those of members of the primary class.

[2] The statement of claim was issued on June 9, 2008 and was amended on March 27, 2009 and December 9, 2009. Declarations and damages are claimed against OLGC for negligence, occupiers' liability and breach of contract. In the alternative, the plaintiffs seek a disgorgement of revenues, net income or profits derived by OLGC from the class members. In the aggregate, the damages claimed – including punitive damages – amount to $3.5 billion.

[3] OLGC is an agent of the provincial Crown. It was incorporated by statute on the amalgamation of the Ontario Lottery Corporation and the Ontario Casino Corporation ("OCC") on April 1, 2000. As a result of the amalgamation, it became vested with all the rights, property, assets, liabilities and obligations of the amalgamating corporations. For the most part, it will not be necessary to distinguish between these entities and, unless otherwise indicated, my references to OLGC will refer to its predecessor, OCC, at any relevant times before April 1, 2000.

[4] OLGC has not yet delivered a statement of defence.

BACKGROUND

[5] The action involves the response of a government agency to the recognized serious social problem of addictive or compulsive gambling. The legal issues must be viewed against a background of a system operated primarily to make profits for the government from the gambling losses of the persons who use its facilities. The tension between maximising profits and promoting responsible gambling to the financial detriment of OLGC is acute. Government policy is involved to an extent that political resolution may be more appropriate and more effective than judicial proceedings.

[6] Although plaintiffs' counsel have attempted to frame the claims advanced on behalf of the class quite narrowly, it is likely that, at a trial, the question of distinguishing between justiciable and non-justiciable issues will need to be confronted.

[7] This, however, is entirely a procedural motion in which the general question is whether it will be appropriate for the claims of class members to be pursued under the procedure in the CPA, or in individual actions. The issues of political and social policy remain in the background and they will not be addressed directly by a decision to grant or deny certification. Nor, in my opinion, should the financial consequences to the government and the taxpayers of Ontario - if the plaintiffs are successful - have a bearing on the decision.

1. Legalised Gambling in Ontario

[8] Under sections 201 through 207.1 of the *Criminal Code,* R.S.C. 1985, c. C. 46, it is an offence to conduct the business of organized gambling in Canada unless the activity falls within one of the specific exemptions provided in those provisions. One such exemption is contained in section 207 (1) (a) which provides that it is lawful for

> ... the government of a province, either alone or in conjunction with the government of another province, to conduct and manage a lottery scheme in that province, or in that and the other province, in accordance with any law enacted by the legislature of that province.

[9] Further exemptions relate to lottery schemes conducted by charities, religious organisations, fairs and exhibitions pursuant to licences issued by the Lieutenant Governor in Council.

[10] For the purpose of the exemptions. the term "lottery scheme" is broadly confined to include, among other things, any scheme, contrivance or operation of any kind for the purpose of determining who, or holders of what lots, tickets, numbers or chances, are the winners of any property.

[11] In 1992, prior to the incorporation of OCC, more than $4 billion was spent in legalised gambling on horseracing, bingo and lotteries in Ontario. The decision to introduce casino gambling was made in 1992 and OCC was incorporated in the following year. A pilot project - Casino Windsor - opened in 1994 and the gambling facilities provided by OCC, and now OLGC, have since expanded considerably.

[12] The objects of OLGC are set out in section 3 of the *Ontario Lottery and Gaming Corporation Act, 1999,* S.O. 1999, c. 12 and include the following:

1. To develop, undertake, organize, conduct and manage lottery schemes on behalf of Her Majesty in right of Ontario.

2. To provide for the operation of gaming premises.

3. To ensure that gaming premises are operated and managed in accordance with this Act and the *Gaming Control Act, 1992* and the regulations made under the Acts.

[13] Ostensibly pursuant to the exemption in section 207 (1) (a) of the *Criminal Code*, OLGC currently operates:

(a) four commercial casinos managed for it by private operators - Casino Niagara, Fallsview Casino Resort, Casino Rama and Casino Windsor;

(b) six community casinos operated directly by OLGC; and

(c) 17 slot gambling facilities located at racetracks in various parts of the province.

[14] OLGC has a proprietary interest in, and directs the operation of, the facilities under the supervision of the Alcohol and Gaming Commission which administers the *Gaming Control Act,1992,* S.O. 1992, c. 24, in accordance with government policy. In 2008, more than 42 million patrons visited one or more of these facilities.

[15] As yet unresolved questions have been raised by, among others, the authors of a paper prepared in July 2005 for the Law Commission of Canada in connection with the entitlement to an exemption under section 207 (1) (a) of the *Criminal Code* in respect of the four commercial casinos. In the submission of plaintiffs' counsel, OLGC has infringed the prohibitions in the *Criminal* Code by entering into its relationships with profit-driven commercial casino operators

and such relationships have compromised its ability to implement programs consistent with its public commitment to ensure responsible gambling.

2. Problem Gambling

[16] Social evils associated with gambling, and particularly organized gambling, have long been recognized and are reflected in the prohibitions in the *Criminal Code*. The decision to establish the pilot project in Windsor in the early 1990s raised opposition and concerns that focused on, among other things, the personality disorder generally referred to as "problem gambling".

[17] In paragraphs 28 and 29 of the statement of claim it is pleaded that Mr Dennis and members of the primary class he seeks to represent were problem gamblers in that they suffered from:

> ... a progressive behavioural disorder in which an individual develops a psychologically uncontrollable preoccupation and urge to gamble leading to excessive gambling.
>
> Key features of problem gambling include uncontrollable feelings and compulsions relating to gambling such as preoccupation with gambling, irrational repeated gambling to recover losses due to gambling and the development of tolerance to the risk of gambling which requires gambling at high stakes with the attendant greater risks of greater losses to obtain the same "high" (paras. 29 (a) and (b))

[18] The terms "problem gambling" and "pathological gambling" were discussed in a report prepared in 1993 by Ernst & and Young for the Ministry of Consumer and Commercial Relations. The term "problem gambling" was used in the report to apply to gambling that may compromise, disrupt or damage family, personal or vocational pursuits. It was said that in this sense it would, in most cases, be characterised as "pathological gambling", a term which refers to a recognized psychiatric disorder:

> ... which consists of frequent, repetitive episodes of gambling which dominates the individual's life to the detriment of social, occupational, material and other family values and commitments. Those who suffer from this disorder may put their jobs at risk, acquire large debts, and lie or break the law to obtain money or evade payment of debts. They describe an intense urge to gamble which is difficult to control, together with preoccupation with ideas and images of the act of gambling and the circumstances which surround the act. These preoccupations and urges often increase at times when life is stressful.

[19] The terminology was also discussed in an affidavit of Dr Robert Williams that was delivered on behalf of the plaintiffs and is referred to extensively later in these reasons.

[20] The existence and the social consequences of problem gambling were prominent in the legislative deliberations that led to the enactment of the *Ontario Casino Corporation Act* and they have received continuing recognition by the government and by OLGC.

[21] In an affidavit sworn for the purpose of this motion, Mr Paul Pellizzari - the Director of Policy of OLGC stated:

> Since introducing casino gaming in Ontario in 1994, Ontario has become a leading jurisdiction in North America concerning the prevention and treatment of problem gambling.

[22] Although the existence of problem gambling was known in Ontario prior to the introduction of casino gaming in 1994, the need for funds to be applied to its treatment and prevention had been virtually ignored by government. With the creation of the casinos it began to receive attention.

[23] Since 1999/2000, $322 million has been directed by Ontario to treatment, prevention and research initiatives with $40 million committed for 2009/2010. This, according to Mr Pellizzari, is greater than the amount expended on prevention and treatment of problem gambling in any other North American jurisdiction.

[24] In his affidavit, Mr Pellizzari refers to the development of responsible gambling initiatives by OCC and OLGC after 1994, as expertise with respect to problem gambling was acquired, and advances were made in scientific knowledge of the disorder. From the outset, each casino operator was required to implement responsible gambling strategies to raise awareness among its patrons, employees and community members.

[25] In 2008/2009, OLGC's expenditures on such initiatives were in the region of $9.5 million. This amount was in addition to the Ministry of Health's contributions to prevention, treatment and research from the gambling revenues it received from OLGC.

3. Self-Exclusion

[26] Section 32 (3) of Regulation 385/99 under the *Gaming Control Act* currently provides that the Registrar of the Alcohol and Gaming Commission can require the operator of a gambling facility - including OLGC - to implement and comply with a policy and program approved by the board of the Commission that provides "a process for players to exclude themselves from playing games of chance". Under section 32 (1) such operators are required to exclude from gambling individuals who advise the operators that they are participating in such a self-exclusion program.

[27] Although it appears that no directions have been issued under section 32 (3) of the regulation, OLGC's gambling facilities have offered a self-exclusion program since their inception. In paras 88 and 89 of his affidavit, Mr Pellizzari described the process as follows:

> Self-exclusion is a self-help tool to enable patrons to take positive action to address problems they may be experiencing with gambling. The objective of the self-exclusion program is to help patrons acknowledge their responsibilities over their gambling behaviour, and the potential implications of excessive gambling. Self-exclusion is a form of positive action patrons can take to address problems they may be experiencing with gambling.
>
> The patron initiates the self-exclusion process. To date, over 17,000 patrons have chosen to do so, and currently, approximately 12,500 remain self-excluded. In most cases a patron will identify himself or herself on the gaming floor to casino staff or security indicating that he/she wants to self-exclude. In administering its program, and when handling requests for self-exclusion enrolment, [OLGC] makes no determination of an individual's state or possible condition. The self-exclusion process does not require judgment, assumption or assessment that a self-excluded patron is in fact a problem gambler or a pathological gambler.

[28] The self-exclusion process, which in different forms, has been used in the United States, other Canadian provinces and European countries, is based on an awareness that problem gamblers often have "moments of clarity" in which they recognise the existence of the problem, the disastrous consequences it can have for them and their families, and the need to obtain assistance to prevent them from giving in to their weakness.

[29] Under OLGC's practices, patrons who wish to self-exclude are interviewed by casino staff and required to provide photo identification and to sign a self-exclusion form. The forms signed by Mr Dennis and the other members of the primary class were identical in all material respects. That signed by Mr Dennis was as follows:

> Self-Exclusion Form
>
> Ontario Lottery and Gaming Corporation
>
> We offer you the opportunity to self-exclude yourself from Ontario Lottery and Gaming Corporation (OLGC) gaming venues. Self-exclusion will direct the OLGC, and commercial casino operators acting for OLGC, to use their best efforts to deny your entry, as a service, to all OLGC's gaming venues in the province of Ontario. The OLGC and commercial casino operators accept no responsibility, in the event that you fail to comply with the ban, which you voluntarily requested.
>
> I hereby request that I be refused entrance to all OLGC gaming venues (a list of which has been provided to me), and be prohibited from entering on

> to, or in any way trespassing upon any of these gaming venues, for any reason whatsoever save solely to attend at my place of employment if applicable, as of this date. I understand that this form and my photograph will be shared with the other gaming venues.
>
> This self-exclusion shall be for an indefinite time period and can be reinstated only after a minimum period of six months, at which point I may request in writing reinstatement in any of the venues. Once reinstatement is granted, it applies to all venues from which I was excluded. This self-exclusion form cannot be revoked or withdrawn until such time as I notify, in writing, the Security Office at any one of the gaming venues and only after the minimum period of six months. Upon signing a required reinstatement request I must wait an additional 30 days before being allowed to play at any of these venues. If this is the third request for self-exclusion at any of the gaming venues within the last three years, I will automatically be self-excluded for a minimum of five years at all the relevant gaming venues.
>
> I understand that my failure to comply with this voluntary ban may mean that I will be apprehended for trespassing and dealt with according to law. I release and forever discharge the OLGC, and the commercial operators of any of the operator's parent companies, shareholders, subsidiaries or affiliates, or successors, as well as any and all of their directors, officers and employees, from any and all liability, causes of action, claims and demands whatsoever in the event that I fail to comply with this voluntary ban.

[30] The form then provided for details of the signatory's name and address, the identification provided, the identification number, date of birth, and telephone number. The name of an employee who was present at the interview was then to be provided and, at the end of the form, the number of a helpline was given for the signatory to obtain information about problem gambling, and treatment resources in Ontario.

[31] The versions of the form used before the commencement, and after the end, of the class period contain no reference to a direction to OLGC to use its best efforts to deny entry to the signatory. As I will indicate, the existence of the direction is fundamental to the manner in which the claims advanced by the plaintiffs have been framed. Another difference is that the form introduced as of February 10, 2005 specifically denied any responsibility of OLGC or its employees to prevent self-excluded persons from entering or remaining on the premises and from gambling while there.

EVIDENCE

[32] A vast amount of material was filed for purpose of the motion. The plaintiff's motion record filled 15 substantial volumes. Much of the evidence was directed at the merits of the claims advanced on behalf of the class members rather than at the requirements for certification. However, this is a case in which a great deal of the evidence that is not directly relevant to those requirements is of assistance in explaining the factual context in which the certification issues arise.

1. Evidence in Support of the Motion.

[33] In addition to affidavits filed by each of the plaintiffs, the motion record contained two affidavits of one of their lawyers - Ms Lori Stolz - and affidavits of two experts, Professor Kevin Harrigan of the University of Waterloo and Dr Robert Williams of the University of Lethbridge, Alberta.

(a) Peter Dennis

[34] Mr Dennis is 50 years of age. In the records of the Centre for Addiction and Mental Health he is described as an "intelligent and insightful man".

[35] Mr Dennis was born in India and, after attending high school, worked in the tourism and travel industry until, in the mid-1980s, he became a sales manager for a large travel agency in Dubai. He remained in that position for 16 years during which he married Ms Noble and their two children were born.

[36] Mr Dennis states that the family was doing well financially and had acquired savings when, in 1997, they emigrated to Canada. On arrival, he and Ms Noble enrolled in various courses to upgrade their skills and very quickly obtained employment by American Express. Feeling secure in their financial position, they purchased a house in Markham, in June 1998 with a cash down-payment of $26,280 and a mortgage of $189,700.

[37] In July 1998, when some relatives from the United States were with them, Mr Dennis first visited one of OLGC's gambling facilities. Thereafter, he would go to Casino Rama once or twice a month - at first with his wife on occasions when he would wager no more than $500. Subsequently, when she refused to accompany him to the casino, he began to go there by himself after telling her he was otherwise occupied. In 2000, he discovered the slot games at Woodbine and began to visit there frequently and to lose increasingly large amounts. He states that he could not stop himself from gambling and that he continued to do this throughout 2001, 2002, 2003 and 2004.

[38] Mr Dennis's employment with American Express was terminated in 2002 when he was earning approximately $40,000 a year. Because of his losses from his uncontrollable gambling, he had previously had to take out a second mortgage on their home. He subsequently defaulted on this and the first mortgagee sued for possession. At this time Mr Dennis was receiving

unemployment insurance but spending it on visits to Woodbine. The severance payment he received from American Express had already been dissipated in the same way.

[39] In March 2003, Mr Dennis obtained another mortgage and a private loan to enable him to pay off the first and second mortgages. By the end of that month, he had incurred gambling losses of $88,000 since the beginning of the year. In this period Mr Dennis would gamble at Woodbine during the day while his wife was working and his children were at school. He would lie to her about his activities. His gambling continued in amounts considerably in excess of his annual income.

[40] By May 2004, Ms Noble was aware of what was happening and desperate about their increasingly fragile financial situation. Earlier in the year they had defaulted on the latest mortgage and had retained possession of their home only by transferring title to friends who obtained a mortgage on it and rented it back to them.

[41] After the intervention of another family friend, Mr Dennis attended Woodbine on May 23, 2004 and told the security officers there that he wanted to self-exclude. He was given the self-exclusion form, read it, initialed each paragraph and signed it. In his affidavit he stated:

> My comprehension of the document was poor as I was so distraught and embarrassed by the whole experience but I did understand I had agreed to be refused entry into the [OLGC] gambling venues because I had provided my particulars and been photographed.

[42] He stated further that he had understood that, having signed the self-exclusion form, he would subsequently be denied entry to all OLGC gambling sites and that OLGC had the right to do this and to remove him if he entered any of their facilities. This occurred only once on the many occasions – commencing just one week after he signed the form - on which he returned to gamble over the next three years.

[43] It will serve no useful purpose to set out in any detail the subsequent events that occurred. It is enough to say that, despite the self-exclusion form he had signed, Mr Dennis continued to visit Woodbine and to incur serious gambling losses; the physical and mental health of his wife and children suffered severely; family relations became strained; one family member attempted suicide; and the mortgagee foreclosed. Mr Dennis had been terminated from his latest employment when he had gambled and lost money needed to pay an amount he owed to one of his employer's customers. Finally, after yet another purchase and a subsequent default on the mortgage, the family were forced to sell their home in November 2007 and are at present in rental accomodation.

[44] By October 6, 2007 Mr Dennis continued to have the urge to gamble but had no money to enable him to indulge it. He consulted his family doctor in October, 2007 and was referred to the Centre for Addiction and Mental Health. He was diagnosed as suffering from problem gambling and received treatment.

[45] In cross-examination on November 27, 2009, Mr Dennis stated that he considered that the treatment had been successful, that he has stopped gambling and has not been to a casino since September, 2007.

(b) Ms Zubin Phirose Noble

[46] Ms Noble has a degree in chemistry from an Indian university. She has been employed by American Express since 1997 and at present is an executive travel consultant with that company. In her affidavit she confirmed the accuracy of the contents of the affidavit sworn by Mr Dennis.

(c) Ms Lori Stolz

[47] Ms Stoltz is one of the lawyers for the plaintiffs and has been actively involved in preparing the case for certification. In her affidavits sworn for the purpose of the motion, Ms Stoltz provided an overview of the case, and of the personal gambling history of Mr Dennis, as well as a considerable amount of background information relating particularly to the nature and prevalence of problem gambling, the operations and activities of OLGC and its administration of the self-excluded program, the announced commitment of the government of Ontario, and OLGC, to responsible gambling and a number of criticisms that have been made by various individuals and entities of the effectiveness of the commitment and that of the self-exclusion program.

[48] Ms Stoltz also refers to nine individual actions that have been brought against OLGC by self-excluded persons and reportedly settled for an average payment of $167,000 per claim. She refers to four other pending actions. She offers the opinion based on discussions with self-excluded persons that a combination of the expense involved and the potential stigma attached to problem gambling would act as a significant deterrent to the commencement of similar actions by other self-excluded persons.

(d) Dr Kevin Harrigan

[49] Dr Harrigan is a research associate professor at the University of Waterloo where he teaches and conducts research in computer-game design including electronic gambling games such as slot-machines and video poker games. His particular research interest at present is in understanding whether and, if so how, structural characteristics of slot machines may explain why so many people develop an addiction to them.

[50] From 1999 through June 2008, Dr Harrigan visited OLGC gambling venues on approximately 240 occasions on which he concentrated on slot-machine gambling. He played the games, observed others playing them, and spoke to the technicians servicing them. In his affidavit and in his answers in cross-examination he described in considerable detail:

(a) the different varieties of machines that are selected by OLGC from those approved by the Alcohol and Gaming Commission pursuant to the *Gaming Control Act*;

(b) the standards applied by the testing laboratory of the Commission;

(c) different design elements - or structural characteristics - that, in his opinion, "conceal and misrepresent" how the games work and do not, for example, reveal the significantly different probabilities of winning on various versions of the same game;

(d) how the machines are programmed to indicate various types of "near miss" that, in fact, have not occurred in any meaningful sense, and to treat as wins what are actually losses reflecting paybacks less than the amounts wagered; and

(e) how it is a distinguishing characteristics of slot-machine gambling that the player wins very frequently while as a matter of statistical probability, his bankroll steadily declines as the wins are reinvested.

[51] Dr Harrigan also refers to the substantial revenues generated by OLGC's slot machines - $3 billion in 2002 - 2003. He expresses the opinion that slot machines are highly addictive and that the misleading features of the machines contribute to the addiction. He does not provide specific grounds for these opinions other than a reference to an article co-authored by Dr Robert Williams in which it is estimated that approximately 60 per cent of slot-machine revenue - about $1.6 billion annually - is derived from problem gamblers.

[52] Dr Harrigan's cross-examination was largely informative for his opinion that statistical sampling can be used to estimate the likely reactions of problem gamblers to the different features of slot machines that he had characterized as potentially misleading and addictive.

(e) Dr Robert Williams

[53] Dr Williams has a Ph.D. degree in psychology from McMaster University. From 1985 to 1996 he worked as a regional psychologist in the Department of Family Services in Manitoba. From 1996 he was a clinical psychologist at the addiction centre of a hospital in Calgary. In 2001, he accepted a faculty position at the School of Health Science at the University of Lethbridge, specialising in gambling research. He is at present a full professor in the addiction counselling program at the University of Lethbridge as well as a co-ordinator for the Alberta Gaming Research Unit. In the report exhibited to his affidavit he stated that he is the best-funded gambling researcher in the world and is recognized as one of the world's leading authorities in the prevention of problem gambling and related subjects.

[54] Dr Williams described "problem gambling" as a term that refers to someone whose gambling has resulted in significant harm for that person or for other people in the person's immediate social network. These harms can be in any of the following areas: finances, psychological health, physical health, legal problems, work/school problems, and family relationship problems.

[55] The appropriateness of the reliance and attempted use by plaintiffs' counsel of Dr Williams classification of some individuals as severe or pathological problem gamblers – as distinguished from recreational, low-risk and moderate problem gamblers – is, in my judgment, very much in issue on this motion.

[56] After referring to the biological, environmental and psychological factors that contribute to a person being a problem gambler, and the adverse consequences that can ensue for the individuals, their families and the community, Dr Williams discussed the features and history of self-exclusion programs, the extent of their use in Canada, the losses suffered by problem gamblers who have not self-excluded, and available alternative models and measures for dealing with problem gambling.

[57] Among the opinions Dr Williams provided on the basis of his research and experience were that, apart from biological and psychological factors, contributing factors to the likelihood that a person would engage in problem gambling include:

(i) the availability of electronic gambling machines which because of high rates of reinforcement, illusion of control and deceptive "near miss" features, are the most addictive forms of gambling;

(ii) erroneous beliefs about how gambling works, and the probabilities of success;

(iii) the ready availability of funds through nearby automated cash machines; and

(iv) ineffectual self-exclusion programs.

[58] Dr Williams referred to the very low percentage of problem gamblers who enter into self-exclusion programs in Canada - approximately 10,000 out of 269,000 in Ontario, or 3.7 %. He estimates that 87 % of these would be severe problem gamblers and 10 % moderate problem gamblers. He attributes the low percentage of signatories, in part, to deficiencies in the promotion of the programs. He contrasts the position with that in the Netherlands where, he states, patrons with a high attendance rate are approached by staff of the facilities to ascertain whether they would wish to self-exclude.

[59] Dr Williams estimated that the losses of the 10,428 problem gamblers who subsequently entered into self-exclusion arrangements with OLGC would have amounted to approximately $80 million annually.

[60] Finally, Dr Williams identifies what he considers to be weaknesses in OLGC's self-exclusion measures and possible alternative methods for dealing with problem gambling. He considers one of the main problems to be the physical impossibility for security personnel to memorise and recognize more than 10,000 excluded individuals from the photographs they have on file. He compares this unfavourably with the system used in most European countries where

the names of self-excluded persons are recorded in an electronic database and all patrons have to provide identification before entering a gambling facility.

[61] A second problem identified by Dr Williams was that the OLGC program is reactive in that, unlike the measures used in the Netherlands, no help is provided unless and until the problem gambler requests self-exclusion.

[62] Further initiatives by OLGC to combat the harm caused by problem gambling were then discussed by Dr Williams and found to be inadequate in various respects. He concludes that the reluctance of OLGC to implement effective initiatives stems, in part, from

> an unrealistic desire to implement effective prevention policies that do not inconvenience non-problem gamblers or reduce revenues. Unfortunately, the reality is that effective problem gambling prevention is only likely to occur with some level of inconvenience to non-problem gamblers and necessarily involves a loss of revenue because of the significant contribution problem gambling makes to overall gambling revenue (36 per cent in Ontario).

[63] In his supplementary affidavit, Dr Williams made detailed comments on the contents of the affidavits sworn by the defendant's deponents, Mr Pellazzari and Dr Howard Shaffer. The tone of the comments is argumentative and, although they may have some relevance to the merits of the litigation, I did not find them to be of great assistance for the purpose of this motion.

[64] I note, however, that Dr Williams takes issue with what he considers to be Mr Pellizzari's characterization of self-inclusion as an unenforceable customer-based initiative – a "self-help" tool - with no onus on the venue. Dr Williams states in the report exhibited to his supplementary affidavit:

> Gamblers enroll in self-exclusion for the purpose of obtaining external constraints on their behaviour following their repeated inability to voluntarily control it themselves, and the serious negative consequences that are being caused by the continued involvement. If they believed or understood that the venue would not or could not actually exclude them, most would not sign up in the first place.

[65] An analogy drawn by Dr Howard Shaffer – whose affidavit was delivered on behalf of OLGC - between self-exclusion and a "no-suicide agreement" was similarly rejected by Dr Williams, as was Mr Pellizzari's claim, that Ontario is a leading jurisdiction in the prevention and treatment of problem gambling. Dr Williams would prefer to give this accolade to the State of Utah which has not legalised gambling, or the 13 U.S. States that have not licenced casinos or slot machines.

[66] In cross-examination, Dr Williams stated that, in his opinion, a significant majority of self-excluded persons would have come back to an OLGC facility. He said that, although the only way to be certain would be to interview each excluded gambler, there were reasonable projections that could be made based firmly on estimates derived from the behaviour of persons

addicted to alcohol, drugs and tobacco. He indicated that he had not interviewed any class members other than Mr Dennis and that he had very little information about their long-term behaviour.

[67] In an article published in 2002, and referred to in his report, Dr Williams and his co-author described self-exclusion as a fairly new procedure and one that was not yet widely known. They referred to the absence of research on how best to optimise its effectiveness. In the same article, the authors describe the enforcement of self-exclusion to be a universal problem.

[68] The reliability of Dr Williams' methodology and conclusions for determining losses even on an aggregate basis were challenged by OLGC's counsel. It is not the function of the court on this procedural motion to choose between the competing opinions of expert witnesses. In connection with parts of Dr Williams' evidence there are, however, questions relating to the utility of his opinions for purposes of certification even if their correctness is assumed.

2. Evidence in Response to the Motion.

[69] In addition to the affidavit of Mr Pellizzari, OLGC delivered an affidavit of Dr Howard J. Shaffer of Harvard Medical School.

(a) Mr Paul Pellizzari

[70] As well as the background information I have already mentioned, Mr Pellizzari's affidavit deals with the history of the introduction of casino gambling in Ontario, and the evolution of OLGC's efforts to promote responsible gambling through self exclusion and by other means. He refers to the reasons for relying solely on photo identification and the existence of an "open access" policy that precluded the use of other methods of recognising self-excluded patrons at OLGC's venues. The adequacy of these reasons was disputed by Dr Williams, as well as the other two matters I mentioned in my summary of his evidence.

[71] In the course of his cross-examination, Mr Pellizzari denied that it was the intended objective of the self-exclusion problem to keep the signatories out of the gambling venues. The objective he said was to give those people an opportunity to make a commitment to themselves to stay away from gambling.

[72] In response to a question from plaintiffs' counsel, Mr Pellizzari stated that, to his knowledge, civil actions were the only available methods of resolving the plaintiff's claims. He did not accept the suggestion that OLGC had never adopted what he had described as an "open access" policy that had the effect of limiting the measures that could be taken to identify self-excluded patrons.

[73] Plaintiffs' counsel were critical of the choice of Mr Pellizzari to swear an affidavit in response to the motion as he did not commence his employment with OLGC until 2007 and had no personal knowledge of events in the class period from December 1, 1999 to February 10, 2005. However – apart from the few matters I have mentioned - it is not my understanding that

there are disputed statements of fact in his affidavit that bear heavily on the resolution of the issues on this motion.

(b) Dr Howard Shaffer

[74] Dr Shaffer is a clinical and research psychologist specialising in the area of addictive behaviours in general, and gambling-related disorders in particular. He is an associate professor at Harvard Medical School and the Director of the Division on Addictions at one of that school's teaching affiliates.

[75] A large part of Dr Shaffer's report concerned biological, psychological and other factors with which problem gambling is associated. He emphasised that pathological gamblers are not a homogenous group because of the varying interactive factors that may influence the likelihood of developing, sustaining or recovering from the disorder.

[76] Dr Shaffer considered that self-exclusion programs were best considered to be "an accommodation: that is to assist the gambler to regain control of his behaviour".

[77] Dr Shaffer referred to studies in other jurisdictions that suggest that approximately 50% of self-excluded persons continue to gamble in other venues. The reliability of this estimate was challenged by Dr Williams.

CERTIFICATION

[78] For a proceeding to be certified under the CPA each of the conditions in section 5(1) must be satisfied. A certification motion is intended to be a procedural stage of the action, or application, and evidence that is relevant only to the merits of the claims advanced on behalf of the plaintiffs, or the class, is not admissible. The plaintiff must, however, adduce evidence that provides some basis in fact for each of the statutory requirements in section 5(1)(b) through (e): *Hollick v. City of Toronto*, [2001] 3 S.C.R. 158 at para 25. Where, as is often the case, this can only be done by evidence that also bears on the merits, the minimum evidential standard - and not the ordinary civil standard of a balance of probabilities - is to be applied for the purpose of determining whether a particular requirement is satisfied.

[79] Evidence is not admissible in respect of the condition in section 5 (1) (a). This is to be determined solely on the basis of the plaintiffs' pleading.

[80] Before dealing with each of the statutory requirements in turn, it is important to note one important limitation on the claims advanced by the plaintiffs. Although there are paragraphs of the statement of claim that might suggest otherwise, plaintiffs' counsel insisted that the claims advanced in the proceeding are limited to those of persons who signed the particular self - exclusion forms between December 1, 1999 and February 10, 2005. It is no part of their case that OLGC owes duties of care, or other legal duties, to problem gamblers as such. In consequence, this wider question is not in issue in the proceeding.

1. Section 5(1)(a): Disclosure of a Cause of Action

[81] Section 5 (1) (a) requires that the statement of claim must disclose a cause of action. For this purpose, the plaintiffs must plead the material facts that would constitute a cause of action and the question whether this has been done is to be determined in accordance with the "plain and obvious" test commonly associated with the decision of the Supreme Court of Canada in *Hunt* v. *Carey Canada Ltd.*, [1990] 2 S.C.R. 959. This test, which is applied also in motions to strike a pleading under rule 21.01(1)(b), requires the pleading to be read generously without regard to infelicities of drafting and on the assumption that all allegations of facts - other than those that are manifestly incapable of proof - will be established at trial.

[82] It has also been held on numerous occasions in the Court of Appeal that, where there is uncertainty as to the existence of a cause of action in an area of the law that is in the course of development, the cause of action should be accepted so that it will be dealt with at trial on the basis of a full evidential record: *Anderson* v. *Wilson* (1999), 44 O.R. (3d) 673 (C.A.), at page 679; *Nash* v. *Ontario* (1995), 27 O.R. (3d) 1 (C.A.), at para 11; *R. D. Belanger and Associates Ltd.* v. *Stadium Corporation of Ontario Ltd.* (1991), 5 O.R. (3d) 778 (C.A.), at page 782. Consistently with this approach, the novelty of a cause of action will not, by itself, lead to its rejection: *Hunt* at para 33.

[83] In addition, I note the following passage from the judgment of the court in *Hunt* which I believe has particular relevance to the facts of this case:

> I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure, that the law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society. (para 52).

[84] There is one other aspect of the inquiry required by section 5(1)(a) that is of particular importance in this case. It is fundamental to the requirements for certification that the relevant question under section 5(1)(a) is whether the pleading discloses a cause of action of the plaintiffs. It is not whether causes of action of the other class members have been pleaded. The existence of claims of such other class members is to be considered under the requirements in section 5(1)(b) and 5(1)(c) that there be a class whose members share issues in common. For these purposes, evidence is required to satisfy the minimum burden of "some basis in fact" referrd to in *Hollick* at para 25.

[85] It follows that, although in this case the statement of claim contained allegations of fact relating to all class members - and, in particular, an allegation that they wore all problem gamblers in the sense defined in the pleading - this has no bearing on the issues arising under any of the paragraphs of section 5 (1) except those that arise under section 5 (1) (a) in respect of the plaintiffs. As far as the other class members are concerned, the rule that it must be presumed that allegations of fact in the pleading will be proven at trial has no application.

[86] Although it follows that the proposed causes of action in this case must be accepted unless it is plain and obvious that they cannot, in law, arise from the facts pleaded, recent decisions of the Court of Appeal have underlined that there are limits to the latitude that is to be allowed.

[87] In this case, the causes of action on which the plaintiffs rely are negligence, occupiers' liability, and, in the alternative, breach of contract or a disgorgement of revenues. In the submission of counsel for OLGC, none of these causes of action is sufficiently disclosed in the plaintiffs' pleading.

[88] The interpretation and effect of the terms of the self-exclusion form are relevant to each of the causes of action asserted in the statement of claim. As they are central to the claims for breach of contract - and as the existence of the other causes of action may be affected by OLGC's attempt in the form to exclude its liability - it will be convenient to consider first whether breaches of contract have been sufficiently disclosed in the pleading.

(a) Breach of Contract

(i) Was there a contract?

[89] It is pleaded that OLGC's self exclusion policy provided for binding contracts under which OLGC committed to use its best efforts to deny customers entry to all OLGC's gambling venues, and to detect and remove them if entry was effected. It is pleaded further that OLGC breached these contractual obligations and a duty to exercise good faith, and that these were fundamental breaches from which serious and permanent injuries and losses were suffered by the plaintiffs and the class members.

[90] The allegation that OLGC's self-exclusion policy entitled problem gamblers to enter into binding contracts by signing self-exclusion forms is a legal conclusion and, as such, is not governed by the rule that assumes pleaded allegations of fact will be proven at trial. The documents containing the self-exclusion policy are incorporated in the pleading. They do not, in my opinion, provide any support for the plea that self-exclusion is effected by way of a binding contract other than through the terms of the self-exclusion forms that they include.

[91] Although the forms do not contain any explicit promise by OLGC to do anything, it is, I believe, sufficiently clear that in the first paragraph it is committing to provide a service that will consist of using its best efforts to deny entry to the customer. In return, the customers impliedly waived all rights or licences they might otherwise have to enter into the gambling premises without complying with the conditions for reinstatement in the second paragraph, they accepted that the form and the photographs could be shared with other OLGC venues, and they provided the releases set out in the third paragraph of the form. On the basis of the terms of the form alone - and, subject to the effect, if any, of the disclaimer of responsibility at the end of the first paragraph, and the releases in the third paragraph - I do not consider that it is plain and obvious

that there was no contract between the parties. The consideration moving from the self-excluded person was weak but it was not, in my opinion, non-existent or illusory.

[92] I am also of the opinion that sufficient allegations of OLGC's breaches of the contractual duty to exercise its best efforts have been pleaded. Essentially, the allegations are that OLGC knew that its system of memory-based enforcement was entirely inadequate to identify self-excluded gamblers who sought re-entry; that it knew that the system was ineffective; that it did not attempt to remedy the deficiencies; and that it failed to implement more effective measures reasonably available to it.

[93] For the purpose of certification, OLGC's counsel did not challenge the proposition that, in providing the customer with the opportunity to self-exclude, OLGC assumed an obligation to use its best efforts that could be contractually binding. Rather, it was their submission that any such contractual obligation was negated by the disclaimer of responsibility and the releases.

(ii) Exclusion of OLGC's liability

[94] The self-exclusion forms contained two provisions that are evidently intended to deny, or limit, OLGC's responsibility in the event that the signatory subsequently sought and obtained entry to the gaming venues. The first consists of the repudiation of responsibility "in the event that you fail to comply with the ban, which you voluntary requested". While the generality of these words might be understood to extend the disclaimer to all cases in which entry was obtained – and irrespective of whether OLGC performed its obligation to use its best efforts - they might also be read more narrowly as addressing only non-compliance by the gambler and not a breach of OLGC's obligation. In this respect, there is a contrast with the form introduced immediately after the end of the class period. This contains an express acknowledgement and agreement that OLGC and the private operators "have no responsibility or obligation to keep or prevent me from entering an OLGC facility, to remove me if I enter, or to stop me from gambling". There is an even greater contrast with the exclusion of liability clause referred to in *Calvert* v. *William Hill Credit Ltd.*, 2008 EWHC 454, aff'd [2009] 2 W.L.R. 1055 which will be considered later in these reasons.

[95] I agree with counsel for the plaintiffs that, viewed in isolation, the disclaimer at the end of the first paragraph of the form does not satisfy the requirements set out in *Falcon Lumber Ltd. v. Canada Wood Speciality Co.* (1978), 28 O.R. (2d) 345 (H.C.) at page 350 in a passage approved by the Court of Appeal in *Braun Estate* v. *Zenair Ltd.*, [1998] O. J. No. 4841 at para 10:

> First, the clause must be strictly construed and the burden is on the party relying upon the exemption to prove that the particular loss caused to the other party was clearly within the scope of the exemption clause. Secondly, if there is an ambiguity in the meaning of the exempting clause and it is capable of more than one reasonable construction, then the rule of contra proferentem will apply and the exemption clause will be construed against the maker. Thirdly, the defendant

> will not generally be exempt from liability for the negligence of its servants unless express words are used or unless the only possible head of damage for which the defendant may be liable on the contract, lies in negligence. Here the words of the exempting clause do not expressly exclude negligence and, while the clause speaks of the defendant as not being "responsible for damages", it does not refer to the cause or origin of such damages.

[96] The ambiguity - or at least, the lack of clarity - in the disclaimer at the end of the first paragraph of the form is, in my opinion, remedied when it is read in conjunction with the releases in the third paragraph. These expressly extend to "any and all liability, causes of action, claims and demands whatsoever in the event that I fail to comply with the voluntary ban". When the form is read in its entirety, I believe it sufficiently discloses an intention of OLGC to offer an accommodation, or service, to assist the problem gambler while excluding any legal responsibility that might otherwise arise if it failed to do so.

[97] It would not, in my opinion, be reasonable to interpret the form as intended to exclude OLGC's liability only in the event that it had used its best efforts to deny entry to the problem gambler. To do so would, in my opinion, be to give the language of the document the kind of strained and artificial interpretation condemned by Wilson J. in *Hunter Engineering Co.* v. *Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 at para 150.

[98] It is not pleaded that Mr Dennis did not read the form before he appears to have initialled each paragraph and signed it. Nor is it pleaded that he did not understand any of its terms. In my opinion, the plain meaning of the release is that any claims and causes of action against OLGC for failing to exercise its best efforts were intended to be included in the reference to "any and all liability, causes of action, claims and demands, whatsoever". Contrary to the submission of plaintiffs' counsel, and notwithstanding the *contra proferentem* principle, it would not in my judgment be a reasonable interpretation to limit these words to claims arising out of attempts by OLGC'S staff to apprehend self-excluded persons and to escort them off the premises. As, in my opinion, the meaning of the disclaimer and release is clear, this is not a situation in which extrinsic evidence is required for the interpretation of the language of the form:

> ... it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face.: *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 at para 55.

[99] There has, in any event, been no suggestion that the context is other than that indicated in the pleading. The purpose of self-exclusion - and the context in which the form was signed - was to assist a person concerned to avoid further gambling losses. It would, in my opinion, be an artificial, and not a reasonable, interpretation to conclude that – depite the stated intntion to release "any and all liability" - the only liability that OLGC intended to exclude was that relating to harm suffered by the self-excluded person by being dealt with as a trespasser. I am in agreement with counsel for OLGC that the disclaimer of responsibility and the releases should be

interpreted as excluding liability for gambling losses incurred as a result of a failure "to comply with this voluntary ban", whatever the cause of action.

[100] Even on the basis of the above interpretation of the form, plaintiffs' counsel submitted that the release would not necessarily be given effect as the failure of OLGC to exercise its best efforts was a fundamental breach that, on the facts pleaded, would make it unconscionable to permit it to rely on the disclaimer and release. In view of the possible implications of the decision in *Tercon Contractors Ltd.* v. *British Columbia (Transportation and Highways)* 2010 SCC 4; [2010] S.C.J. No. 4, which was released shortly after the hearing of this motion, I invited, and received, further submissions from counsel in respect of this aspect of OLGC's entitlement to rely on the disclaimer and release.

[101] Although the court in *Tercon* was divided on the interpretation to be given to the particular exclusionary language in that case, it was unanimous in holding that the concept of fundamental breach should no longer have any role to play when a plaintiff seeks to escape the effect of an exclusion of liability clause to which he had previously agreed. The correct - and now the authoritative - approach endorsed by the nine members of the court was summarized by Binnie J. as follows:

> The first issue, of course, is whether as a matter of interpretation the exclusion clause even applies to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462) This second issue has to do with contract formation, not breach.
>
> If the exclusion clause is held to be valid and applicable, the court may undertake a third inquiry, namely whether the court should nevertheless refuse to enforce a valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs a very strong public interest in the enforcement of contracts. (paras 122-123)

[102] On the first question - that of interpretation - I have already given my opinion that the words of the form reveal an intention to exclude OLGC from liability even in circumstances where, as here, it is alleged to have failed to perform its contractual obligation to exercise its best efforts.

[103] On the question of unconscionability at the time the form was executed, this was not a case in which there was inequality of bargaining power in the traditional sense in which that term has been used in the authorities. The concept of bargaining contemplates an exchange of

benefits. The context was not one in which OLGC was attempting to obtain any benefit for itself, other than, perhaps, the public image of a responsible government agency.

[104] OLGC was providing a service in an attempt to assist the plaintiff and the class members to obtain control over their propensity to gamble to excess. OLGC would obtain no financial benefit from self exclusion and there was no reliance by the plaintiff and other class members on OLGC's undertaking to exercise its best efforts except to the extent that it may have had some influence on the decision to sign the self-exclusion form. They did not rely on the undertaking in the sense that it otherwise influenced their future conduct; they did not act upon it to their detriment. On the contrary, they sought to circumvent and frustrate its performance.

[105] But for one remaining consideration, there was, in my opinion nothing unconscionable in OLGC stipulating that it would undertake to exercise its best efforts so as to assist the plaintiff and class members but only on the condition that in no circumstances would it be liable for any gambling losses incurred by them in the event that, for any reason, self-exclusion failed to achieve its intended affect.

[106] The plaintiffs have, however, pleaded that at all material times OLGC knew that its system for enforcing self-exclusion was inadequate and would be ineffective. If this is proven, and it is found that the self-exclusion program was mere window-dressing – a public relations exercise - and did not reflect a genuine commitment to the program and to responsible gambling, it could, in my judgment, be found to have been unconscionable at the outset to offer such a program to vulnerable problem gamblers seeking assistance and, *a fortiori*, to attempt to exclude OLGC's liability when so doing. It could well, in my opinion, be found to extend beyond extraordinary and unacceptable cynicism for a Crown agency – that had repeatedly and publicly proclaimed its commitment to responsible gambling - to respond to pleas for help from vulnerable problem gamblers by providing an undertaking that it had no intention to fulfill.

[107] The third inquiry required by *Tercon* would be relevant only if unconscionability at the outset is not established.

[108] In his discussion of the role of public policy in determining when a court should exercise its "narrow" public policy jurisdiction to give relief against an exclusion of liability clause, Binnie J. referred to cases where criminal or fraudulent conduct on behalf of the defendant would justify a finding that reliance on an exclusion clause should be considered to be an abuse that should not be countenanced by the court. He emphasised, moreover, that less egregious conduct could require the same conclusion where, for example,

> ... the defendant was so contemptuous of its contractual obligation and reckless as to the consequences of the breach as to forfeit the assistance of the court. The public policy that favours freedom of contract was outweighed by the public policy that seeks to curb its abuse.

> ... where this type of conduct is reflected in the breach of contract, all the circumstances should be examined very carefully by the court. Such misconduct may disable a defendant from hiding behind the exclusion clause. But a plaintiff who seeks to avoid the effect of an exclusion clause must identify the overriding public policy that it says outweighs the public interest in the enforcement of the contract. (paras 119-120)

[109] The enquiry into public policy considerations in this case will require a consideration of a number of factors identified in the statement of claim. These include the conflict between OLGC's interest in maximising profits from its gambling operations and its avowed commitment to responsible gambling; alleged breaches of the *Criminal Code* in its operations; and its alleged breaches of the *Business Practices Act*, R.S.O. 1990, c. B.18. Countervailing considerations may arise from the status of OLGC as an agency of the Crown and the extent to which policy decisions of the kind relevant at the second stage of the *Anns* test for the existence of a duty of care are not open to challenge. In my opinion the interplay between these considerations requires a full evidential record before a reasoned determination can be made.

[110] It follows that, in my judgment, neither the unconscionability nor the public policy enquiries required by the analysis in *Tercon* can be satisfactorily performed solely on the basis of the pleading in this case. In consequence, it is not plain and obvious that OLGC is absolved from liability by the disclaimer and the releases in the form.

(b) Negligence

[111] I note at the outset of the consideration of the claim in negligence that although, on the basis of *Central Trust Co.* v. *Rafuse* [1986] 2 S.C.R. 147 – as explained in *B.G. Checo International Ltd.*, v. *British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 – words excluding contractual liability may be effective also to preclude liability in tort, the possibility of concurrent liability in contract and tort would not otherwise be excluded.

[112] As a matter of interpretation, and while a duty to exercise "best efforts" has been held to require a higher standard than a duty to exercise reasonable care – see, for example, *OEB International Ltd., v. Leyden*, [!995] O.J. No. 3571 (G.D.), citing *Atmospheric Diving Services Inc. v. International Standard Suits Inc.*, [1994] B.C.J. No. 493 (C.A.) – the words excluding OLGC's liability in the self-exclusion form are, in my opinion, as applicable to liability for negligence as they are to that arising from a breach of the contractual obligation.

[113] Although self-exclusion programs have been adopted in other provinces, counsel were not able to cite any Canadian decisions that involved claims in negligence against gambling operators who failed to prevent self-excluded problem gamblers from continuing to gamble. In view of the novelty, as well as the difficulty, of the questions that arise, it will be useful to consider first an English decision - *Calvert* v. *William Hill Credit Ltd.*, 2008 EWHC 454 (Ch.), aff'd [2009] 2 W.L.R. 1065 (C.A.) - in which on somewhat similar, though not identical, facts, such claims were considered at length and in depth.

[114] *Calvert* was made after a trial and was affirmed on appeal. At first instance, Briggs J. began by noting that it was the first time an English court had been required to consider the question:

> ... whether a bookmaker who has, at the customer's request, undertaken to prohibit the customer from gambling for a specified period, owes the customer a duty to take reasonable care to enforce that prohibition, so as to protect the problem gambler from the risk of gambling losses during the specified period.

[115] A recognition of such a duty would, he stated, involve a "journey to the outermost reaches of the law of negligence to the realm of the truly exceptional".

[116] In *Calvert*, the plaintiff claimed damages of approximately £1.8 million for the negligence of the defendant bookmaker. This amount represented gambling losses incurred by Mr Calvert throughout the period between August 5 and December 2, 2006 in respect of telephone bets placed with the defendant after Mr Calvert had on two occasions asked to have his telephone account closed permanently.

[117] At the times of Mr Calvert's requests, the defendant had adopted a self-exclusion policy and procedures which required, among other things, the completion of a self-exclusion agreement. These procedures - which should have prevented Mr Calvert from reopening his account - were not complied with by the defendant's employees and he was permitted to continue to place bets by telephone with the defendant.

[118] Mr Calvert claimed - and at the trial was found - to be a problem gambler. He claimed that, as such, he was owed a broad duty of care under which bookmakers were required to protect problem gamblers from the consequences of their compulsive disorder. In the alternative, he claimed that on the basis of the assurances given by the defendant's employees when he requested that his account be closed, the defendant had assumed a sufficient responsibility to exclude him from telephone gambling with the defendant to give rise to a duty to implement the exclusion.

[119] At first instance, Briggs J. rejected the existence of the broader duty of care that was said to be owed by bookmakers to all problem gamblers. As, in this case, plaintiffs' counsel disclaimed reliance on any such broader duty, it is not necessary to consider the reasons given by Briggs J. on this point. (They are to be found at paras 163-174 of the judgment)

[120] At paras 175-187 of the judgment, Briggs J. considered whether the defendant owed a duty of care to Mr Calvert on the basis of the assurances he had received from the defendant's employees that his account would be closed. In finding in favour of such a duty, the learned judge attributed weight to the following considerations:

(a) problem gambling is a recognised psychiatric disorder from which the plaintiff was known by the defendant to be suffering. In consequence, both

financial and psychiatric harm from a failure of the self-exclusion processes was reasonably foreseeable;

(b) there was no risk of indeterminate liability to an indeterminate class in the context of a specific request for self-exclusion by a particular problem gambler;

(c) there was no reason why it should be considered to be unfair that a bookmaker who has undertaken, albeit without consideration, to exclude a problem gambler at his request, without making any disclaimer of liability, should incur a duty of care. A bookmaker does not become a gambler's loss insurer as the only obligation is to take reasonable care;

(d) there was no basis for a floodgates concern on the facts; and

(e) the exchanges between the plaintiff and one of the defendant's employees were sufficient to indicate a voluntary assumption of responsibility by the defendant and a duty to take care to implement the exclusion. The fact that these exchanges had all the *indicia* of a contract save for consideration:

> ... means that the assumption of responsibility arising from their exchange can properly be extrapolated from the main line of authorities stemming from the *Hedley Byrne* case, even though the present case is more about a request for assistance by a person whose vulnerability gives rise to a degree of dependence, than a mere request for advice and information, the accuracy or truth of which is then to be relied upon. In the present case, the nature of the reliance was of course different, but it is in my judgment inherent in a request for self-exclusion that the problem gambler is seeking to rely upon the bookmaker's assistance in maintaining his diminished control of his gambling, which, without that assistance, he fears will fail him.

[121] Although the analysis of the duty of care in *Calvert* does not follow the *Anns* structure as approved by the Supreme Court of Canada in cases such as *Cooper v. Hobart,* [2001] 3 S.C.R. 537, *Edwards v. Law Society of Upper Canada,*[2001] 3 S.C.R. 562 , *and Childs v. Desormeaux,* [2006] 1 s.C.R. 643, the strands in the reasoning of Briggs J. are all, in my opinion, relevant in applying the principles in those cases. Reasonable foreseeability, proximity and policy considerations - including those relating to indeterminate liability - were all considered in *Calvert.*

[122] In particular, I note that the relevance of assumptions of responsibility to questions of proximity was recognised by McLachlin J. as she then was, in *Canadian National Railway* v. *Norsk Pacific Steamship Co.* [1992] 1 S.C.R. 1021 at paras 256 – 258 as well as in the more

recent decision of the Court of Appeal in *Sauer* v. *Canada*, [2007] O.J. No. 2443. Similarly, as in *Calvert,* the relevance of the existence of a contractual relationship to the issue of proximity has been accepted: *Rafuse* at para 49.

[123] Having accepted the existence of a duty of care, Briggs J. had no difficulty in concluding that it had been breached by the defendant's continued acceptance of telephone betting by Mr Calvert. Nevertheless, he dismissed the action on the ground that the breach did not cause Mr Calvert's financial ruin.

[124] The learned judge was satisfied on a balance of probabilities that Mr Calvert's gambling disorder was so compulsive, and the other gambling opportunities available to him so extensive, that the defendant's negligence contributed to his losses only by accelerating what would probably have occurred in any event. His conclusion was as follows:

> It follows that the claimant's case entirely falls upon the ground that William Hill's negligence merely affected the manner in which, and in particular the rate at which, the pre-existing pathological gambling disorder caused the financial and social ruin and the psychological harm which form the basis of his claim, without in any definable way increasing the aggregate amount of either form of harm.

[125] The analysis of causation issues that led to that conclusion is, I believe, sufficiently indicated by the following passages (at paras 195 - 197):

> It follows of course that the particular losses which the claimant suffered between August and December 2006 by reason of his telephone betting would not have been sustained, but for William Hill's negligence. But that by no means concludes the causation analysis. Although in a sense the claimant's case is that he was harmed by the aggregate outcome of the particular debts which he placed with William Hill, his complaint is that by failing to exclude him from gambling, William Hill caused his financial and social rule and an aggravation of his gambling disorder.
>
> However unsatisfactory this may be to philosophers and legal academics, causation is, as applied by the courts, ultimately a matter of common sense: [authorities omitted]. It would in my opinion fly in the face of common sense and be a travesty of justice if a problem gambler were able to attribute liability for his financial ruin to a particular bookmaker with whom he had made the relevant losses due to their failure to exclude him at his request, if he would, had he been excluded by that bookmaker, probably have ruined himself by betting with one or more of that bookmaker's competitors. ....
>
> It follows that in my judgment it is essential for the court to form a view about what would have happened to the claimant's gambling career if he had been excluded from telephone betting with William Hill. If the conclusion is that he

> would still have suffered financial and social ruin and a similar aggravation of his gambling disorder by betting with others, accompanied by more intensified gambling at William Hill's betting offices, it seems to me that as a matter of common sense the claim must fail on causation grounds. William Hill's negligence may have been a *sine qua non* for his particular gambling losses, but would not have been the effective cause of his ruin.

[126] On an appeal from the decision of Briggs J., the court found it necessary to deal only with the question of causation. The appeal was dismissed on the following ground:

> Mr Calvert's claim does not fail, in our judgment, because his continued gambling with William Hill was his own deliberate act breaking the chain of causation; but because the scope of William Hill's duty of care did not extend to prevent him from gambling, and because the quantification of his loss cannot ignore other gambling losses which Mr Calvert would probably have sustained but for their breach of duty. The law not only prescribes the appropriate causal connection, but also the scope of the duty and the scope of the loss which the causal connection links.

[127] Finally, in connection with *Calvert* I note that the agreement that should have been – but was not – completed contained a release in the following terms:

> The customer releases all companies from within the William Hill Group, their officers and employees from any liability or claims whatsoever in the event that *they* fail to comply with this voluntary exclusion. (emphasis added)

[128] In his discussion of causation, Briggs J. accepted that, "subject to any question as to its reasonableness" the release would have protected the defendant from any subsequent acts of negligence. (at para 192)

[129] In the submission of plaintiffs' counsel, the facts pleaded in this case are sufficient to satisfy the plain and obvious test with respect to each of the constituent elements of the tort of negligence. Specifically, it was submitted that:

> (a) a finding that OLGC had reasonable foresight that Mr Dennis would suffer financial and physical harm if OLGC did not take reasonable steps to exclude him from its premises was sufficiently supported by the allegations that OLGC knew that Mr Dennis was a problem gambler and that memory-based enforcement would be inadequate to prevent him from continuing to gamble and to obtain entry for that purpose;
>
> (b) a finding of a relationship of proximity between Mr Dennis and OLGC could be made on the basis of OLGC's repeated representations of its commitment to assist problem gamblers through self-exclusion and otherwise, and, more particularly, through the specific steps it undertook

to implement the self-exclusion program for Mr Dennis and the other class members individually;

(c) no facts have been pleaded from which the court could infer that there are residual considerations of policy that would negative the existence of a duty of care at the second stage of the *Anns* enquiry. There is no risk of indeterminate liability and the self-exclusion measures adopted by OLGC were operational measures undertaken to support and implement its policies related to problem gambling and those of the Government of Ontario;

(d) the claim that OLGC breached its duty to exercise reasonable care is sufficiently supported by the pleaded allegations of the total ineffectiveness of the system of memory-based enforcement and the existence of other more effective alternatives that could have been employed by OLGC; and

(e) on the facts as pleaded, it is not plain and obvious that the gambling and other financial losses suffered by Mr Dennis after he executed the self-exclusion form - and the physical harm he suffered by the progression of his recognised psychiatric disorder - were not the direct and foreseeable consequences of OLGC's breaches of duty.

[130] In their submissions, plaintiffs' counsel placed the emphasis quite properly on the contents of the pleading. Given the novelty and difficulty of the issues relating to the duty of care in (b) and (c) above – and the evident sufficiency of the pleading to support the submissions on the other elements of the cause of action - my initial inclination was that the pleading should be accepted and the plaintiffs permitted to have the issues relating to the duty of care tried on the basis of the evidence without being "driven from the judgment seat" at this preliminary stage of the proceeding. It is, however, necessary to be mindful of a number of recent decisions of the Court of Appeal in which the latitude allowed by the reasoning in *Hunt* has not prevented claims against the Crown from being rejected on the basis of the pleadings alone.

[131] The authoritative approach to the application of the *Anns* test was described by McLachlin C.J. and Major J. in *Edwards* at para 9, as follows:

> At the first stage of the Anns test, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a prima facie duty of care. The focus at this stage is on factors arising from the relationship between the plaintiff and defendant, including broad considerations of policy. The starting point for this analysis is to determine whether there are analogous categories of cases in which proximity has previously been recognised. If no such cases exist, the question then becomes whether a new duty of care should be recognised in the circumstances. Mere foreseeability is not enough to

> establish a *prima facie* duty of care. The plaintiff must also show proximity - that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances.

[132] In the submission of plaintiffs' counsel, the existence of OLGC's duty of care in this case falls within the established category recognised by the same learned judges in *Cooper* at para 36, as cases where "governmental authorities who had undertaken a policy of road maintenance had been held to a duty of care to execute the maintenance in a non-negligent manner".

[133] This established category was relied on by Sachs J. in *Edmonds* v. *Le Plante* (unreported, March 15, 2005) where, in the course of a trial the learned judge ruled that OLGC owed a duty of care when implementing an announced policy of ensuring that no unfair advantage was obtained over other purchasers of lottery tickets when retail vendors purchased tickets for themselves.

[134] The same category was expanded further incrementally in *Heaslip Estate* v. *Mansfield Ski Club Inc.* (2009), 96 O.R. (3d) 401 (C.A.) when proximity was found to exist between a provincial air ambulance operator and an individual whose death was allegedly caused by the operator's failure to give his needs priority over other patients in accordance with its declared policy. Sharpe J. stated (at para 21):

> The appellant's alleged acts of negligence in responding to a specific request for urgently required medical services and the negligent failure to comply with an established government policy, both of which are alleged to have caused harm to Patrick Heaslip. I agree with the appellants that the alleged facts in this case support the existence of a duty of care akin to the one identified in *Attis*, at para 66: "once the government has direct communication or interaction with the individual in the operation or implementation of a policy, a duty of care may arise, particularly where the safety of the individual is at risk." ... the duty of care alleged here belongs within the established category of a public authority's negligent failure to act in accordance with an established policy where it is reasonably foreseeable that failure to do so well cause physical harm to the plaintiff: see, e.g., *Just v. British Columbia*, ...

[135] Arguments by analogy from one factual situation to another are always vulnerable to challenge on the ground that there are material distinctions between the two sets of facts. The analogy here is, I believe, sufficiently close. OLGC adopted a policy under which it would use its best efforts to exclude problem gamblers who requested its assistance. On the analogy of *Edmonds* and *Heaslip*, this policy gave rise to a duty of care that would be breached by a failure to implement it.

[136] Independently of the established category - and on the basis that this is a novel situation - I believe the facts as pleaded would be sufficient to support a finding of proximity in accordance with the principles stated by the Supreme Court of Canada in the cases I have mentioned and

others. I accept the submission of plaintiffs' counsel that a relationship of proximity between OLGC and Mr Dennis could be found to have arisen from the former's repeated representations of its commitment to assist problem gamblers and the specific steps it undertook to implement the self-exclusion program for his benefit.

[137] The plaintiffs' position is that the subsequent gambling losses of Mr Dennis would not have occurred but for OLGC's failure to take reasonable steps to exclude him from the gaming venues. While, as in *Calvert*, this might well be in issue on the basis of a full evidential record at a trial, the material facts from which a finding of causation could be made have, in my judgment, been sufficiently pleaded. In *Drady* v. *Canada* (2008), 300 D.L.R. (4th) 443 the Court of Appeal was insistent that, by itself, the creation of a risk will not give rise to relationship of proximity. It was not, I think, denied that it may be very relevant to causation which, in turn, can be one of the factors on which a finding of proximity is based.

[138] In *Norsk Pacific Steamship Co.* McLachlin J. stated (at para 49):

> In determining whether liability should be extended to a new situation, courts will have regard to the factors traditionally relevant to proximity, such as the relationship between the parties, close physical propinquity, assumed or imposed obligations and close causal connection.

[139] In *Cooper* the same learned judge described the relevant factors as those

> ... that allow us to evaluate the closeness of the relationship between the plaintiff and defendant and to determine whether it is just and fair having regard to their relationship to impose a duty of care upon the defendant (at para 34)

[140] Although in *Childs* the court was dealing with a case of a private social event, the Chief Justice made a number of comments that, I believe, point in the direction of proximity on the pleaded facts of this case. In particular, two situations were identified in which duties to take positive steps to control the behaviour of others may arise. The first was:

> ... where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls ... (para 35)

[141] The other situation:

> ... concerns defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large. In these cases, the defendants offer a service to the general public that includes attendant responsibilities to act with special care to reduce risk. Where a defendant assumes a public role, or benefits from offering a service to the public at large, special duties arise. (para 37)

[142] Two other passages in the judgment were relied on by plaintiffs' counsel as relevant by analogy to the issue of proximity in this case:

> .. the contractual nature of the relationship between a tavern keeper serving alcohol and a patron consuming it is fundamentally different from the range of different social relationships that can characterize private parties in the non-commercial context. The appellants argue that there is "nothing inherently special" about profit-making in the law of negligence. In the case of alcohol sales, however, it is clear that profit-making is relevant. Unlike the host of a private party, commercial alcohol servers have an incentive not only to serve many drinks, but to serve too many. Over-consumption is more profitable than responsible consumption. The costs of over-consumption are borne by the drinker him or herself, taxpayers who collectively pay for the added strain on related public services and sometimes tragically, third parties who may come into contact with intoxicated patrons on the roads. Yet the benefits of over-consumption go to the tavern keeper alone, who enjoys large profit margins from customers whose judgment becomes more impaired the more they consume. This perverse incentive supports the imposition of a duty to monitor alcohol consumption in the interests of the general public. (para 22)

[143] In the submission of plaintiffs' counsel the words of the Chief Justice can be applied equally to the operators of gambling venues such as OLGC.

[144] Finally, I note in connection with the question of risk the Chief Justice's statement in paragraph 38:

> Running through all these situations is the defendant's material implication in the creation of risk or his or her control of the risk to which others have been invited. The operator of a dangerous sporting competition creates or enhances the risk by inviting and enabling people to participate in an inherently risky activity. It follows that the operator must take special steps to protect against the risk materialising.... The public provider of services undertakes a public service, and must do so in a way that appropriately minimises associated risks to the public.

[145] In this connection, I note the pleading that, by making gambling facilities available to the public, OLGC created an environment that was inherently dangerous and would inevitably stimulate latent problem gambling propensities in vulnerable individuals.

[146] On one side of the line is the decision in *Drady* in which the importance of risk creation was downplayed and the absence of allegations that the plaintiff had relied on representations made by Crown servants concerning the safety of particular medical implants was considered to be decisive against a finding of proximity. *Sauer v. Canada*, [2009] O.J. No. 402 (C.A.) is on the other side of the line. There, proximity was found to have been sufficiently pleaded by the

Crown's "public assumption of a duty to Canadian cattle farmers to ensure the safety of cattle feed".

[147] As I have previously indicated, there is no allegation that OLGC's commitment to provide a "best efforts" service induced Mr Dennis to change his position in a manner that caused his losses. The allegation that he relied on OLGC's repeated public representations that it was a responsible operator of the gambling venues, and its undertaking to use its best efforts, appears to me to be much closer to the "assumption of responsibility" approach in *Sauer* than the representation and reliance analysis in *Drady*. Mr Dennis relied on the undertaking of OLGC to exercise its best efforts to exclude him only in the sense that it gave him cause for optimism that he might be able to defeat his compulsive urge to gamble, and may have influenced him to sign the self-exclusion form. "Expectations" would appear to be a more appropriate expression than "reliance" in the sense used in the law relating, for example, to negligent misrepresentations. In *Childs*, at para 40, "reasonable reliance" was explicitly equated with a "reasonable expectation". This, I believe, is also consistent with the reasoning of Briggs J. in *Calvert*.

[148] In disputing the submission that proximity existed between OLGC and Mr Dennis, defendant's counsel referred to the concept of "personal autonomy" and the general principle that there is no duty to take care to safeguard another person from self-inflicted harm. The importance of this principle was affirmed by McLachlin C.J in *Childs* and considerable weight was attributed to it in a number of Australian cases which were referred to in *Calvert* and which, like *Calvert*, were decided after a trial. In one unreported case, however, it appears that an Australian court declined to strike a pleading of negligence by an alleged problem gambler.

[149] Here, it was pleaded that all of the class members were problem gamblers. It was also pleaded that OLGC knew, or ought to have known, that problem gambling is a progressive behavioural disorder in which an individual develops a psychologically uncontrollable preoccupation and urge to gamble. Given the additional pleading of OLGC's public recognition of the existence and severity of the problem, I do not believe that the notion of personal autonomy should be decisive against the existence of proximity for the purposes of section 5(1)(a). As I will indicate, I believe it may have considerable relevance to the enquiry into commonality in which the plaintiffs are not assisted by – and cannot rely on - the pleading that all of the class members were vulnerable problem gamblers in the sense pleaded.

[150] In connection with the possibility of policy considerations that might displace the *prima facie* duty of care established at the first stage of the *Anns* enquiry, plaintiffs' counsel referred to the documentation containing statements of OLGC's self-exclusion policies and procedures. The statements were adopted by OLGC at various times, and without substantial changes, throughout the class period. As I have indicated, they are expressly incorporated in the pleading.

[151] The statements are described as proactive steps taken to complement and support the Government's initiatives in connection with responsible and problem gambling. They contain detailed procedures for implementing the self-exclusion policy and include the forms for self-exclusion and reinstatement.

[152] Plaintiffs' counsel submitted that the forms and the statements of procedures are on their face, and in substance, simply means of implementing government policy and not themselves statements of policy that would be relevant at the second stage of the *Anns* test. In consequence, the challenge to the adequacy of the self-exclusion process does not, in their submission, conflict with government policy that would exclude the existence of a duty of care.

[153] The distinction between policy and operational decisions can be difficult to draw. I am not prepared to find at this stage that plaintiffs' counsel were plainly and obviously wrong. OLGC is an agency of the Crown and was here endeavouring to conduct a commercial enterprise in a manner consistent with government policy. The extent to which its efforts to do this should be characterised as policy decisions of a Crown agent, or purely operational efforts in implementing government policy, is problematic.

[154] The basis of the Crown's immunity for policy decisions was described by McLachlin C.J in *Cooper* at para 38 as follows:

> ... it is established that government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the elected Legislature. It is inappropriate for courts to impose liability for the consequences of a particular policy decision. On the other hand, a government actor may be liable in negligence for the manner in which it executes or carries out the policy.

[155] In *Sauer* it was held at first instance and in the Court of Appeal that issues relating to residual policy considerations should be tried. At paras 45 and 63, Goudge J.A. stated in connection with claims against a manufacturer, Ridley, and against the Crown, respectively:

> 45. It is to be remembered that at this point we have only the statement of claim. Ridley has not filed a defence. In *Childs*, *supra*, the court said that at the second stage, the defendant (in this case Ridley) has the evidentiary burden of showing countervailing policy considerations sufficient to negate the *prima facie* duty of care. It is for this reason that this court has said that it should be circumspect in determining so early in an action that residual policy considerations make it plain and obvious that there is no duty of care.
>
> 63. Moving to the second stage of the analysis, Sauer pleads that these were not policy decisions but were operational, and that this therefore negates Canada's major reason for saying that Sauer's complaints cannot survive this stage of the duty of care analysis. Given that the evidentiary onus at this stage is on Canada, and that at this early point in the proceedings it has brought forward nothing, I agree.

[156] It is not claimed in this case that OLGC did not follow the specific procedures it had formally adopted with respect to the provision of the self-exclusion forms and the manner in

which their execution was to be supervised. The complaint is essentially that, by failing to live up to the commitment it had made with the self-excluded persons, OLGC was not acting consistently with the policies those procedures were intended to implement. In consequence, even if the procedures prescribed by OLGC are to be considered to be policy decisions, this would not, in my opinion, necessarily confer immunity on the decision to adopt an allegedly inadequate method of enforcement of the best efforts commitment: *cf.*, *Heaslip* where a duty of care was found to have arisen by reason of a Crown instrumentality's failure to adhere to its policy decisions. In these circumstances I am not prepared to find that, on the basis of the pleading alone, it is plain and obvious that the adoption of a memory-based enforcement procedure is to be considered as a policy decision that insulates OLGC as a Crown agent from civil law liability.

[157] Finally, for essentially the same reasons as those provided by Briggs J. in *Calvert*, I agree with plaintiffs' counsel that recognition of the existence of a duty of care would not raise the spectre of indeterminate liability in this case.

(c) Occupiers' Liability

[158] Relevant provisions of the *Occupiers' Liability Act,* R.S.O. 1990, c. O. 2 ("OLA") are as follows:

> 1. In this Act, "occupier" includes,
>
> (a) a person who is in physical possession of premises, or
>
> (b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises, despite the fact that there is more than one occupier of the same premises;
>
> 2. Subject to section 9, this Act applies in place of the rules of common law that determine the care that the occupier of premises at common law is required to show for the purpose of determining the occupier's liability at law in respect of dangers to persons entering on the premises or the property brought on the premises by those persons.
>
> 3. (1). An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.
>
> (2) the duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on the premises.

> (3) the duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty.
>
> 4. (1) The duty of care provided for in subsection 3 (1) does not apply in respect of risks willingly assumed by the person who went on the premises, but in that case the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property. ...

[159] It is not part of the plaintiffs' case that OLGC, as an occupier, of the gambling venues had a duty to identify problem gamblers and prevent them from gambling. As applied to Mr Dennis, the claim of occupiers' liability is based on a breach of a duty under section 3(1) of the OLA with respect to a specific person who was, to the knowledge of OLG, a problem gambler. Whether or not the alleged failure of OLGC to exercise its best efforts to exclude Mr Dennis from the premises was actionable as a breach of contract, or of a common law duty of care, section 3(1) might well, in my opinion, impose a duty to take reasonable steps to prevent him from gambling in the event that he obtained access to the gaming premises.

[160] It is pleaded that the system of memory-based recognition was entirely inadequate for this purpose and that Mr Dennis and the other class members suffered significant consequential injuries and losses including "the worsening of their illnesses as problem gamblers" as well as financial and other losses.

[161] Given the pleading that problem gambling is a progressive behavioural disorder in which an individual develops a psychologically uncontrollable predisposition to gambling when exposed to available gambling facilities - and OLGC's knowledge of this - I am not satisfied that the plea that the gambling was a dangerous activity within the meaning of section 3(2) of the Act is plainly and obviously incapable of proof in respect of Mr Dennis.

[162] Similarly, in view of this pleading, I do not believe it is plain and obvious that Mr Dennis must be found to have "willingly" accepted the risks attached to being on the premises and participating in the activities there within the meaning of section 4(1) of the statute.

[163] Counsel for the defendants submitted that reliance on occupiers' liability was misconceived in that the OLA permits recovery for physical injuries only. As authority for this submission, counsel cited the decision of Ground J. in *Geo S. Kelson and Co.* v. *Ellis Don Construction Ltd.*, [1998] O.J. No. 1172 (G.D.), in which it was held that the OLA did not extend to claims for economic loss. Referring, in particular, to section 4 (1) of the Act, the learned judge commented that the OLA seems to contemplate that only physical injury to persons and property will be actionable (at para 55).

[164] Here, however, Mr Dennis claimed damages for the deleterious consequences that the availability of gambling facilities had on his psychologically uncontrollable progressive behavioural disorder. In *Odhavji Estate* v. *Woodhouse*, [2003] 3 S.C.R. 263 at para 41, Iacobucci J. stated:

> It is well established to that compensation for psychiatric damages is available in instances in which the plaintiff suffered from a visible and provable illness" or "recognisable physical or psychopathological harm".

[165] In *Mustapha v. Culligan of Canada Ltd*, [2008] 2 S.C.R. 114 at para 8, the court stated:

> Generally, a plaintiff who suffers personal injury will be found to have suffered damage. Damage for purposes of this inquiry includes psychological injury. The distinction between physical and mental injury is elusive and arguably artificial in the context of tort.

[166] There is, in my opinion, sufficient in the pleading to distinguish this case from *Kelson* and to permit a finding that a cause of action of Mr Dennis for occupiers' liability has been sufficiently disclosed in the pleading.

(d) Waiver of Tort

[167] In the alternative to the claims for compensatory damages in negligence and occupiers' liability, the plaintiffs claim an order for the payment of revenues or net profits obtained by OLGC from problem gamblers.

[168] To the extent that the claim extends to revenues or profits from gambling by persons who are not within the class, it is obviously untenable.

[169] If the claim is restricted to the amounts received from Mr Dennis and the other class members, I believe that, in conformity with the reasoning in *Hunt*, the decision of the Divisional Court in *Serhan Estate* v. *Johnson & Johnson*, [2006] O.J. No. 2421 (Div. Ct.) - and the subsequent decision to deny leave to appeal in *Heward* v. *Eli Lilly*, [2008] O.J. No. 2610 (Div. Ct.) – it is not plain and obvious that Mr Dennis has no cause of action to recover the amounts of his subsequent gambling losses.

[170] In argument, Mr Morse referred briefly to the possibility of a restitutionary accounting of revenues or profits based on OLGC's alleged breaches of the *Criminal Code*. The argument was not developed and, as pleaded, the claim was based on the torts of negligence and occupiers' liability. As such it would be equally dependent on the ambit and effectiveness of OLGC's attempt to exclude its liability in the self-exclusion forms.

[171] It is unfortunate that the law on the availability of what are sometimes referred to as restitutionary damages, or an account of profits, should remain in a state of uncertainty. In this regard, I am not aware of any significant developments in this jurisdiction since the decision in *Serhans* - although I understand that there are pending proceedings in which the issue is likely to be tried.

[172] The availability of an account of profits gained from non-proprietary torts was considered by the Court of Appeal in England in *Devenish Nutrition Limited* v. *Sanofi-Aventis SA (France)*, [2009] 3 All E.R. 27 as a preliminary issue to be decided, for the most part, on the pleading. The court was unanimous in holding that it was bound by its previous decision in *Stoke-on-Trent City Council* v. *W & J Wass Ltd.*, [1988] 3 All E.R. 394 to find that the remedy was not available in cases of non-proprietary torts.

[173] In *Serhan*, at first instance, I had referred to criticisms of the decision in *Stoke-on-Trent* and its possible inconsistency with other cases in England and in this jurisdiction. I concluded that the law was sufficiently uncertain to make it inappropriate to follow the decision and to reject the availability of the remedy for the purposes of section 5(1)(a) of the CPA on the facts of *Serhan*.

[174] While, ordinarily, a decision of the English Court of Appeal to follow *Stoke-on-Trent* might be considered to justify reopening the issue of the availability of the remedy of a disgorgement and account of profits for non-proprietary torts, I do not think the reasoning in *Devenish* would justify such an approach.

[175] Quite apart from the fact that I am bound to follow the decisions of the Divisional Court, the analysis in each of the three judgments delivered in *Devenish* falls short of settling the issues of law that will have to be decided in this jurisdiction.

[176] The most extensive analysis was contained in the reasons of Arden L.J. who considered at some length the implications of the decision of the House of Lords in *Blake v. Attorney-General*, [2001] A.C. 268 and stated:

> I conclude on this sub-issue that it is consistent with Blake for restitutionary awards to be available in the case of a non-proprietary tort but that the decision of this court in [*Stoke-on-Trent*] precludes this court from reaching that conclusion.

[177] The learned judge expanded on that statement in paragraph 58 as follows:

> As I read the speech of Lord Nicholls, the making of a restitutionary award does not depend on whether a property right has been infringed or whether the award is compensatory for loss or not. Rather, it depends on whether damages alone would be a sufficient remedy in the eyes of the law for the wrong that has occurred. If this is right, and moreover an account of profits can be ordered for a breach of contract that, as in Blake, does not involve interference with a proprietary right, it would not, in my judgment, be inconsistent with the reasoning of Lord Nicholls in

> the passages cited above if it were also available in the case of non-proprietary tort. This point can be supported by pointing to the fact that a claim for damages under Lord Cairns' Act may also be available for a non-proprietary tort. Lord Nicholls' speech does not suggest an account of profits is not available on a like basis in the case of a non-proprietary tort. He draws on cases in which damages are assessed by reference to the benefit obtained by the wrongdoer. This can occur in cases in tort. However, this is not a line of thought which I can pursue if as the respondents admit this court has held that such an award can only be made in the case of a proprietary tort in a manner binding on this court on this appeal.

[178] Tuckey L.J. was similarly of the opinion that the reasoning in *Blake* suggests that "an account of profits could be ordered for non-proprietary torts" but that the court was bound by its earlier decision in *Stoke-on-Trent*. He stated:

> I agree with what Arden L.J. says at para 57 that Blake suggests that an account of profits could be ordered for non-proprietary torts. But for the reason she gives in para 75 I do not think it can be said that [*Stoke-on-Trent*] which was not cited in *Blake* has necessarily been overruled by it. It can stand with *Blake*. Non-proprietary torts do still therefore fall to be considered as an exception to the general principles articulated by Lord Nicholls in Blake unless and until [*Stoke-on-Trent*] is overruled.

[179] The third judge, Longmoore L.J, was not prepared to regard *Stoke-on-Trent* as closing the range of cases in which an account would be ordered but considered that, generally, it should be available only in connection with property, or fiduciary claims and other exceptional cases such as *Blake*. At para 149 he quoted the following passage from the dissenting speech of Lord Hobhouse in *Blake* at page 299:

> ... if some more extensive principle of awarding non-compensatory damages for breach of contract is to be introduced in to our commercial law the consequences will be very far-reaching and disruptive. I do not believe that such is the intention of your Lordships but if others are tempted to try to extend the decision of the present exceptional case to commercial situations so as to introduce restitution rights beyond those presently recognised by the law of restitution, such a step will require very careful consideration before it is acceded to.

[180] Each of the learned judges in *Devenish* accepted that, in accordance with the reasoning in *Blake*, an account might be available in cases where the plaintiff had suffered no loss and each was of the opinion that the remedy should be limited to cases where compensatory damages would not be adequate. In considering the question of adequacy the court had recourse to evidence - an avenue that is not open to me for the purposes of section 5(1)(a). The assessment of compensatory damages in this case may well give rise to some difficulty. In *Devenish*, Arden L.J. left open the possibility that evidential difficulties in proving losses might have some

bearing on the question whether an account of profits should be ordered instead of compensatory damages (para 106).

[181] Two final points on *Devenish*: Arden L.J. (at para 39) referred to the existence of flexibility in determining the percentage of profits to be awarded; and the same learned judge categorically rejected the notion that an election to claim an account of profits rather than compensatory damages can be deferred until after judgment. (para 104)

[182] I have referred to *Devenish* at some length because the analysis is helpful in focusing attention on the issues that have emerged in this comparatively undeveloped area of the law of remedies that is particularly encountered in class proceedings and remains at present in a state of limbo in this jurisdiction. As a decision based ultimately on *stare decisis* as applied to decisions of the English Court of Appeal, it would not in my opinion justify a reconsideration of the earlier decisions of this court, even if it were open for me to do this. In consequence, in this case, as in the others, I am satisfied that the important issues raised on the claim for an account of revenues or profits - under the rubric of "waiver of tort" or otherwise - should be left to be dealt with at trial after the evidential record is complete.

2. Section 5 (1) (b): The Existence of a Class

[183] In paragraph 5 (a) of the statement of claim the primary class that the plaintiffs seek to represent is defined as:

> Dennis, and all other residents of Ontario and the United States who signed the [self-exclusion form] at any time in the period from December 1, 1999 to February 10, 2005.

[184] It was not disputed by OLGC's counsel that the definition employs objective criteria. Given the claims advanced on behalf of the class, I am satisfied that it is not objectionably under-inclusive. The question whether it is over-inclusive involves an enquiry into the existence of a rational connection between the class definition and the common issues. This, in turn, will require a consideration of the commonality of the latter and will be considered in connection with the requirement in section 5(1)(c).

[185] The inclusion of residents of the United States is presumably based on the accessibility of OLGC's gaming venues – such as the original casino in Windsor - to such persons. At this stage OLGC has not been able to determine the number of them who would be included in the estimated 10,428 persons who signed self-exclusion forms during the class period.

[186] The derivative class of family law members is, as such, defined satisfactorily.

3. Section 5(1)(c) - Common Issues

[187] The plaintiffs have provided a list of 15 proposed common issues. These must advance the proceeding significantly if it is to be acceptable for certification. The most important for this purpose are:

(a) whether the self-exclusion forms are binding contracts that required OLGC to take reasonable care to deny entry to OLGC's facilities to the primary class members, and to detect and remove any who gained entry;

(b) whether OLGC had a duty in tort to take such reasonable care;

(c) whether OLGC breached either, or each, of the duties in 1. or 2. or its duty under the OLA;

(d) whether damages sustained by class members as a consequence of any breaches of the above duties can be determined on an aggregate basis in whole, or in part; and

(e) whether OLGC can be required to account for gross revenues, or net income, derived from class members as a consequence of any such breaches of duty.

[188] In addition, there are issues relating to punitive damages, limitations, damages sustained by family members of the derivative class, prejudgment and post-judgment interest, and the expenses of administration and of the resolution of individual issues.

[189] I believe that serious flaws in the plaintiffs' case for certification are exposed when consideration is given to the requirements of commonality, and that of a rational connection between the class definition and the proposed common issues. For the reasons that follow, I am satisfied that:

1. the claims advanced on behalf of the class members are predicated, and dependent, on their vulnerability;

2. vulnerability is not a condition of class membership. As defined, and, in consequence, causes of action that are addressed by the proposed common issues are not confined to compulsive gamblers;

3. the problem of over-inclusiveness of the class definition, and the consequential individualistic nature of the proposed common issues, cannot be resolved by the use of statistical evidence to characterize a percentage of the class members as pathological problem gamblers; and

4. in consequence, the requirement of a class in section 5(1)(b) and of common issues in section 5(1)(c) of the CPA are not satisfied and certification must be denied.

[190] A mass of evidence has been filed on the nature and prevalence of problem gambling. The vulnerability of self-excluded persons - the class members – as problem gamblers is the general theme of the claims pleaded on their behalf. It is, therefore, striking – and I believe it is significant - that the class definition does not require the members to be identified as problem gamblers in any sense, or to any particular degree. Similarly, the proposed common issues do not refer to problem gambling and do not, in their terms, treat its nature and extent as factors to be considered by the trial judge. The class definition as originally defined in the statement of claim restricted the class to "compulsive" gamblers. This class criterion was deleted when the pleading was amended because, I presume, it would not have permitted class members to be identified with sufficient objectivity and certainty.

[191] In my opinion, the vulnerability of class members is essential to the validity of their claims. Persons who were not problem gamblers would have no tenable claims and there could be no question of certifying the proceeding in respect of such persons. The evidence is that the disorder is progressive and that there is a range of its severity. There is nothing in the class definition or the formulation of the common issues to confine the claims asserted to members of the class who were vulnerable to any particular degree, if at all, and, in my judgment, the class definition is to that extent objectionably over-inclusive, and the proposed common issues lack commonality. While it can no doubt be presumed that most self-excluded persons were at least apprehensive about their vulnerability, the degree of their addiction, if any, and the significance to be attributed to the concept of personal autonomy could only be determined on an individual basis.

[192] If Mr Dennis, or any of the other class members, had advanced the same claims in individual actions, OLGC would have been entitled to raise issues relating to personal autonomy and degrees of vulnerability in connection with elements of liability such as reasonable foresight of harm; proximity; unconscionability; a willing assumption of risk for the purposes of section 4(1) of the OLA; causation of proven losses; contributory negligence; and punitive damages. The right of OLGC to pursue such issues on an individual basis is not, in my opinion, excluded by pursuing the claims under the procedure of the CPA and defining the class, and the common issues, without reference to the vulnerability of the class members. Nor, for the reasons I will give, can the issues be resolved by reference to statistical probabilities.

[193] In *Hollick,* at para 21, it was accepted that over-inclusive classes can be permitted where the class "could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues". I do not understand this principle to permit an over-inclusive class to be accepted if the reason why it could not be drafted more narrowly is the inability to provide a limiting class criterion that will establish the rational link with the proposed common issues on which commonality depends. In such a situation, instead of common issues determinable on a class-wide basis, there will be individual issues affecting liability to each member of a diverse group. In my judgment, that is the case here.

[194] The problem is not avoided by the pleading that each of the class members was a problem gambler in the sense that he or she suffered from psychologically uncontrollable preoccupations, urges and compulsions to engage in gambling. For the purpose of the inter-related requirements of an acceptable class definition and acceptable common issues, evidence is required and the pleading will not be determinative on the basis of an assumption that its allegations of fact will be proven at trial. Evidence of a rational connection between the class definition and the common issues - and, which amounts to the same thing, the existence of commonality - must provide some basis in fact for an inference that each of the class members has a claim of which a resolution of the proposed common issues will be a substantial ingredient.

[195] Plaintiffs' counsel attempted to remedy the absence of anything in the class definition that would confine it to a discrete determinative group of vulnerable gamblers by reference to the evidence of Dr Williams and his reliance on a classification of gamblers into: (a) pathological problem gamblers with an uncontrollable propensity to gamble; (b) moderate problem gamblers where there is no significant loss of control; (c) at-risk, or low-risk, gamblers where there is a pattern of gambling behaviour that puts the gambler at risk of becoming a moderate or pathological gambler; and (d) recreational or non-problem gamblers.

[196] The category of pathological gamblers corresponds broadly with the description of problem gamblers in the pleading and the identification of the class members as pathological gamblers is, in my opinion, fundamental to the case for certification presented by plaintiffs' counsel. As Dr William stated in cross-examination:

> We're not talking about moderate gamblers we're talking about pathological gamblers where loss of control is an inherent feature and so it is likely these people will tempt fate and sooner rather than later.

[197] It is not disputed that empirical and statistical research into the behaviour of self--excluded problem gamblers is still in its infancy. Based on his work, and a limited number of studies conducted by others, Dr Williams estimated that approximately 87% of the class members would have been pathological gamblers.

[198] Apart from the criticisms that were levelled by OLGC 's counsel at the objectivity of Dr Williams and the adequacy of his methodology, there are a number of reasons why reliance on this evidence is insufficient to convert the class, as defined, into a sufficiently determinative group of vulnerable persons.

[199] In the first place, Dr Williams concedes - and Dr Shaffer agrees - that not all class members are pathological gamblers.

[200] Second, within the category of problem gamblers there are degrees of severity and moments of clarity are experienced.

[201] For the purpose of the classification, Dr Williams cited the *Diagnostic and Statistical Manual for Mental Disorders* - 4th edition (DSM-IV) of the American Psychiatric Association (1994). This is referred to by Dr Shaffer in a footnote to his report as follows:

> There is ambivalence about the construct validity of pathological gambling as a unique disorder. Example, there is a cautionary note in the DSM-IV (American psychiatric Association, 1994) suggesting possible limits to the relevance and exculpatory value of this diagnostic category: "... inclusion here, *for clinical and research purposes*, of a diagnostic category such as Pathological Gambling ... does not imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder, or mental disability. *The clinical and scientific considerations involved in categorisations of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability, determination and competency.* (emphasis added)

[202] The test set out in DSM-IV for determining whether a person is a pathological gambler was discussed in *Calvert* and a case in the Federal Court of Australia: *Foroughi* v. *Star City Proprietary Ltd*, [2007] F.C.A. 1503.

[203] As described by Briggs J. in *Calvert*, a list of 10 factual criteria is provided. When three or more are satisfied, a patient is characterised as a problem gambler. If five or more are met, he or she is described as a "probable pathological gambler". This would be the case if, for example, the patient:

1. needs to gamble with increasing amounts of money in order to achieve the desired excitement;

2. is restless or irritable when trying to cut down or stop gambling;

3. gambles as a way of escaping from problems or of relieving a dysphoric mood (eg feelings of helplessness, guilt, anxiety, depression);

4. after losing money gambling, often returns another day to get even;

5. lies to family members, therapists, or others to conceal extent of involvement with gambling.

[204] In *Foroughi*, although the expert witnesses were in agreement that the plaintiff satisfied five of the conditions to be a probable pathological gambler, the court accepted the opinion of one of the experts that such persons can exercise control and limit or cease gambling if they choose to do so.

[205] In *Calvert*, Briggs J. referred to the DSM-IV classification when reaching a conclusion about the degree of the compulsion to gamble suffered by Mr Calvert at various times. After a

detailed consideration of Mr Calvert's gambling history and hearing expert witnesses on each side, it was held that he was a severe pathological gambler by the end of the relevant period after he had requested sel-exclusion, but not necessarily earlier. Despite this use of the DSM-IV classification, the learned judge stated that Mr Calvert's

> ... undoubted continued responsibility ... in relation to his gambling would, however severe the loss of control during the second half of 2006, have led to a very large reduction of any award on the grounds of contributory negligence.

[206] The Court of Appeal agreed with the learned judge on this point stating:

> ... we agree with the judge that a deduction would fall to be made for contributory negligence as a result of Mr Calvert continuing to gamble despite periods of clarity which he would have had, and when he could have taken steps, not limited to self-exclusion, to try to deal with his habit. In that connection, it was not until some time in the last quarter of 2006 that he became a severe pathological gambler who had lost control of his gambling, rather than merely suffering an impairment of control:.... Moreover, on 10th October 2006, in a moment of clarity, he was expressly offered the opportunity to self-exclude and he declined to take it.

[207] In the opinion of the Court of Appeal, damages would have been reduced by 30 per cent for contributory negligence if a finding of liability had been made.

[208] I find nothing in these authorities from other jurisdictions to suggest that it would be fair to the defendant - or that the court could properly be asked - to decide, for example, whether a duty of care was owed to all class members, and whether they "willingly" accepted the risks when entering OLGC's gambling venues on the basis of an assumption that a person who satisfied five or more of the diagnostic criteria in DSM-IV would have a materially uncontrollable disorder.

[209] As the caveat at the end of the passage I have quoted from DSM-IV suggests, the 10 *indicia* may be useful for research and clinical studies but there is, in my opinion, nothing in the evidence to suggest that, even if the class was limited to those self-excluded persons who satisfied five of the diagnostic criteria, the proposed common issues could fairly be answered on a class-wide basis without individual enquiries into the personal circumstances and gambling history of each class member.

[210] Moreover, as, in this case, the experts were in agreement that not all self-excluded persons - the class members - were problem gamblers in the sense on which plaintiffs' counsel relied, counsel were forced to justify reliance on their vulnerability by reference to the statistical evidence of Dr Williams that 87% of self-excluded persons would be pathological gamblers at, I believe, the times that they executed the self-exclusion forms. As I have mentioned when summarizing his evidence, he was also of the opinion that a significant number of self-excluded

persons would have returned to an OLGC gambling facility, and that reasonable projections of their numbers could be derived from studies of the behaviour of persons addicted to alcohol, drugs and tobacco. He also stated with some confidence that, by referring to a published index, it would take him no more than five minutes to place any particular gambler in the appropriate one of his four categories without regard, presumably, to any issues of credibility.

[211] The statistical evidence based on sampling to which Dr Williams referred – and on which plaintiffs' counsel relied - is not, in my opinion, admissible for the purpose of determining commonality of the five of the proposed common issues on which OLGC's liability depends. To ascribe commonality to such issues on the basis of such evidence would be to assert that OLGC's liability, or elements affecting its liability – other than proof of damages or the amount of a monetary award - can be determined on the basis of statistical probability.

[212] Commonality presupposes that the same, or some of the same, material issues of fact or law that will assist in establishing the claims of each class member – and the liability of OLGC - can be decided at the trial of the proposed common issues. The CPA does not permit the requirement of commonality to be avoided by a statistical estimate that 87% of the class members were pathological problem gamblers, or that there was an 87% statistical probability that each class member was a pathological problem gambler. It is a procedural statute and it does not abrogate the requirement that a defendant can be found liable only to those persons who can prove their claims.

[213] Accordingly, it has been held that the statute does not permit the liability of a defendant, or the entitlement of a class member, to be determined on the basis of statistical probabilities based on the behaviour of other persons: *Chadha* v. *Bayer Inc.* (2001), 54 O.R. (3d) 520 (Div. CT.); *2038724 Ontario Ltd.* v. *Quiznos Canada Restaurant Corp.*, [2008] O.J. No. 833 (S.C.J.); rev'd on other grounds, [2009] O.J. No. 1874 (Div. Ct.); *Risorto* v. *State Farm Mutual Automobile Insurance Co.*, [2007] O.J. No. 876 (S.C.J.); *Parsons* v. *Canadian Red Cross Society* (2000), 51 O.R. (3d) 261 (S.C.J.)

[214] In *Chadha*, Somers J. stated (at paras 72-73):

> The submission of the respondents ... that "the Class Proceedings Act was expressly designed by the Ontario Legislature to provide procedures which will allow the claims of victims of a price-fixing conspiracy to be assessed on an aggregate basis" is erroneous. It is not the entitlement to damages which can be assessed on an aggregate basis under the Act, but rather the quantum of damages which can be so assessed.
>
> Nor can statistical evidence adduced by experts resolve the problems of proof present in this case. First, s. 23 of the Act deals with the admissibility and use of statistical evidence "[F]or the purposes of determining issues relating to the amount or distribution of a monetary award under this Act. ..." It does not render

otherwise inadmissible statistical evidence admissible for other purposes, such as determining liability.

[215] Although made in the context of the administration of a plan under a settlement, the following comments of Winkler J. in *Parsons,* (at para 32) are equally applicable to the issues relating to commonality in this case:

> In my view, to paraphrase the words of Gonthier J. in Lawson, while probabilities may be part of a determination of causation, the determination of entitlement should not be moved from the concrete to the probabilistic plane. In these circumstances given the overwhelming effect of expert evidence of this nature, especially where the evidence to the contrary is sparse or non-existent, the use of probability calculations will likely become the sole determining factor used by the Administrator. Moreover, this inherent danger in the use of expert evidence has been recognized by the Supreme Court of Canada in *R.D.* v. *D. (D.)*, 2000 SCC p. 43. There, Major J., writing for the majority, expressed concern that the use of expert evidence often leads to the decision-maker simply "attorning" to the expert's opinion. In this case, the danger of the misuse of the probability calculations is manifest.

[216] I note that recent decisions of this court have denied that, where proof of loss is a necessary element of liability, it must be shown that damages could be proven on a class-wide basis without regard to the aggregate assessment provisions of 24 of the CPA assisted by an application of generally accepted statistical principles referred to in section 23. This I understand was the view of the majority of the Divisional Court in *2038724 Ontario Ltd. v. Quiznos Ltd Canada Restaurant Corporation,* [2009] O.J. No. 1874 at paras 46 - 66 - with Swinton J., in dissent, at paras 186 – 187, agreeing with the motion judge that all the constituent elements of liability must be proven on a class-wide basis. The passage I have quoted from the reasoning of Somers J. in *Chadha* was arguably to the same effect as that of Swinton J. I have been told that an appeal in *Quiznos* is pending.

[217] The possible conflict in the decisions was considered by Rady J. in *Irving Paper Ltd v. Atofina Chemicals Inc.*, [2009] O.J. No. 4021 (S.C.J.) where the learned judge referred to statements in the reasons of Rosenberg J.A. and Winkler C.J.O. in *Markson v. MBNA Canada Bank,* [2007] O.J. No. 1684 (C.A.) and *Cassano v. Toronto-Dominion Bank,* [2007] O.J. No. 4406 (C.A.) to the effect that only a finding of "potential liability" is required before an aggregate assessment of damages can be made. She concluded (at para 118):

> I am of the view that *Markson* and *Cassano* signal a different approach to be taken to certification whether it be in breach of contract or other types of cases. Justice Rosenberg spoke of the need to establish "potential liability" before resort to the aggregate provisions could be had. That being so, it seems to me that the plaintiffs here need only prove potential liability - in other words, that the defendants acted unlawfully. This would trigger the aggregate assessment

> provisions. Further, *Markson* establishes that not every class member need have suffered a loss and so it is not necessary to show damages on a class-wide basis.

[218] The learned judge did not suggest that proof that the defendants acted unlawfully could be avoided by use of the aggregation provisions or by way of statistical evidence, and I do not believe her decision or those of the Divisional Court and the Court of Appeal, alter the necessity to show that other elements of liability that are framed as common issues - such as the existence of a duty of care or a breach of duty - must have commonality. For this purpose, it must be shown that they can be proven on a class-wide basis without regard to the aggregate assessment provisions of section 24. These provisions apply only where:

> ... no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; ...

[219] I am of the same opinion where the question is whether proven losses were caused by the defendant's conduct – as distinguished from whether there were any losses compensable in damages. There may, perhaps, be a question whether the approach of the Court of Appeal in *Calvert* is consistent with that in *Athey v. Leonati,* [1996] 3 S.C.R. 458 and *Resurfice Corp. v. Hanke,* [2007] 1 S.C.R. 333. However, despite the liberalising effect of the recent decisions, I do not believe we have yet reached the stage where "potential liability" will be established - and the aggregation provisions can be used - without the need to determine individual issues relating to causation of identified losses. Nor do I believe that the "potential liability" of OLGC can fairly and properly be established on the basis of statistical probabilities relating to individual issues other than those referred to by Rady J. in *Irving Paper*, or to other common issues of material fact or law on which liability depends.

[220] I am also of the opinion that, even if the result is that *Chadha* has been overtaken by the subsequent decisions to the effect that sections 23 and 24 can be applied even where proof of harm or losses is a precondition for liability, the prohibition on the use of statistical evidence fo satisfy other preconditions has not been affected and should be applied in this case; *cf., Pro-Sys Consultants Ltd v. Infineon Technologies AG*, [2009] B.C.J. No. 2239 (C.A.) at paras 411 ff.

[221] In short, if, as I believe, the degree of vulnerability of members of the primary class is relevant to such other elements of liability, it is not permissible to conclude on the basis of statistical sampling, or a five-minute labelling test, that any of the class members was a vulnerable problem gambler to any particular degree. Individual inquiries would be necessary for this purpose and this would then be an example of the situation referred to by the Chief Justice in *Rumley v. British Columbia,* [2001] 3 S.C.R. 184 (at para 29) where a determination of the proposed common issues would degenerate into a consideration of the claims of each of a potentially diverse group of individuals. There would have to be an inquiry into the personal circumstances, the gambling history, the extent of the addiction or compulsion to gamble of each class member at particular times, and, if the approach to causation in *Calvert* is accepted, his or her likely behaviour if OLGC had exercised its best efforts or exercised reasonable care. An

attempt to avoid problems of class definition and commonality at the certification stage by relying on statistical evidence at trial for the purpose of narrowing the class is not in my opinion acceptable.

[222] A similar problem exists in connection with the commonality of the issue relating to breach of duty. The experts are in agreement that a significant number of self-excluded persons would not have subsequently attempted to obtain entry to the gambling venues. In consequence, for them there can be no question of a failure to exercise OLGC's best efforts, or to take reasonable steps to exclude them, as the occasion for doing so would not have arisen.

[223] As Rady J. indicated in *Irving Paper*, it is established that the inability of some class members to prove harm or losses will not make a class objectionably over-inclusive. Here, however, it is not just that persons who did not attempt to re-enter would not have suffered losses from a breach, but rather that no breach would have occurred as the obligation could not be performed unless and until entry was attempted.

[224] Again, the CPA does not, in my opinion, permit the commonality of issues of breach to be determined - from studies of alcohol or drug addictions, as Dr Williams suggested, or otherwise – on the basis that it is statistically more likely than not that any self-excluded person, or number of them, would subsequently attempt to return to OLGC's gambling facilities. Common issues are those that can be determined on a class-wide basis - and not on the basis of expert evidence of the statistical probability of commonality. Defendants in individual actions are not subjected to liability on the basis of statistical probabilities that the material facts that constitute a cause of action exist or have occurred. The CPA, as a procedural statute, does not alter this position except for the limited purposes referred to in section 23.

[225] In the form in which the case for certification has been presented, the absence of commonality in the five of the common issues I have identified as most fundamental would be fatal to the claim for certification as the remaining common issues are either dependent on them, or by themselves would not advance the proceeding to a sufficient extent. In view of the questions of law and fact that would remain to be determined after the trial of common issues there would be no possibility of an aggregate assessment of damages pursuant to section 24 of the CPA.

[226] The absence of commonality in the issue relating to breaches of duty could possibly, be cured by an amendment that would limit the class definition to self-excluded persons who subsequently achieved re-entry, unless the additional criterion is thought to be objectionably merits-based. The question whether a particular claimant did re-enter would then be another individual issue to be determined in respect of each class member before any possibility of reliance on the aggregation provisions in section 24 would arise.

[227] Plaintiff's counsel did not suggest that the class definition could properly be amended to limit the class to self-excluded persons who were pathological gamblers under the DSM-IV classification, or otherwise. As I have indicated, the restriction of the class to "compulsive

gamblers" in the class definition as originally framed in the pleading was subsequently and, in my opinion, properly deleted.

[228] Although the possibility of amending the class definition at the certification stage was referred to in *Hollick*, the plaintiffs have not, in my judgment, discharged the burden of providing even the required minimum basis in fact for a conclusion that the DSM-IV classification of pathological gamblers is sufficiently reliable and determinate to permit it to be used as a class criterion that would not beg the questions of the existence and relevance of different degrees of loss of control and vulnerability.

[229] Finally, on the question of aggregation, I should add that the evidence falls far short of satisfying me that statistical evidence that complies with the conditions in section 23 (1) of the CPA could establish that "the aggregate or a part of [OLGC's] liability to some all the class members can reasonably be determined without proof by individual class members" as required for an aggregate assessment of damages pursuant to section 24(1)(c) of the CPA.

[230] As the decision in *Calvert* shows, the amount of any liability for breach of contract - or of a duty of care - would depend on the resolution of difficult issues of causation. There is no evidence, and there has been no suggestion, that information compiled in accordance with generally accepted statistical principles could determine the losses caused by OLGC's failure to exercise its best efforts, or to exercise reasonable care, for all or any of the class members. The estimates provided by Dr Williams do not take into account the difficult question of a causal link, if any, between losses subsequently incurred by class members and the alleged breaches of duties by OLGC. Nor do they distinguish between losses incurred at OLGC's gambling facilities and those incurred elsewhere, or by other available methods of gambling. They also appear to assume the existence of 10,428 class members at all times during the class period.

[231] For the reasons given, I am of the opinion that the attempt to define the common issues in a manner that would avoid an inquiry into the status of each class member as a "problem gambler" has not been successful. I am satisfied that a proceeding that requires a consideration of the nature, degree and consequences of each class member's gambling propensities is individualistic to an extent that it is not amenable to resolution under the procedure of the CPA. The common issues would have to be so truncated that their resolution would not sufficiently advance the claims of the class members. They would, for the most part, be limited to the interpretation of the forms and the adequacy of OLGC's efforts to enforce self-exclusion.

4. Section 5 (1) (d) - The Preferable Procedure

[232] As each of the requirements for certification in section 5 (1) must be satisfied, my conclusions on the over-inclusiveness of the class definition, and the issue of commonality, require the dismissal of the motion to certify the proceeding. In these circumstances, the need to consider the preferability of a class action over individual actions does not arise. However, it follows from the findings I have made that a class proceeding would not be preferable to

individual proceedings in terms of fairness and efficiency viewed in the light of the legislative objectives of judicial economy and access to justice.

[233] The procedure under the the CPA could not be adapted fairly and efficiently to resolve the individual issues relating to the degrees of vulnerability of each of 10,428 class members for the purpose of determining whether actionable breaches of duty occurred - including the question of unconscionability - as well as whether losses can be attributed causally to any such breaches and, subject to a possible application of section 4 of the *Negligence Act*, R.S.O. 1990, c. N. 1, degrees of fault for the purposes of contributory negligence.

[234] I agree with counsel for OLGC that these individual issues do not lend themselves to a summary determination as is contemplated by section 25 of the CPA. I am satisfied that they cannot be dealt with fairly and adequately without evidence, and a detailed consideration, of the degree of vulnerability, and the circumstances, of each class member. To wrap them all into one proceeding would, in my opinion, make it complex and unmanageable to an extent that would far outweigh the benefits to be obtained from subjecting them to the procedure in the CPA. As I have indicated, the attempt to avoid the individual issues by pleading that all class members were problem gamblers in a severe, or pathological, sense must be rejected. Evidence is required for each of the requirements for certification other than that in section 5(1)(a).

[235] Similarly, the excessively individualistic aspects of the claims asserted by the plaintiffs, are not avoided by their counsel's characterisation of the claims as "systemic". Where, in cases such as *Rumley* v. *British Columbia*, [2001] 3 S.C.R. 184, such a characterization has been found to be appropriate and helpful, it has been predicated on a material lack of diversity among the members of the class. That is not the case here.

[236] The evidence does not support a conclusion that all class members were pathological problem gamblers, and the omission to refer to problem gambling in the formulation of the common issues does not alter the fact that the identification of the class members as vulnerable is fundamental to the plaintiffs' case for certification as well as, in the ultimate analysis, the tenability of their individual claims.

[237] This is a situation in which, in my opinion, the procedure under the CPA would have disadvantages rather than any significant advantages over individual actions in which the focus would be entirely on the circumstances and experience of a particular individual rather than simultaneously on those of a potentially large class of persons with diverse backgrounds and gambling histories for whom liability could only – but could not properly - be established by the use of statistical evidence.

[238] In view of the nature of the individual inquiries, and the difficulties of proof relating to the existence of losses, I am not persuaded that certification would appreciably advance the legislative objective of judicial economy. The procedure under the CPA has its own associated special costs – including but not limited to those of giving notice. In view of these costs, and the uniqueness of the personal circumstances and gambling history of each of the class members, I

am of the opinion that the expense and complexity of attempting to dispose of all their claims in one inevitably protracted proceeding is likely to outweigh any economy achieved by a resolution of the questions of interpretation, and the adequacy of OLGC's efforts to perform its obligations, in a single trial.

[239] As far as access to justice is concerned, this is not a case where the amounts at stake are so small that individual proceedings would be prohibitively expensive. The evidence is, again, that nine individual actions have been settled to date with payments of $167,000 on average and another four actions are pending. Access to justice would be enhanced only to the extent that class members may well prefer the relative anonymity of a class proceeding. However, passive participation would not be an option and class members would be at risk for the costs of resolving the individual issues.

[240] Given the status of OLGC as a government agency, and the publicity that successful individual actions are likely to receive - as well as steps already taken by OLGC in 2007 and 2008 to find means for making self-exclusion programs effective - behavioural modification would not, in my opinion, weigh heavily in favour of certification.

5. Section 5(1)(e): The Representative Plaintiffs and the Litigation Plan

[241] Counsel for OLGC raised no objections to the suitability of Mr Dennis and Ms Noble to represent the class if the proceeding was otherwise amenable to certification. In their affidavits sworn for the purpose of the proceeding they deposed to their understanding of their responsibilities as representative plaintiffs if the proceeding was certified. They are obviously intelligent persons and, having lived through the harrowing experiences I have described, their understanding and sensitivity to the pressures created by problem gambling would assist them in communicating with members of the class.

[242] A prodigious amount of work has been undertaken by plaintiffs' counsel in preparing this difficult case. If certification had been granted, I have no doubt that they would have guided the plaintiffs through the subsequent stages of the litigation in a skilled and professional manner.

[243] Counsel for OLGC were critical of the litigation plan filed on behalf of the plaintiffs. In counsel's submission, this did not adequately address procedures for resolving the individual issues. I believe the criticisms have merit, but in view of the findings I have made on the individual issues, the proposed plan is obviously deficient.

CONCLUSION

[244] Despite the very able efforts of plaintiffs' counsel, the issues that are truly common are far outweighed by the many individual issues requiring a consideration of the personal circumstances, gambling history and degree of autonomy of each class member. In my judgment, the proceeding is not amenable to a fair and efficient determination under the CPA, and it has not been shown that this would be preferable to individual actions. The attempt to avoid these

conclusions by reliance on statistical probabilities would not be fair to the defendant and would do violence to the concept of the CPA as a purely procedural statute.

[245] The motion is dismissed. If the parties are unable to agree on costs, written submissions on behalf of OLGC will be received if made within 21 days of the release of these reasons and the plaintiffs will have a further 14 days in which to respond. The submissions should, of course, refer to the possible application of section 31(1) of the CPA.

Cullity J.

Released: March 15, 2010

CITATION: Dennis v. OLG, 2010 ONSC 1332

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

PETER AUBREY DENNIS and ZUBIN PHIROZE NOBLE

Plaintiffs/Moving Parties

– and –

ONTARIO LOTTERY AND GAMING CORPORATION

Defendant/Respondent

REASONS FOR JUDGMENT

CULLITY J.

Released: March 15, 2010

Court File No. CV-08-00356378-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE JUSTICE M. C. CULLITY	))	MONDAY, THE 15th DAY OF MARCH, 2010

B E T W E E N:

PETER AUBREY DENNIS and ZUBIN PHIROZE NOBLE

Plaintiffs

-and-

ONTARIO LOTTERY AND GAMING CORPORATION

Defendant

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6

ORDER

THIS MOTION, made by the Plaintiffs was heard on January 13, 14 and 15, 2010, at the Court house, 393 University Avenue, 10th Floor, Toronto, Ontario, M5G 1E6, with the endorsement as to costs issued May 21, 2010.

ON READING the affidavits with exhibits of Peter Dennis, Zubin Noble, Lori Stoltz, Professor Kevin Harrigan, Dr. Robert Williams, Paul Pellizzari and Dr. Howard Shaffer, the Plaintiffs' Factum, the Defendant's Responding Factum and the Plaintiffs' Reply Factum, all filed, on hearing the oral submissions of the lawyers for the parties, Jerome R. Morse, Adair Morse LLP and Hassan Fancy, Fancy Barristers PC, for the Plaintiffs/Moving Parties, and James Doris and Matthew Milne-Smith, Davies Ward

Philips Vineberg LLP, for the Defendant/Responding Party, and on reading the written submissions of the lawyers for the Plaintiffs and the Defendants regarding *Tercon Contractors Ltd. v. British Columbia* and regarding the costs of the motion, filed,

1. THIS COURT ORDERS that the Plaintiffs' motion that this action be certified as a class proceeding pursuant to the *Class Proceedings Act*, 1992, S.O. 1992, c.6, as amended, be dismissed; and

2. THIS COURT ORDERS that no costs are awarded for the motion.

Aug 27/10 _____
(Signature of Judge)

RCP-E 59A (July 1, 2007)

C. CHIBA
REGISTRAR, SUPERIOR COURT OF JUSTICE
LE ADJOINT, COUR SUPÉRIEURE DE JUSTICE

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

AUG 27 2010

AS DOCUMENT NO.:
À TITRE DE DOCUMENT NO.:
PER / PAR:

DENNIS et al.

Plaintiffs

- and - ONTARIO LOTTERY AND GAMING CORPORATION

Defendant

Court File No.: CV-08-00356378-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced at Toronto

ORDER

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Lawyers for the Plaintiffs

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Court File No.: CV - 08 - 00356378 - 0000

Dennis and Noble - and - Ontario Lottery and Gaming Corporation

ENDORSEMENT ON COSTS

Despite the comprehensive submissions of counsel for OLGC, I am satisfied that this is a case in which the weight to be attributed to two of the three considerations referred to in section 31 (1) of the CPA is such that should be no order for costs in favour of OLGC - the successful responding party - or otherwise.

Counsel for the plaintiffs relied on each of the three considerations in section 31 (1) - a novel point of law, a matter of public interest and a test case - and, although I do not agree that the proceeding can properly be characterised as a test case, I am in general agreement with counsel's submissions on the novelty of the issues and the extent to which the public interest was engaged.

Apart from other aspects of the case, novelty attached to the question whether the pleading disclosed that OLGC had a duty of care to protect the class members from harming themselves and, also, to the question of the legitimacy of using statistical evidence to prove commonality of issues among the class.

As I indicated in paragraph 113 of my reasons, no previous Canadian cases were cited that involved claims in negligence against gambling operators who failed to prevent self-excluded gamblers from continuing to gamble. The novelty - as well as the difficulty - of the issues that arose was recognized in that paragraph and in the *Calvert* case in the United Kingdom that I referred to in paras 114 - 116.

The questions relating to the legitimate use of statistical evidence outside the parameters of section 23 (1) of the CPA are potentially of immense importance to the issues relating to the statutory requirements for certification. Although, as I indicated, they have been touched on in limited contexts in earlier decisions, this, to my knowledge, was the first time that the case presented for certification was crucially dependent on such evidence. Quite apart from the problems of dealing with conflicting expert evidence at the certification stage, the unrestricted acceptance of statistical evidence to demonstrate commonality could revolutionise proceedings under the CPA.

As far as the public interest is concerned, I referred in paras 5 through 7 to the tension between maximising profits for OLGC and the promotion of responsible gambling to its detriment. There is, in my opinion a very strong public interest in the question whether a government agency should be actively attempting to make profits from the gambling losses of patrons who include vulnerable problem gamblers - and, if this is considered to be socially acceptable by the community - in the steps that should be taken to protect the latter. Although, as I indicated, the certification motion did not address these questions

directly, they were very much in the background. The availability of the CPA procedure to test them by providing access to justice to self-excluded gamblers is, and in my opinion should be, itself a matter of serious interest to the community at large.

On the basis of either of the relevant considerations referred to in section 31 (1) - when read with those set out in rule 75.01 and the authorities cited by counsel - I would feel justified in departing from the usual practice of awarding costs to a successful party. Taken in combination, I have no doubt that this is an appropriate exercise of the discretion under the rule and under section 131 of the *Courts of Justice Act*. There will be an order accordingly.

Released: May 21, 2010

CULLITY J.

Court File No. DC-10-00000188-0000

ONTARIO
DIVISIONAL COURT, SUPERIOR COURT OF JUSTICE

THE HONOURABLE JUSTICE JENNINGS	)	WEDNESDAY, THE 9TH DAY OF JUNE, 2010

BETWEEN:

[redacted]

PETER AUBREY DENNIS and ZUBIN PHIROZE NOBLE

Plaintiffs/Appellants

-and-

ONTARIO LOTTERY AND GAMING CORPORATION

Defendant/Respondent

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6

ORDER

THIS MOTION, made by the Plaintiffs, for a scheduling order was heard this day at the courthouse, 130 Queen Street West, Toronto, Ontario M5H 2N5.

ON READING the Consent of the lawyers for the parties, Jerome R. Morse, Adair Morse LLP and Hassan Fancy, Fancy Barristers PC, for the Plaintiffs/Appellants, and James Doris and Matthew Milne-Smith, Davies Ward Philips Vineberg LLP, for the Defendant/Responding Party,

1. THIS COURT ORDERS that the Appellants/Plaintiffs will serve their Appeal Book, Exhibit Book, Factum and Compendium as required by Rule 61.09(3) on or before July 30, 2010;

2. THIS COURT ORDERS that the Respondent/Defendant will serve and file its Factum and Compendium as required by Rule 61.12 on or before October 8, 2010; and

3. THIS COURT ORDERS that in accordance with Rule 61.05(4) of the Rules of Civil Procedure, the Appellants/Plaintiffs and Respondent/Defendant will reach an agreement respecting the evidence required for the hearing of the within appeal as of October 8, 2010.

(Signature of Judge)

RCP-E 59A (July 1, 2007)

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO: 15
LE / DANS LE REGISTRE NO.: 280
JUN 09 2010
PER / PAR:

DENNIS et al.

Plaintiffs

(Appellants)

- and -

ONTARIO LOTTERY AND GAMING CORPORATION

Defendant

(Respondent)

Court File No.: DC-10-00000188-0000

ONTARIO
DIVISIONAL COURT,
SUPERIOR COURT OF JUSTICE

Proceedings commenced at Toronto

ORDER

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Court File No. DC-10-00000188-0000

ONTARIO
DIVISIONAL COURT, SUPERIOR COURT OF JUSTICE

THE HONOURABLE MR.) FRIDAY, THE 30th DAY of
JUSTICE H.J. WILTON-SIEGEL) DAY OF JULY, 2010

BETWEEN:

[redacted]ER AUBREY DENNIS and ZUBIN PHIROZE NOBLE

Plaintiffs/Appellants

-and-

ONTARIO LOTTERY AND GAMING CORPORATION

Defendant/Respondent

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6

ORDER

THIS MOTION, made by the Plaintiffs, for a scheduling order was heard this day at the courthouse, 130 Queen Street West, Toronto, Ontario M5H 2N5.

ON READING the Consent of the lawyers for the parties, Jerome R. Morse, Adair Morse LLP and Hassan Fancy, Fancy Barristers PC, for the Plaintiffs/Appellants, and James Doris and Matthew Milne-Smith, Davies Ward Philips Vineberg LLP, for the Defendant/Responding Party,

1. THIS COURT ORDERS that the Appellants/Plaintiffs will serve their Appeal Book, Exhibit Book, Factum and Compendium as required by Rule 61.09(3) on or before September 3, 2010;

2. THIS COURT ORDERS that the Respondent/Defendant will serve and file its Factum and Compendium as required by Rule 61.12 on or before November 12, 2010; and

3. THIS COURT ORDERS that In accordance with Rule 61.05(4) of the Rules of Civil Procedure, the Appellants/Plaintiffs and Respondent/Defendant will reach an agreement respecting the evidence required for the hearing of the within appeal as of *November 12, 2010*

J.

(Signature of Judge)

RCP-E 59A (July 1, 2007)

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO: 15
LE / DANS LE REGISTRE NO.:
355
AUG 05 2010
PER / PAR:

DENNIS et al.
Plaintiffs
(Appellants)

- and - ONTARIO LOTTERY AND GAMING CORPORATION

Defendant
(Respondent)

Court File No.: DC-10-00000188-0000

ONTARIO
DIVISIONAL COURT,
SUPERIOR COURT OF JUSTICE

Proceedings commenced at Toronto

ORDER

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Court File No. DC-10-00000188-0000

ONTARIO
DIVISIONAL COURT, SUPERIOR COURT OF JUSTICE

THE HONOURABLE JUSTICE CLINTON	)	TUES DAY, THE 31ST DAY OF AUGUST, 2010

AUBREY DENNIS and ZUBIN PHIROZE NOBLE

Plaintiffs/Appellants

-and-

ONTARIO LOTTERY AND GAMING CORPORATION

Defendant/Respondent

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6

ORDER

THIS MOTION, made by the Plaintiffs, for a scheduling order was heard this day at the courthouse, 130 Queen Street West, Toronto, Ontario M5H 2N5.

ON READING the Consent of the lawyers for the parties, Jerome R. Morse, Adair Morse LLP and Hassan Fancy, Fancy Barristers PC, for the Plaintiffs/Appellants, and James Doris and Matthew Milne-Smith, Davies Ward Philips Vineberg LLP, for the Defendant/Responding Party,

1. THIS COURT ORDERS that the Appellants/Plaintiffs will serve their Appeal Book, Exhibit Book, Factum and Compendium as required by Rule 61.09(3) on or before September 24, 2010;

2. THIS COURT ORDERS that the Respondent/Defendant will serve and file its Factum and Compendium as required by Rule 61.12 on or before December 3, 2010; and

3. THIS COURT ORDERS that In accordance with Rule 61.05(4) of the Rules of Civil Procedure, the Appellants/Plaintiffs and Respondent/Defendant will reach an agreement respecting the evidence required for the hearing of the within appeal as of December 3, 2010

Pursuant to Rule 59.05

(Signature of ~~Judge~~)

Assistant Registrar

RCP-E 59A (July 1, 2007)

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO: 15
LE / DANS LE REGISTRE NO.:
190.
AUG 31 2010
PER / PAR:

DENNIS et al.

Plaintiffs

(Appellants)

- and - ONTARIO LOTTERY AND GAMING CORPORATION

Defendant
(Respondent)

Court File No.: DC-10-00000188-0000

ONTARIO
DIVISIONAL COURT,
SUPERIOR COURT OF JUSTICE

Proceedings commenced at Toronto

ORDER

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CITATION: Dennis v. Ontario Lottery And Gaming Corporation, 2011 ONSC 7024
DIVISIONAL COURT FILE NO.: DC-10-00000188-0000
DATE: 20111202

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

J. Wilson, Swinton and Low JJ.

BETWEEN:	)	
	)	
PETER AUBREY DENNIS AND ZUBIN PHIROZE NOBLE	)	*Jerome R. Morse* and *Hassan A. Fancy*, for the Plaintiffs (Appellants)
	)	
Plaintiffs (Appellants)	)	
	)	
– and –	)	
	)	
ONTARIO LOTTERY AND GAMING CORPORATION	)	*James Doris* and *Matthew Milne-Smith*, for the Defendant (Respondent on Appeal)
	)	
Defendant (Respondent on Appeal)	)	
	)	
	)	**HEARD:** April 6 and 7, 2011 at Toronto

LOW J.

[1] The plaintiffs appeal from the order of Cullity J. dated March 15, 2010 denying their motion for certification of a proposed class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA").

STANDARD OF REVIEW

[2] The standard of review on an appeal from an order denying certification is one of deference, subject to errors of law going to the proper application of s. 5 of the *CPA*. As Winkler CJO stated in *Cassano v. The Toronto Dominion Bank*, 2007 ONCA 781, at para. 23, allowing an appeal from the Divisional Court which dismissed the appeal from the order of Cullity J.:

> The motion judge is an experienced class action judge. His decision is entitled to substantial deference: see *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 at para 33 (C.A.), leave to appeal to S.C.C. requested, [2007] S.C.C.A. No. 346. The intervention of this court should be limited to matters of general

> principle: see *Cloud v. Canada (A.G.)* (2004), 73 O.R. (3d) 401 at para 39 (C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 50. However, legal errors by the motion judge on matters central to a proper application of s. 5 of the *CPA* displace the deference usually owed to the certification motion decision: see *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 267 D.L.R. (4th) 601 at para 6 (Ont. C.A.).

[3] On the other hand, in *2038724 Ontario Ltd. v. Quizno's-Canada Restaurant Corp.* (2010), 100 O.R. (3d) 721 (C.A.) the court stated, at para. 38,

> ... In my view, the majority correctly concluded that the focus of the motion judge's reasons was on the issue of damages, which he found overwhelmed the remaining proposed common issues. While he referred to the other issues in passing, there was effectively no independent analysis of those issues by the motion judge, which constitutes the kind of error that attracts the intervention of an appellate court.

THE ACTION

[4] The Ontario Lottery and Gaming Corporation ("the OLGC") is an agent of the provincial Crown, formed in 1999 by the amalgamation of the Ontario Lottery Corporation and the Ontario Casino Corporation. It operates four commercial casinos with private operators, six community casinos and 17 slot machine facilities at race tracks. The plaintiff Peter Dennis has used facilities operated by the OLGC. The second plaintiff, Zubin Phiroze Noble, is his wife.

[5] Dennis claims damages for the failure by the OLGC to deny him entry to the OLGC's gambling venues pursuant to a voluntary self-exclusion contract prepared by the OLGC and signed by him ("the self-exclusion contract"). Exclusion of individuals who had signed the self-exclusion contract depended on the individuals' own will to stay away and, where the individuals attempted to enter despite their agreement to stay away, on the ability of OLGC's employees to remember whether the individual was a self-excluder. Dennis alleges that he was not stopped by the OLGC from entering its gambling facilities despite the self-exclusion contract and that he consequently gambled and sustained losses and other damages.

[6] The action centers on the lack of creation and implementation by the OLGC of a more effective means of excluding individuals who had signed self-exclusion contracts. The underlying context is the tension between government operation of gambling establishments to generate revenue for public benefit in the form of financial support for programs and the negative effects of available gambling opportunities on certain individuals who are afflicted with the illness of problem gambling which, to varying degrees, abrogates self-control.

[7] The plaintiffs seek to represent a primary class of approximately 10,428 individuals defined as:

> Dennis, and all other residents of Ontario and the United States, or their estates, who signed the Self-Exclusion Contract ... at any time during the period from December 1, 1999 to February 10, 2005.

They also seek to represent a secondary class of individuals claiming under the *Family Law Act*, R.S.O. 1990, c. F.3 as amended ("the FLA").

[8] While there were, over time, three versions of the self-exclusion contract, they were similar in all material respects and provide, in part:

> *We offer you the opportunity to self-exclude yourself from Ontario Lottery and Gaming Corporation (OLGC) gaming venues. Self-exclusion will direct the OLGC, and commercial casino operators acting for OLGC, to use their best efforts to deny your entry, as a service, to all OLGC's gaming venues in the province of Ontario. The OLGC and commercial casino operators accept no responsibility, in the event that you fail to comply with the ban, which you voluntarily requested.*
>
> I hereby request that I be refused entrance to all OLGC gaming venues (a list of which has been provided to me), and be prohibited from entering onto, or in any way trespassing upon any of these gaming venues, for any reason whatsoever save solely to attend at my place of employment if applicable, as of this date. I understand this form and my photograph will be shared with the other gaming venues.
>
> ...
>
> I understand that my failure to comply with the voluntary ban may mean that I will be apprehended for trespassing and dealt with according to law. I release and forever discharge the OLGC ... from any and all liability, causes of action, claims and demands whatsoever in the event that I fail to comply with this voluntary ban.

[9] Dennis pleads that he was a person suffering from "problem gambling", a progressive behavioural disorder and an illness, and that each of the members of the primary class was a problem gambler. Problem gambling and problem gamblers are pleaded to have the following features as set out at para. 29 (b) through (f) of the statement of claim:

> (b) Problem gamblers have a propensity to gamble that is latent until they are exposed to the gambling-inducing availability and features of the Gambling Venues;
>
> (c) Problem gamblers seek a "high" from gambling and the pursuit of that "high" through gambling irrespective of a won or lost bet;

(d) Problem gambling is a progressive behavioural disorder in which an individual develops a psychologically uncontrollable preoccupation and urge to gamble leading to excessive gambling;

(e) Key features of problem gambling include uncontrollable feelings and compulsions relating to gambling such as preoccupation with gambling, irrational repeated gambling to recover losses due to gambling, and the development of tolerance to the risk of gambling which requires gambling at higher stakes with the attendant greater risks of greater losses to obtain the same "high";

(f) Problem gambling disrupts, compromises and ultimately destroys the lives of individual problem gamblers by causing a range of harms for them and their family members including emotional, social, financial, legal, employment, education and health-related harms.

[10] It is alleged that Dennis and each member of the primary class gave notice to the OLGC of their vulnerability as problem gamblers when they signed the self-exclusion contract, that they were permitted to enter one or more of the OLGC's gambling venues following the execution of the self-exclusion contact, that they engaged in gambling on one or more occasions consistent with the nature and extent of their illness as problem gamblers, and that they suffered loss and damage as a result of gambling activities at the OLGC's venues, including the progression of their illnesses as problem gamblers (para. 54 of the Statement of Claim).

[11] The plaintiffs claim damages for negligence, breach of the *Occupier's Liability Act,* R.S.O. 1990, c. O.2 ("OLA") and breach of contract arising from the failure to deny them entry to gambling venues operated by the defendant. Alternatively, they claim an order for payment of the revenues or net income or profits realized by the defendant from problem gamblers. In either case, the plaintiffs claim punitive damages.

[12] It is alleged that the OLGC knew or ought to have known that the primary class members were relying on it to detect and remove them from OLGC venues, that the program that the OLGC had in place to detect self-excluders was memory based and therefore ineffective, that the OLGC knew that it was ineffective, and that it was reasonably foreseeable that the class members would suffer the harms alleged. It is alleged that the OLGC owed a duty, *inter alia*, to implement reasonable measures other than memory based enforcement to deny entry to class members including carding with photo-identification and other technologies.

[13] The plaintiffs plead also (at para. 56) that each of the class members relied on the OLGC's repeated and public representations that it would, *inter alia*, fulfill its obligation under the self-exclusion contract to use its best efforts to detect and deny entry or remove self-excluders.

[14] The plaintiffs rely in the alternative on the *Occupier's Liability Act*, and allege that the OLGC failed to take such care as was reasonable in the circumstances to ensure that the class members were reasonably safe while on OLGC premises. It is said that, in respect of the class members, gambling was a dangerous activity.

[15] The plaintiffs plead alternatively that the OLGC breached its contractual obligations to each of the class members under their respective self-exclusion contracts. It is alleged that under the self-exclusion contracts, the OLGC had an obligation to use best efforts to exclude the plaintiffs and that the obligation included a duty to implement enforcement measures other than the memory based measures of which its program consisted and which were known to be ineffective.

[16] The plaintiffs plead that punitive damages are appropriate because of, *inter alia*, vulnerability of the class members. The pleading states, at para. 70(a):

> **Vulnerability**: Dennis and each of the Class A Members suffer from problem gambling, which the OLGC knew or ought to have known at all material times and which allowed the OLGC to exploit their vulnerabilities including, in particular, their psychologically uncontrollable pre-occupation and urge to gamble leading to excessive gambling.

THE ISSUES ON THE APPEAL

[17] In deciding the motion for certification, the motions judge concluded that the pleading met the "plain and obvious" test in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 and that the plaintiffs had met s. 5(1)(a) of the *CPA*.

[18] He held that the primary class and derivative class were satisfactorily defined, as required under s. 5(1)(b). The primary class is defined by objective criteria – signature of the self-exclusion contract.

[19] This appeal centers on the motions judge's treatment of the plaintiffs' proposed common issues under s. 5(1)(c) of the *CPA* (at para. 187 et seq. of the reasons) and his determination under s. 5(1)(d) of the *CPA* that a class action was not the preferable procedure.

ANALYSIS

The question of common issues

[20] Issues are defined by the factual allegations in the pleadings. This is no less the case in a class proceeding than in any other civil action.

[21] Common issues must advance the proceeding significantly to render the action acceptable for certification. The question of what is or is not a common issue was dealt with in *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 18-19 where McLachlin C.J.C. stated,

> 18 A more difficult question is whether "the claims ... of the class members raise common issues", as required by s. 5(1)(c) of the Class Proceedings Act, 1992. As I wrote in Western Canadian Shopping Centres, the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial ... ingredient" of each of the class members' claims.
>
> 19 In this case there is no doubt that, if each of the class members has a claim against the respondent, some aspect of the issue of liability is common within the meaning of s. 5(1)(c). For any putative class member to prevail individually, he or she would have to show, among other things, that the respondent emitted pollutants into the air. At least this aspect of the liability issue (and perhaps other aspects as well) would be common to all those who have claims against the respondent. The difficult question, however, is whether each of the putative class members does indeed have a claim -- or at least what might be termed a "colourable claim" -- against the respondent. To put it another way, the issue is whether there is a rational connection between the class as defined and the asserted common issues: see Western Canadian Shopping Centres, at para 38 ("the criteria [defining the class] should bear a rational relationship to the common issues asserted by all class members"). ... [Emphasis added.]

[22] The plaintiffs put forward a list of 15 proposed common issues on the certification motion (found at Tab 11A of the appeal book) which are summarized below:

1. whether the self-exclusion forms are binding contracts;

2. whether the OLGC owes a tort duty to the primary class to take reasonable care to deny them entry;

3. whether the OLGC owes a duty as an occupier to detect and remove primary class members;

4. measures taken by the OLGC to deny entry in the period December 1, 1999 to date and the duration of such measures;

5. whether the OLGC breached its contractual obligations and the particulars of the breaches;

6. whether the OLGC delegated the conduct/management in breach of ss. 206 and 207 of the *Criminal Code*;

7. whether the OLGC breached its tort duty;

8. whether the OLGC breached its duty as an occupier;

9. whether the OLGC may avoid liability by reason of expiry of the applicable limitation periods;

10. whether damages sustained by primary class members owing to breaches of duty by the OLGC can be determined on an aggregate basis, and if so, how they should be distributed;

11. whether the primary class members may elect to "waive the tort" and require the OLGC to account for gross revenues or net profits, and if so, the quantum and how they should be distributed;

12. whether the derivative class members sustained damages pursuant to s. 61 of the *Family Law Act*, and if so, the quantum, and how they should be distributed;

13. whether the primary or derivative class members are entitled to punitive damages and how they should be distributed;

14. whether the OLGC should pay prejudgment interest and post-judgment interest and if so how it should be distributed;

15. whether the OLGC should pay the costs of administering and distributing any judgment.

[23] The motions judge identified the following as the most important issues among those put forward by plaintiffs:

(a) whether the self-exclusion forms are binding contracts that required OLGC to take reasonable care to deny entry to OLGC's facilities to the primary class members, and to detect and remove any who gained entry;

(b) whether OLGC had a duty in tort to take such reasonable care;

(c) whether OLGC breached either, or each of the duties in 1 or 2 or its duty under the OLA;

(d) whether damages sustained by class members as a consequence of any breaches of the above duties can be determined on an aggregate basis in whole or in part; and whether OLGC can be required to account for gross revenue, or net income, derived from class members as a consequence of any such breaches of duty.

[24] The central findings of the motions judge with respect to the proposed common issues under s. 5(1)(c) appears at para. 189 of the reasons:

I believe that serious flaws in the plaintiffs' case for certification are exposed when consideration is given to the requirement of commonality, and that of a rational connection between the class definition and the proposed common issues. For the reasons that follow, I am satisfied that:

(1) the claims advanced on behalf of the class members are predicated, and dependent, on their vulnerability;

(2) vulnerability is not a condition of class membership as defined, and, in consequence, causes of action that are addressed by the proposed common issues are not confined to compulsive gamblers;

(3) the problem of over-inclusiveness of the class definition, and the consequential individualistic nature of the proposed common issues, cannot be resolved by the use of statistical evidence to characterize a percentage of the class members as pathological problem gamblers; and

(4) in consequence, the requirement of a class in section 5(1)(b) and of common issues in s. 5(1)(c) of the CPA are not satisfied and certification must be denied.

[25] The crux of the motions judge's reasoning appears at paras. 190 to 192:

[190] A mass of evidence has been filed on the nature and prevalence of problem gambling. The vulnerability of self-excluded persons -- the class members -- as problem gamblers is the general theme of the claims pleaded on their behalf. It is, therefore, striking -- and I believe it is significant – that the class definition does not require the members to be identified as problem gamblers in any sense or to any particular degree. Similarly, the proposed common issues do not refer to problem gambling and do not, in their terms, treat its nature and extent as factors to be considered by the trial judge. The class definition as originally defined in the statement of claim restricted the class to "compulsive" gamblers. This class criterion was deleted when the pleading was amended because, I presume, it would not have permitted class members to be identified with sufficient objectivity and certainty.

[191] In my opinion, the vulnerability of class members is essential to the validity of their claims. Persons who were not problem gamblers would have no tenable claims and there could be no question of certifying the proceeding in respect of such persons. The evidence is that the disorder is progressive and that there is a range of its severity. There is nothing in the class definition or the formulation of the common issues to confine the claims asserted to members of the class who

> were vulnerable to any particular degree, if at all, and, in my judgment, the class definition is to that extent objectionably over-inclusive, and the proposed common issues lack commonality. While it can no doubt be presumed that most self-excluded persons were at least apprehensive about their vulnerability, the degree of their addiction, if any, and the significance to be attributed to the concept of personal autonomy could only be determined on an individual basis.
>
> [192] If Mr. Dennis, or any of the other class members, had advanced the same claims in individual actions, OLGC would have been entitled to raise issues relating to personal autonomy and degrees of vulnerability in connection with elements of liability such as reasonable foresight of harm; proximity; unconscionability; a willing assumption of risk for the purposes of s. 4(1) of the OLA; causation of proven losses; contributory negligence; and punitive damages. The right of OLGC to pursue such issues on an individual basis is not, in my opinion, excluded by pursuing the claims under the procedure of the CPA and defining the class, and the common issues, without reference to the vulnerability of the class members. Nor, for the reasons I will give, can the issues be resolved by reference to statistical probabilities.

[26] The plaintiffs argue that the motions judge erred in principle in failing to find sufficient common issues to warrant certification. Those common issues in contract are the following: whether there is a contract between the OLGC and the self-excluders, whether the exclusion language fails due to ambiguity, whether the exclusion is invalid for reasons of public policy, whether the OLGC was obliged to provide best efforts on a common basis, and whether the OLGC breached its best efforts obligation. The plaintiffs also argue that if there has been a breach proven, on a systemic basis, then a court could order aggregate damages. As well, they argue that there is a common issue as to whether the self-exclusion contract was a "peace of mind" contract, giving rise to damages for mental distress.

[27] The plaintiffs also argue that there is a common issue in tort as to the existence of a duty of care. They submit that the motions judge misconstrued the pleading, as the duty of care in tort does not rest on a finding of vulnerability. Rather, as in the case where a commercial host has a duty to a patron, the duty rests on the knowledge OLGC had of the characteristics of those who signed the agreement and the danger inherent in the activity of gambling.

[28] OLGC argues that the motions judge made no error in principle. While there are common issues relating to the existence of a contract, the interpretation of the exclusion clause and the issue of public policy in relation to the enforceability of that clause, the motions judge made no error in principle in finding that the common issues do not sufficiently advance the litigation.

[29] Even if there are some common issues in contract, in my view, the plaintiffs cannot prove breach of contract as a common issue. While it is arguable that the issue of whether the self-exclusion contracts are binding is a question of interpretation only and that evidence as to individual circumstances is not likely to be determinative one way or the other, nevertheless, a

positive answer to the question is irrelevant to and is of no avail to any class member in the absence of proof of unimpeded entry: that inquiry is individual.

[30] Allowing a class member entry into the OLGC's facilities in violation of the self-exclusion agreement is a necessary element of the alleged breach of contract. It is not, however, a condition of the class definition and although entry without ejection by each class member is pleaded, it cannot be presumed to be a fact. It must be proved individually in respect of each member of the class.

[31] The evidence before the motions judge showed that some individuals who signed the self-exclusion agreement did not try to re-enter. For those who did try to re-attend, approximately 1,000 were caught annually. A factual determination that there either was no attempt to enter or that an attempt or attempts were made that did not succeed will be the end of the road for some members of the class; for those members, there will be no other issues to be decided and all other issues, including what the self-exclusion contract means and whether the disclaimer is enforceable, will be irrelevant, as there has been no breach of contract and no harm suffered.

[32] Evidence led on the motion discloses that approximately 1,000 violations were detected annually by the OLGC. It cannot be determined without individual inquiry which of the class members presented themselves at an OLGC facility in violation of the self-exclusion agreement and, if so, with what results.

[33] If a self-excluder does not present himself at an OLGC facility, there is no occasion for performance or non-performance of the OLGC's duties toward him, and hence no breach of contract. Similarly, where a self-excluder presents himself and is detected and excluded, there is no breach. Such class members would not have shown a necessary element of the claim and the determination of any issues common to those class members who are found, as a fact, to have entered and suffered gambling losses would be irrelevant.

[34] Even if the interpretation of the exclusionary clause is a common issue, the plaintiffs concede that the issue of unconscionability is not a common issue, as it turns on the vulnerability of the individual class members and the degree to which they were victims of unequal bargaining power. This is an individual issue (see *Lam v. University of British Columbia*, [2010] B.C.J. No. 1259 (C.A.) at para. 75).

[35] While the plaintiffs argue that restitutionary damages are a common issue, damages for breach of contract cannot be assessed in the aggregate, as the motions judge correctly concluded. The issue of such damages sustained by primary class members can be determined on an aggregate basis only in respect of those class members to whom the OLGC is found to be liable. The question does not arise with and is irrelevant to those class members in respect of whom there has been no breach shown.

[36] Moreover, in order to determine the amount that OLGC should have to disgorge as restitutionary damages, a court would have to determine what OLGC earned from self-excluded gamblers. That would require an individual inquiry as to their losses.

[37] With respect to liability in negligence, the motions judge concluded that vulnerability was an individual issue, and the individuality of any vulnerability determination rendered virtually every significant element of liability in tort or under the OLA an individual issue.

[38] Whether the claims advanced on behalf of the class members are predicated on their vulnerability is answered by examining whether vulnerability has been put in issue by the pleading. As alluded to above, the pleading alleges that each of the class members suffers from the illness of problem gambling and made known his/her consequent vulnerability to the OLGC. This puts in issue (a) whether each member had the illness of problem gambling and (b) whether each member had vulnerability arising from the illness. As the illness is alleged to be a progressive one, the degree of illness and vulnerability suffered by each class member is also put into issue. Further, the pleading puts in issue whether each class member made known his vulnerability to the OLGC and, if so, how.

[39] Neither illness nor vulnerability is integral to the definition of the class. Nor is there a legal correlation between those conditions and the class. Both are questions of fact for proof upon medical (and, more specifically, psychiatric) evidence. It cannot be presumed that because illness and vulnerability are pleaded as afflictions suffered by each class member that they can be proved with respect to each class member. The execution of the self-exclusion contract, while it may suggest that the signing individual had concerns that he or she either had or might develop a gambling problem, is not proof of existence of the illness in each person who signed. The presence of illness, its degree and the consequent vulnerability in each class member is a factual issue that can only be decided on an individual basis, as the motions judge correctly found.

[40] The presence and degree of the manifestations of the illness in any class member as pleaded at para. 29 is relevant to the issue of liability in relation to each class member, because duty of care is alleged as being rooted in the OLGC's knowledge of the vulnerability of or, in other words, the diminution of the personal autonomy of the class member by reason of his affliction with the illness. The existence and degree of vulnerability on the part of each class member also goes to the foreseeability of loss and harm to that member. Accordingly, the issue of liability for breach of duty of care is also individual and cannot be determined on a class-wide basis.

[41] There is as well no necessary co-relation between the existence of the illness of problem gambling in a class member and unimpeded entry whether accompanied by gambling losses or not: the plaintiff Dennis (and other members of the class) who suffered from the illness of problem gambling may have obtained entry to gambling venues operated by the OLGC and suffered gambling losses but other members of the class who suffered from the illness may have, despite their vulnerability, complied with the self-exclusion contract; yet other members of the

class who suffered from the illness may have been detected and excluded upon attempting to enter.

Admissibility of expert's opinion based on statistical study

[42] An issue raised on this appeal concerns the admissibility of the opinion evidence of Dr. Williams, an expert for the plaintiffs, who stated that, based on his study, 87% of self-excluders would be pathological gamblers at the time that they signed the self-exclusion contracts and that a significant number of the self-excluders would have returned to an OLGC facility, with reasonable projections of those numbers being derivable from behavior studies of individuals addicted to drugs, alcohol and tobacco.

[43] As the motions judge noted, the experts whose evidence was tendered on the motion agreed that not all self-excluded persons – the class members – were pathological gamblers.

[44] Admissibility is dependent on relevance. The issue to be decided in relation to the proposed common issues is whether each issue is common in the sense that determination of that issue for one member of the class is determination of the same issue for all members of the class.

[45] In my view, quite apart from the frailty of the studies underlying Dr. Williams' opinion, statistical evidence that a certain percentage of individuals who sign self-exclusion contracts are afflicted with the subset of the illness of problem gambling designated as "pathological" gambling and other statistical evidence suggesting that a particular percentage of those individuals will likely re-attend at a gambling facility despite the self-exclusion contract is of no relevance in determining whether the liability issues raised on the pleadings are common or individual.

[46] I agree with the motions judge's conclusion that the plaintiffs' use of the statistical evidence offered by Dr. Williams was to advance the proposition that liability of the OLGC is determinable by statistical probability. The motions judge correctly observed that the CPA does not permit the requirement of commonality to be avoided by statistical estimates of probability of commonality. Nor is the requirement of proof of liability at common law permitted to be replaced by statistical evidence of likelihood of liability.

[47] In *Chadha v. Bayer Inc.*, 63 O.R. (3d) 22; [2003] O.J. No. 27 a decision upon which the plaintiffs rely, the Court of Appeal did not suggest that statistical evidence could be used to establish liability. Rather, as set out at para. 52, it confirmed the necessity for liability to be provable on a class-wide basis in order to make the determination that it is a common issue:

> In my view, the motion judge erred in finding that liability could be proved as a common issue in this case. The evidence presented by the appellants on the motion does not satisfy the requirement prescribed by the Supreme Court in *Hollick* of providing sufficient evidence to support certification. The evidence of the appellants' expert assumes the pass-through of the illegal price increase, but does not suggest a methodology for proving it or for dealing with the variables

> that affect the end price of real property at any particular point in time. The motion judge focused on the expert's opinion that the loss could be measured, rather than on how any such loss could first be established on a class-wide basis.

In the result in *Chadha*, neither liability nor loss was held to be provable on a statistical basis.

[48] In *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [2010] B.C. J. No 380; 2010 B.C.S.C. 285, the British Columbia Court of Appeal affirmed that for purposes of certification as a common issue, the evidence that aggregate gain, and its counterpart, aggregate harm, can be shown on common evidence at trial need meet only a low threshold.

[49] In the case at bar, and despite the argument made on this appeal, the statistical evidence is not directed only to the issue of either gain or loss, but rather to liability and in my view, neither *Chadha* nor *Pro-Sys* assist the plaintiffs' position that the motions judge erred in holding the evidence to be inadmissible. While the Williams report and others studies of similar kind may have value in policy development, the opinions cannot replace proof of the facts necessary to find liability. For that reason, the opinion evidence is not relevant to the question of whether the liability issues are common.

[50] As with the question of breach, the issue raised by the allegation that each of the class members relied on the OLGC's repeated and public representations can only be determined individually. The fact that the OLGC made public representations is not proof that each of the class members received the representations or that each one of them acted upon the representations.

Do the common issues significantly advance the litigation?

[51] The motions judge did not perform a separate analysis of each of the issues proposed by the plaintiffs as common. Upon doing such an analysis, however, I would come to the same result arrived at by the motions judge that, on balance, the common issues do not sufficiently advance the litigation, and the plaintiffs have not satisfied s. 5(1)(c) of the CPA.

[52] As to whether the self-exclusion contracts are binding, the question is one of interpretation only, and evidence as to individual circumstances is not likely to be determinative one way or the other. Nevertheless, a positive answer to the question is irrelevant to and is of no avail to any class member in the absence of proof of unimpeded entry: that inquiry is individual.

[53] On the issue of whether the OLGC owes a tort duty to take reasonable care to deny entry to class members, it is my view that the answer is dependent both on the circumstances of the class member and the knowledge of the OLGC of those circumstances. The existence of a signed self-exclusion form is some evidence of some knowledge by the OLGC of the concerns of the signatory, but, in my view, is not *per se* proof of the existence or degree of illness nor of the existence or degree of vulnerability arising from the illness, both of which are put in issue by the plaintiffs in the statement of claim. These require individual inquiries. However, if it is a common issue whether the fact of execution of the self-exclusion agreement raises a tort duty,

the determination of that issue does not really advance the action because of the individuality of the issue of breach.

[54] With respect to the proposed common issue as to whether the OLGC has a duty as an occupier of land to detect and remove primary class members, there are, in my view, two aspects to the question: first, whether gambling is capable of being construed as a "dangerous" activity within the meaning of the OLA, and second, whether, in respect of each class member, gambling was in fact a dangerous activity. With respect to the first, the issue is a question of law. It seems to me, however, that assuming that it is so held, the question of whether or not gambling is dangerous and the degree to which it is dangerous to any class member is an individual one. As noted above, the class definition contemplates signature of the self-exclusion document only. Illness and vulnerability are allegations requiring individual proof. Danger in the activity of gambling is related to the presence of illness in the particular class member, and the fact of signing the self-exclusion form alone is neither proof of illness nor proof of knowledge of illness on the part of the OLGC.

[55] The question of what measures were taken to deny entry in the period December 1, 1999 to the present and the duration of such measures is relevant, first, only to those class members who obtained entry and, second, only to the extent that measures in place were relevant to their obtaining entry. In respect of class members who either did not attempt to gain entry or were excluded in their attempts to gain entry, the measures that the OLGC had in place at any particular time are irrelevant and cannot advance their cases.

[56] The issue of whether the OLGC breached its contractual obligations and the particulars of the breaches are individual as breach lies in permitting entry. That, as alluded to above, is an individual issue.

[57] The issue of whether the OLGC delegated the conduct and or management of its gaming facilities in breach of ss. 206 and 207 of the *Criminal Code* does not advance the case substantially. Liability as pleaded does not rest on breach of the *Code* and breach of the *Code* does not necessarily entail a causal link to loss and harm to the plaintiffs.

[58] The issues of whether the OLGC breached its tort duty or its duty as an occupier are inextricable from the issues concerning duty to take care to deny entry and to detect and remove class members from the gambling venues. There can be no breach of duty without a duty of care arising. As the existence of the duty of care is individual and dependent upon proven vulnerability on the part of the class member and knowledge of the vulnerability on the part of the OLGC, so too is breach of it. Moreover, there will be significant individual issues involving contributory negligence and causation.

[59] The issue of whether the OLGC may avoid liability by reason of expiry of the applicable limitation periods is individual. There was a change in the legislation governing limitation periods during the period put in issue in the pleading, and with respect to those members of the class who were not denied entry, it is an individual issue whether the *Limitations Act, 2002*, S.O.

2002, c. 24, Sched. B, as amended, is a defence because they will have obtained entry in different years.

[60] The issue of whether damages can be determined on an aggregate basis, and if so, how they should be distributed is one which arises only in respect of those class members to whom the OLGC is found to be liable. The question does not arise with and is irrelevant to those class members in respect of whom breach is not proved.

[61] Similarly, with respect to the proposed common issue of whether the primary class members may elect to "waive the tort" and require the OLGC to account for gross revenues or net profits. It is arguable that only those class members in favour of whom liability is found have a right to elect to waive the tort. The question is inapplicable to class members who cannot show breach or in respect of whom there is a complete defence. Accordingly, this is not a common issue. Moreover, there will need to be an individual inquiry as to how many individuals entered and what their gambling entailed in order to calculate the damages.

[62] The question of whether the derivative class members sustained damages pursuant to s. 61 of the *Family Law Act* and the quantum thereof is, first, individual, and second, is not an issue in the absence of a finding that the OLGC has liability to the primary class member to whom the derivative class member is associated. It is not a common issue that significantly advances the litigation.

[63] Whether the primary or derivative class members are entitled to punitive damages and how they should be distributed is not a common issue. The issue as framed begs the question of liability. The issue arises only with respect to those class members to whom it is shown the OLGC is liable and is not a question relevant to all class members.

[64] Whether the OLGC should pay prejudgment interest and post-judgment interest and, if so, how it should be distributed, and whether the OLGC should pay costs of administering and distributing any judgment are common questions in the sense that they are generic and both presuppose a finding of liability. These questions do not advance the action.

[65] On appeal, the plaintiffs argued that there was a common issue as to whether the self-exclusion agreement was a "peace of mind" contract, so that there should be damages for mental distress and punitive damages. Again, there are significant individual issues required to be determined: whether, in the case of any class member, the agreement was perceived by that member as a "peace of mind" contract, and if so, what that meant, second, whether mental distress was suffered, and third, whether there was causation in the case of the particular class member between mental distress and breach of the agreement *qua* "peace of mind" contract.

[66] In sum, the motions judge did not err in principle in finding that the common issues requirement had not been satisfied.

[67] A necessary but not sufficient fact in the chain of findings that must be made in order for any class member to establish liability in his favour is the factual finding that he entered the

OLGC's gambling premises after signing the self-exclusion contract. If, in the case of any particular class member, there is neither an attempt to enter, or if attempts to enter are prevented, determinations of the meaning of the contract, of the effect of the disclaimer or of the effectiveness or lack of effectiveness of the OLGC's program are irrelevant.

[68] Even where entry in the face of the self-exclusion contract is shown, liability is not a foregone conclusion. The plaintiff has pleaded the case, *inter alia*, on the basis that each of the primary class members was a problem gambler and that a special duty of care arose out of the OLGC's knowledge of the class member's illness and vulnerability. These involve member specific findings of fact to establish the elements of liability. Further, with respect to the question of the enforceability of the disclaimer, an argument that the disclaimer is unconscionable and therefore unenforceable as against a member is necessarily tied to the particular circumstances of each class member and the relationship between the class member and the OLGC.

Is a class action the preferable procedure?

[69] The motions judge determined that none of the goals of the CPA would be satisfied by certifying this action as a class proceeding. He concluded that given the numerous individual issues going to the root of a liability determination, a class proceeding would be "complex and unmanageable to an extent that would far outweigh the benefits to be obtained from subjecting them to the procedure in the CPA" (Reasons, at para 234). He determined that individual actions would be preferable, from the perspective of judicial economy, because of the need to focus on the circumstances and experience of a particular individual.

[70] He also concluded that access to justice was not a relevant consideration since the evidence showed that the amounts at stake did not render individual actions prohibitively expensive. It is common ground that there have been a number of individual lawsuits launched against the OLGC by persons similarly situated to the plaintiffs in this action. None of them have been tried. The settlements have been significant in dollar value, with payments of $167,000 on average. This would tend to suggest that claimants are not averse to litigating with the OLGC, at least where significant amounts are in issue.

[71] The motions judge also concluded that behaviour modification was not a relevant consideration, given the intense scrutiny to which OLGC is subject and given steps taken by it to improve the self-exclusion program before this litigation.

[72] In my view, there was no error in the result arrived at by the motions judge holding that a class action was not the preferable procedure. He applied the correct principles of law, and his conclusion is reasonable on the facts of this case.

CONCLUSION

[73] For these reasons, I would dismiss the appeal.

[74] The plaintiffs argue that there should be no costs, given s. 31 of the CPA. For the reasons set out in the penultimate paragraph of the motions judge's endorsement on costs (dated May 21, 2010), I would award no costs of this appeal.

Low J.

Swinton J.

J. WILSON J. (dissenting):

Overview of the issues

[75] I have reviewed the reasons of Low, J. and respectfully disagree with her conclusions. For reasons to follow, I would allow the appeal, set aside the decision of Cullity, J. dated March 15, 2010, and would certify the Appellants' Claim as a class action.

[76] In reaching this conclusion, I apply the principle that an appellate court owes significant deference to the Superior Court judges who have developed expertise in the complex, nuanced area of class actions. Simply put, Justice Cullity is recognized as one of the most respected and experienced class actions judges in Canada.

[77] Absent matters of general principle, errors of law, or a palpable overriding error with respect to a finding of fact that is central to the proper application of section 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 [*CPA*], a certification decision should not be interfered with by an appellate court: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321, [2007] O.J. No. 1684 at paras. 33, 41, 46, 49; *Cassano v. Toronto-Dominion Bank* (2007), 87 O.R. (3d) 401, [2007] O.J. No. 4406 at paras. 3, 27, 37, 38, 54, 59, 60.

[78] The causes of action relied upon by the plaintiffs against the OLGC for the inadequate system of enforcing the self-exclusion contract include breach of contract, negligence, occupiers' liability, and in the alternative, disgorgement of revenues by waiver of tort.

[79] The motions judge in comprehensive reasons confirmed that the prerequisites of section 5(1)(a) of the *CPA* have been met and that the plaintiffs have pleaded material facts that constitute a cause of action, applying the test in *Hunt v. Carey Canada Ltd.*, [1990] 2 S.C.R. 959. Notwithstanding the submissions of the OLGC, the motions judge concluded that all of the causes of action met the *Hunt* test.

[80] Although the Respondent's factum challenges the section 5(1)(a) analysis in the alternative, it was not pursued by counsel for OLGC in this appeal in oral argument.

[81] With the exception of the question of prematurely interpreting the self-exclusion contract, I adopt the analysis of the motions judge and his conclusions that the prerequisites of section 5(1)(a) of the *CPA* have been met.

[82] The core issue in this appeal is whether the motions judge was correct in concluding that vulnerability as a problem gambler must be proved on an individual basis as a prerequisite to be a member of the class to meet the test of commonality in the 5(1)(c) analysis of the *CPA*.

[83] I conclude, for reasons to be outlined, that the signing of the self-exclusion contract creates the class. Signing puts the OLGC on notice that those who sign are problem gamblers

without the need to canvass the question on an individual basis for the purpose of the certification motion.

[84] In my respectful view, the motions judge erred in principle in reaching the conclusion that vulnerability as a problem gambler must be proved on an individual basis to be a member of the class to meet the test of commonality in the 5(1)(c) analysis. This conclusion dominated his analysis of the proposed common issues and his conclusion that the class was over-inclusive. In light of this conclusion, the comments made in the recent decision of the Ontario Court of Appeal in *Quizno's Canada Restaurant Corporation v. 2038724 Ontario Ltd.* (2010) 100 O.R. (3d) 721, [2010] O.J. No. 2683 at para. 38 engage:

> ....there was effectively no independent analysis of those [common and individual] issues by the motion judge, which constitutes the kind of error that attracts the intervention of an appellate court.

[85] Before considering the specific issues raised by the parties, I outline the Appellants' allegations of the enforcement problems with the memory based system and the failure of OLGC to make its best efforts to enforce the self-exclusion contract.

The Inadequacies of the Memory Based Exclusion System

[86] The self-exclusion contract confirms "Self-exclusion will direct the OLGC, and commercial casino operators acting for OLGC, to use their best efforts to deny your entry, as a service, to all OLGC's gaming venues in the province of Ontario".

[87] The Appellants assert that the OLGC knew that its self-exclusion program as it existed was wholly inadequate and did not effectively meet its undertaking to make its best effort to enforce the self-exclusion contract.

[88] The Appellants argue that OLGC was in a direct conflict of interest between its financial interests to continue to reap significant economic benefits from problem gamblers who continued to gamble in spite of signing the self-exclusion contract, and its obligation as a crown agent to promote responsible gambling and to implement a meaningful system of screening to enforce the self-exclusion contract for citizens.

[89] Cullity, J. summarizes the allegation that OLGC breached its best effort commitment to the self-exclusion contract at para. 92 of his reasons:

> I am also of the opinion that sufficient allegations of OLGC's breaches of the contractual duty to exercise its best efforts have been pleaded. Essentially, the allegations are that OLGC knew that its system of memory-based enforcement was entirely inadequate to identify self- excluded gamblers who sought re-entry; that it knew that the system was ineffective; that it did not attempt to remedy the deficiencies; and that it failed to implement more effective measures reasonably available to it.

[90] The OLGC enforced the self-exclusion contract using a "memory-based system". The self-exclusion contracts, along with photographs of the 10,428 self-excluded persons, were circulated to all OLGC gambling venues. The photographs of the self-excluded persons were kept in the security offices of gambling venues. Due to the number of photographs, the security staff only regularly reviewed the photographs of individuals who had self-excluded at their particular site. The security staff was then responsible for recognizing self-excluded persons at the door from their photographs and refusing them entry.

[91] Based upon OLGC figures, there were three OLGC gambling venues with an estimated 21.1 million annual visits in 1999/2000. By 2008, there were 27 OLGC gambling venues with an estimated 42 million annual visits to OLGC's four commercial or "resort" casinos, six charity or "community" casinos, and 17 slot machine facilities at racetracks.

[92] The Appellants argue that OLGC knew or ought to have known that the memory-based enforcement of the self-exclusion contract was inadequate.

[93] According to the affidavit of current Director of Policy and Social Responsibility at OLGC, Mr. Pellizzari, OLGC gambling venues detected approximately 1,000 self-exclusion violations per year using its approach of memory-based enforcement.

[94] We do not know what percentage of problem gamblers self-exclude, but given the number of visits to casinos annually, it appears that very few violations were detected using this system.

[95] Citing the 2004 study prepared for the Ontario Problem Gambling Research Centre by Dr. Robert Williams,[1] the Appellants assert that problem gamblers account for an estimated 36% of OLCG's total revenue in 2003. In 2003, the OLGC's net revenue was 723.604 million dollars. The Respondent's expert did not comment on this estimation.

[96] The most conclusive evidence of the known failures of the memory based exclusion system was an external review commissioned by the OLGC in 2001 by Neasa Martin. The report entitled "Responsible Gaming Problem Gambling Consultation" (the Martin Report)[2] reviewed the self-exclusion program in 2001.

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[1] Robert Williams and Robert Wood, *Final Report: The Demographic Sources of Ontario Gaming Revenue* (Prepared for the Ontario Problem Gambling Research Centre, June 23, 2004) at 44, located in the Respondent's Compendium at 1851.

[2] Neasa Martin, *Responsible Gaming Problem Gambling Consultation* (Final Report to the Ontario Lottery and Gaming Corporation, October 30, 2001), located in the Appellant's Appeal Book at 734.

[97] The Martin Report was clear that the memory based system of enforcement of the Self-Exclusion contract was inadequate and was unequivocal that the system was in need of an "overhaul." No overhaul took place during the period in issue in this lawsuit.

[98] Specific findings by Martin included the following:

- OLGC voluntarily assumed, through its self-exclusion program, "ownership in the restriction of access to its gaming facility" which brought significant "risk and liability to the Corporation" (p. 739);
- OLGC has left training standards on Responsible Gaming to individual gaming organizations and "as a consequence, staff training is inconsistent across the Corporation" (pp. 740, 766);
- OLGC is falling behind other jurisdictions [in responsible gambling] despite making the largest financial investment" (p. 743);
- Recognition across OLGC sites (i.e., gambling venues) was "relatively impossible" and a central database was required to "coordinate both entry and removal" (p. 784);
- There "will be a backlash against government and gaming industry where they are perceived to be gouging vulnerable individuals" (p. 780);
- There is an "inherent conflict of interest when governments both benefit financial[ly] from gambling and are responsible for [its] prevention, education and treatment" (p. 780);
- "It is a "Pitfall to develop a program and not monitor or enforce it" (p. 783); and
- "If [the self-exclusion program] must stay province wide then OLGC must create a centralized database to coordinate both entry and removal. Should have a longer exclusion period. Six months is too short to insure people get help. Mandatory educate provincial create a central database to coordinate" (p. 784)

[99] The Appellants rely upon evidence of alternative approaches to implement self-exclusion contracts taken by both government and private casino operators, including a carding system, as well as criticisms of "memory-based enforcement" in Canada and around the world.

[100] OLGC's expert, Dr. Shaffer, offered no evidence as to the effectiveness of OLGC's implementation of the self-exclusion contract using "memory-based enforcement."

The Issues to be determined

[101] The appellants put forward the following issues:

- ISSUE 1: Did the motion judge err in concluding that it was a prerequisite that each class member must prove vulnerability on an individual basis as a pathological or problem gambler to meet the test of commonality of issues in the section 5(1)(c) analysis? Given the knowledge of OLGC and the target group for the program was problem gamblers, can vulnerability as a problem gambler be presumed for the purpose of this certification motion to meet the test of "some basis in fact", by the act of signing the self-exclusion contract without further proof?

- ISSUE 2: In the alternative, did the motions judge err in rejecting the statistical evidence of the Appellants' expert that informed whether the Appellants had met the test of "some basis in fact" that signing the self-exclusion contract was proof of vulnerability as a problem gambler?

- ISSUE 3: The Appellants assert that the motions judge's erroneous preliminary conclusion that vulnerability must be proved on an individual basis permeated the decision and resulted in a failure by the motions judge to consider the common issues and the individual issues pursuant to section 5(1)(c) and to determine whether a class proceeding was the preferred procedure in this case having regard to sections 5(1)(d) and (e).

- ISSUE 4: Did the motions judge err in determining the meaning of the waiver in the self-exclusion contract at the certification stage of a proceeding in the section 5(1)(a) analysis? As two alternative interpretations of the self-exclusion contract were possible, does the determination of this issue require factual context and is this question properly treated as a common issue in the section 5(1)(c) analysis?

Overview of Respondent's position

[102] As reflected in detail in the reasons of Low, J., the Respondent vigorously disputes the arguments of the Appellants.

[103] The Respondent asserts that the self-exclusion contract was provided as a self-help tool to certain gamblers and as an accommodation with no obligations upon the OLGC. The Respondent relies on the waiver and release clauses in the terms of the self-exclusion contract and argues that there is no public policy interest that would justify the court overriding what the OLGC asserts is a clear, unambiguous document.

[104] The Respondent adopts the finding of Cullity, J. that the requirement of finding individual vulnerability permeates all issues of both liability and damages, pointing to the significant number of unique facts raised by Mr. Dennis as evidence of the individual nature of the claims. The Respondent argues that each gambler is not a passive participant but is largely responsible for his or her own fate. The success of the self-exclusion program is largely reliant on an individual's motivation.

[105] The Respondent argues that proving a breach engages complex individual issues that preclude certification, as it is not clear who from those that signed the self-exclusion contract crossed the line to return to gamble and experience losses.

Overview of Appellants' position and my conclusions

[106] The Appellants argue that the preliminary issue of requiring proof of individual vulnerability erroneously shaped the findings of the motions judge. This issue underpinned the conclusion of the motions judge that the individual issues dominate the common issues, such that it was not appropriate to certify this as a class action. The Appellants argue that in light of the undisputed facts of this case, vulnerability can be presumed by signing the self-exclusion contract and that the liability issues are important common issues.

[107] Alternatively, the Appellants argue that the motion judge erred in declining to consider the expert evidence that provides context that there is "some basis in fact" that those who signed the self-exclusion contract were vulnerable problem gamblers.

[108] The Appellants argue that there was a systematic breach by OLGC by the inadequate enforcement of the self-exclusion contract. The Appellants concede that in all probability, based upon what is now known, not all members of the class will have experienced loss. The Appellants argue that the question of which self-excluders returned to gamble and suffered losses is properly considered at the stage of considering causation and proof of damages. These facts are not relevant to whether the Appellants have proved a systematic breach by the OLGC.

[109] The Appellants concede that if aggregate damages or waiver of tort cannot be proved, many of the damages issues engage individual issues requiring proof that the person who signed the self-exclusion contract continued to gamble in OLGC sites and experienced losses However, this does not preclude certification of a class proceeding. In accordance with *Sauer v. Canada (A.G.),* [2008] O.J. No 3419 (S.C.J.), leave to appeal denied in [2009] O.J. No. 402 (Div. Ct.), a class action may still be certified where there are difficult individual issues for assessing damages.

[110] As well, as outlined in the majority decision of Low, J. individual issues as to defences may arise. Again, this does not preclude certification: *Western Canadian Shopping Centres Inc. v. Dutton,* [2001] 2 S.C.C 534 at paras. 52 to 57.

[111] The motions judge concluded that proof of individual vulnerability was a threshold preliminary issue that, in his view, doomed this action from being certifiable.

[112] From the undisputed background facts giving rise to the self-exclusion program, it is clear the OLGC was targeting vulnerable, problem gamblers. The OLGC has specialized knowledge that an increase in problem gambling would be a consequence of introducing legalized gambling in Ontario. Given the role of the OLGC for implementing a system of responsible gambling in Ontario and given that the target group for the exclusion program was problem gamblers, vulnerability may be presumed by signing the self-exclusion contract. This

conclusion is for the purpose of the certification motion to decide whether the Appellants have provided "some basis in fact" to meet the test of commonality.

[113] I conclude that it is not necessary at this stage of the proceeding to consider the issue of vulnerability on an individual basis to seek admission to the Class A or to meet the commonality requirement in the section 5(1)(c) analysis. Nor is it necessary at the liability phase to determine which self-excluders returned to gamble and experienced losses when considering whether the Appellants have proved a systemic breach by the OLGC.

[114] Once individual vulnerability is presumed by the act of signing the self-exclusion contract, I conclude that the analysis of issues raised in section 5(1)(c) and 5(1)(d) and 5(1)(e) of the *CPA* favours certification of this action as a class proceeding.

Proposed List of Common Issues and Individual Issues

[115] Class actions inevitably evolve, and this case is no exception. The Statement of Claim has been amended twice.

[116] The proposed list of common issues and individual issues is not identical to what was considered before Cullity, J. and in fact, different versions were filed in the factum and during the argument of this appeal.

[117] Counsel for the OLGC suggests that the Appellant has created sub-issues to common issues in an attempt to tip the scale in favour of certification, by embellishing the number of common issues. There may be some window dressing and parsing, but without doubt, this action, like so many class actions, is complicated with many liability and damages issues.

[118] For the purpose of this appeal, I choose to work with the 15 common issues as argued before Cullity, J. and I adopt his simplification of the proposed list of issues as enunciated in paras. 187 and 188 of his decision.

[119] Refinement of the issues may be conducted by the parties before the motions judge if this action is certified. Unless there has been a change in the law, it is not appropriate for the parties to seek to redefine the issues before this Court.

ISSUE 1: Did the motions judge err in his conclusion in the section 5(1)(c) analysis that the Class A was over-inclusive as it was a prerequisite that each class member must prove vulnerability on an individual basis as a pathological or problem gambler to meet the test of commonality of issues?

The section 5 (1)(c) analysis

The pleadings

[120] This claim was commenced on April 3, 2008. The Amended Amended Statement of Claim dated June 9, 2009 (the Claim) was the pleading before Cullity, J. for the certification motion. OLGC has not yet filed a defence.

[121] The Class A definition contained in the pleading is:

> Dennis, and all other residents of Ontario and the United States who signed the [self-exclusion form] at any time in the period from December 1, 1999 to February 10, 2005.

[122] In the former pleadings, the Class A definition required that the members be person who "suffered from compulsive gambling" signed the self-exclusion contract and "were nonetheless permitted entry to one or more of the Gambling Venues." These deletions were made in the Claim presumably to rectify the problem of engaging preliminary individual issues to determine membership to Class A.

[123] All references to compulsive gambling and pathological gambling in prior pleadings were deleted in the Claim.

[124] Mr. Denis, the representative plaintiff, is described at paragraph 2 of the Amended Amended Claim as "at all material times a person suffering from problem gambling." At paragraphs 28 and 29, the Appellants plead that at all material times, "Dennis and each of the Class A members were problem gamblers" and "the OLGC had special knowledge as an operator of gambling premises [...] of the risks and harms of the Gambling Venues to its customers including, in particular, problem gambling."

[125] The Appellants further allege in the Amended Amended claim that the OLGC knew or ought to have known that problem gambling is

> ... a progressive behavioural disorder in which an individual develops a psychologically uncontrollable preoccupation and urge to gamble leading to excessive gambling.
>
> Key features of problem gambling include uncontrollable feelings and compulsions relating to gambling such as preoccupation with gambling, irrational repeated gambling to recover losses due to gambling and the development of tolerance to the risk of gambling which requires gambling at high stakes with the attendant greater risks of greater losses to obtain the same "high".

[126] The Appellants plead as outlined in para 54 of the Claim that "At all material times Dennis, and each of the Class A Members... (e) gave notice to the OLGC of their vulnerability as problem gamblers when they signed the Self-Exclusion Contract". [Emphasis added]

[127] The Appellant argues that those who signed made known their vulnerability and that no further proof of problem gambling is required at this stage of the proceeding. Signing triggers a finding of vulnerability as a problem gambler sufficient to meet the test of commonality.

Reasons of Justice Cullity in the 5(1)(c) analysis requiring proof of individual vulnerability

[128] Justice Cullity confirmed that the Ontario government's decision to legalize gambling raised concerns about problem gambling:

> Social evils associated with gambling, and particularly organized gambling, have long been recognized and are reflected in the prohibitions in the Criminal Code. The decision to establish the pilot project in Windsor in the early 1990s raised opposition and concerns that focused on, among other things, the personality disorder generally referred to as "problem gambling". [para 16]

[129] Cullity J. concluded at para. 189 that there were serious flaws in the plaintiffs' case for certification as the requirements of commonality and a rational connection between the class definition and the proposed common issues was not met. He concluded at para. 189 that:

> 1. the claims advanced on behalf of the class members are predicated, and dependent, on their vulnerability;
> 2. vulnerability is not a condition of class membership. As defined, and, in consequence, causes of action that are addressed by the proposed common issues are not confined to compulsive gamblers;
> 3. the problem of over-inclusiveness of the class definition, and the consequential individualistic nature of the proposed common issues, cannot be resolved by the use of statistical evidence to characterize a percentage of the class members as pathological problem gamblers; and
> 4. in consequence, the requirement of a class in section 5(1)(b) and of common issues in section 5(1)(c) of the CPA are not satisfied and certification must be denied.

[130] The crux of his decision on vulnerability and its role in defining all of the proposed common issues is summarized at paragraphs 190 to 193 as follows:

> [190] A mass of evidence has been filed on the nature and prevalence of problem gambling. The vulnerability of self-excluded persons -- the class members -- as problem gamblers is the general theme of the claims pleaded on their behalf. It is, therefore, striking -- and I believe it is significant -- that the class definition does not require the members to be identified as problem gamblers in any sense, or to any particular degree. Similarly, the proposed common issues do not refer to problem gambling and do not, in their terms, treat its nature and extent as factors to be considered by the trial judge. The class

definition as originally defined in the statement of claim restricted the class to "compulsive" gamblers. This class criterion was deleted when the pleading was amended because, I presume, it would not have permitted class members to be identified with sufficient objectivity and certainty.

[191] In my opinion, the vulnerability of class members is essential to the validity of their claims. Persons who were not problem gamblers would have no tenable claims and there could be no question of certifying the proceeding in respect of such persons. The evidence is that the disorder is progressive and that there is a range of its severity. There is nothing in the class definition or the formulation of the common issues to confine the claims asserted to members of the class who were vulnerable to any particular degree, if at all, and, in my judgment, the class definition is to that extent objectionably over-inclusive, and the proposed common issues lack commonality. While it can no doubt be presumed that most self-excluded persons were at least apprehensive about their vulnerability, the degree of their addiction, if any, and the significance to be attributed to the concept of personal autonomy could only be determined on an individual basis.

[192] If Mr Dennis, or any of the other class members, had advanced the same claims in individual actions, OLGC would have been entitled to raise issues relating to personal autonomy and degrees of vulnerability in connection with elements of liability such as reasonable foresight of harm; proximity; unconscionablity; a willing assumption of risk for the purposes of section 4(1) of the OLA; causation of proven losses; contributory negligence; and punitive damages. The right of OLGC to pursue such issues on an individual basis is not, in my opinion, excluded by pursuing the claims under the procedure of the CPA and defining the class, and the common issues, without reference to the vulnerability of the class members. Nor, for the reasons I will give, can the issues be resolved by reference to statistical probabilities.

[193] In Hollick at para. 21, it was accepted that over-inclusive classes can be permitted where the class "could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues". I do not understand this principle to permit an over-inclusive class to be accepted if the reason why it could not be drafted more narrowly is the inability to provide a limiting class criterion that will establish the rational link with the proposed common issues on which commonality depends. In such a situation, instead of common issues determinable on a class-wide basis, there will be individual issues affecting liability to each member of a diverse group. In my judgment, that is the case here.

[131] The background evidence called by the Appellants confirms the pervasive and progressive dangers of gambling. The motions judge accepted evidence that problem gamblers and pathological gamblers suffer from a mental illness recognized in the psychiatric literature in the DSM-IV. Evidence was also called that gambling is on a continuum of severity, beginning with non-problem gambling, developing into moderate problem gambling and continuing to the pathological gambler, where gambling controls an individual's life.

[132] The Appellants state that this evidence was provided to the Court to provide context to the issues. This includes the known consequences to OLGC of increasing problem gamblers as a result of introducing legalized gambling in Ontario, and the responsibilities of OLGC, particularly its undertaking to the public to implement a program of "responsible gambling," which included the self-exclusion program to protect vulnerable members of the public.

[133] This evidence was in support of the pleading in para. 54 of the Claim that the members of Class A gave notice to the OLGC of their vulnerability as problem gamblers when they each signed the self-exclusion contract.

[134] This evidence was not presented to the court to suggest that each member of Class A must be individually diagnosed on the DSM-IV as a prerequisite to a right to advance a claim.

[135] Appellants' counsel advised the court during argument in this Appeal that the Respondent did not plead or argue that vulnerability was a prerequisite to consideration of the various liability and damages issues. This was not disputed by counsel for the OLGC. This assertion is confirmed by a review of the record before Cullity, J. and in particular, a review of the Respondent's 129 page factum presented to the motions judge.

[136] The Respondent raised many individual issues, but the need to prove problem gambling was not one of them. Paragraph 16 of the Respondent's factum that was before Cullity J. confirms the list of individual issues raised:

> Individual issues underlie virtually every element of the pleaded causes of action, including the existence of a duty, fundamental breach, breach of duty or contract, causation, fraudulent concealment, contributory negligence, mitigation, proof of loss, and quantum of damages. The individual issues include what class members were told about self-exclusion; whether the exclusion of liability in the self-exclusion form was unconscionable or unreasonable; whether proposed class members returned to gamble at an OLG facility; whether they were able to regain entry at such a facility; whether their re-entry was attributable to any failings of OLG; whether they in fact lost money gambling, and if so, how much; whether they would have lost the same amount of money gambling at one of the countless other venues inside and outside Ontario not covered by the self-exclusion policy; whether their claims are barred by a limitations period, and if so, whether any material facts were fraudulently concealed from them; and whether they are

> contributorily negligent for, or failed to mitigate, any losses suffered. Each of these questions can only be answered by an individual inquiry.

[137] The focus of the certification motion as reflected in the reasons of Cullity, J. was on the 5(1)(a) issues, as well as a host of other individual issues raised by the Respondent, not on the issue of vulnerability or problem gambling.

The test for commonality: some basis in fact

[138] Section 5(1) of the *CPA* provides, "The court shall certify a class proceeding on a motion if ... (c) "the claims or defences of the class members raise common issues".

[139] The test for commonality between the class and the proposed common issues is articulated by McLachlin C.J. in *Hollick* at para. 18:

> An issue is common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, [page172] an issue will not be "common" in the requisite sense unless the issue is a "substantial ... ingredient" of each of the class members' claims.

[140] The threshold to meet the test of commonality is low. The Appellants must only establish "some basis in fact" to show a rational connection between the class definition and the proposed common issues: *Hollick* at para. 25; *Quiznos* at para. 44.

[141] I outline the simplification of the Appellants' proposed common issues enunciated by Cullity, J.:

(1) whether the self-exclusion forms are binding contracts that required OLGC to take reasonable care to deny entry to OLGC's facilities to the primary class members, and to detect and remove any who gained entry;

(2) whether OLGC had a duty in tort to take such reasonable care;

(3) whether OLGC breached either, or each, of the duties in 1. or 2. or its duty under the Occupiers Liability Act;

(4) whether damages sustained by class members as a consequence of any breaches of the above duties can be determined on an aggregate basis in whole, or in part; and

(5) whether OLGC can be required to account for gross revenues, or net income, derived from class members as a consequence of any such breaches of duty.

(6) In addition, there are issues relating to punitive damages, limitations, damages sustained by family members of the derivative class, prejudgment and post

> judgment interest, and the expenses of administration and of the resolution of individual issues.

[142] Common issues need not be determinative of liability. They simply need to move the litigation forward in a significant way by avoiding duplication of fact-finding or legal analysis: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 53, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Lavier v. MyTravel Canada Holidays Inc.*, [2009] O.J. No. 1314 (Div. Ct.), rev'g [2008] O.J. No. 2753 (S.C.J.).

[143] Given the special knowledge and role of the OLGC, can the requirement of "some basis of fact" be met to prove that the Class A members were vulnerable problem gamblers based upon signing the self-exclusion contract?

Evidence of knowledge of OLGC that problem gamblers signed the self-exclusion contract

[144] The Appellants assert that the undisputed facts contained in the motion record for certification are clear and unequivocal that the OLGC specifically targeted problem gamblers for the self-exclusion program and knew that those who signed the self-exclusion contract had problems stopping themselves from gambling. If proof of vulnerability is a necessary consideration in commonality, I conclude that the undisputed facts are sufficient to meet the threshold of proving "some basis in fact". See: *Hollick* at para. 25; *Quiznos* at para. 44.

[145] The self-exclusion program began pursuant to section 32 of Regulation 385/99 under the *Gaming Control Act, 1992*, S.O. 1992, c. 24.

[146] The motions judge confirmed at para. 28 that the self-exclusion program is premised on problem gamblers having moments of clarity to seek help and in which "they recognize the existence of the problem, the disastrous consequences it can have for them and their families, and the need to obtain assistance to prevent them from giving in to their weakness."

[147] Justice Cullity in his reasons also confirms the knowledge and expertise of OLGC with respect to problem gambling at paras. 20, 21 and 24:

> [20] The existence and the social consequences of problem gambling were prominent in the legislative deliberations that led to the enactment of the Ontario Casino Corporation Act and they have received continuing recognition by the government and by OLGC.
>
> [21] In an affidavit sworn for the purpose of this motion, Mr Paul Pellizzari -- the Director of Policy of OLGC stated:
>
> > Since introducing casino gaming in Ontario in 1994, Ontario has become a leading jurisdiction in North America concerning the prevention and treatment of problem gambling.

> [24] In his affidavit, Mr Pellizzari refers to the development of responsible gambling initiatives by OCC and OLGC after 1994, as expertise with respect to problem gambling was acquired, and advances were made in scientific knowledge of the disorder. From the outset, each casino operator was required to implement responsible gambling strategies to raise awareness among its patrons, employees and community members.

[148] When the Ontario Casino Corporation (OCC), the predecessor to the OLGC, embarked upon legalized gambling in Ontario in 1993, it is clear that the crown corporation knew that increased availability of gambling would result in an increased incidence of problem gambling. This is reflected in legislative reports dating back to the inception of legalized gambling in Ontario in 1993.[3]

[149] In the 1993 hearing of the Standing Committee on Finance and Economic Affairs held on the proposed enactment of *Ontario Casino Corporation Act, 1993*, S.O. 1993, c. 25,[4] much evidence was presented about the seriousness of problem gambling.

[150] The Honourable Paul Hellyer, Chairman of the Canadian Foundation on Compulsive Gambling (CFCG), warned the Committee about the effects of gambling venues on problem gamblers:[5]

> The negatives are not adequately stated. For example, just because gambling is being legalized in other jurisdictions is insufficient reason to do the same here. It is less than credible that the expansion of casino gambling would benefit pathological gamblers by providing honesty in games, more security and consistent odds. Whoever wrote that was dreaming in Technicolor. More casinos will not only result in greater crime, but will also create a greater incidence of compulsive and pathological gambling, with its incalculable economic and human cost.
>
> [...]
>
> Consequently, our main purpose here today, I guess, is to urge members of this committee to recommend that a substantial proportion of the revenues from casinos be allocated, first, for information to warn citizens, and particularly young people, of the consequences, the potentially disastrous consequences, to their lives

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[3] Ontario, Legislative Assembly, Standing Committee on Finance and Economic Affairs, August 23, 1994, Committee Transcripts (Hansard), (24 August 1993) [Standing Committee 1993], located in Appellant's Appeal Book at 456.

[4] Repealed in 2000 by the *Ontario Lottery and Gaming Corporation Act, 1999,* S.O. 1999, c. 12. .

[5] *Ibid.* at 1049-1050 (Hon. Paul Helllyer), located in Appellant's Appeal Book at 466.

> of getting hooked on gambling, and, secondly, an even larger proportion of the revenues to be diverted for the provision of diagnostic and treatment facilities, because this is going to be a very expensive operation in the years to come. An American expert has indicated that pathological gambling will be the mental health disease of the next decade. We're going to have to spend a lot of money and a lot of effort to cope with it. I think this is the least that can be expected from governments where policies lead inevitably to such tragic consequences for the unfortunate minority. [Emphasis added]

[151] On November 18, 1994, the OCC introduced the Responsible Gambling Program to address problem gambling. It had three aspects: a self-exclusion program, an employee assistance program, and an awareness program. This program was implemented in Casino Windsor in 1996 and subsequently, in Casino Niagara and Casino Rama.

[152] The Responsible Gambling Program acknowledged that the OCC (and by extension its successor, the OLGC) had a role to play in addressing problem gambling: it recognised that "any overall strategy to deal with issues on problem gambling rests with the provincial government [...] and that all those involved in the gaming industry [...] must play a role" and pledged "to this end [to] develop a program on Responsible Gambling. [Emphasis Added]."[6]

[153] In its Annual Reports from 1996-1999, the OLGC confirms its awareness of the seriousness of problem gambling and its responsibility for addressing this issue. For example, in its 1998-1999 report,[7] the OCC stated the following:

> The OCC recognises its responsibility to help those for whom "the fun stops being fun." The Corporation is committed to leading the way in the North American gaming industry in dealing with a social problem that affects a small minority of players [...]
>
> The OCC has renewed its support for the Canadian Foundation on Compulsive Gambling

[154] In her affidavit, Ms. Lori Stoltz, lawyer for the Appellants, points to one important source of the OLGC's knowledge: the non-profit gambling organization, Canadian Foundation on Compulsive Gambling (CFCG), renamed to Responsible Gambling Council (Ontario) (RGCO), funded by the Ontario government and by OLGC. In a March 2005 report entitled *Review of the*

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[6] Ontario Casino Corporation, "Casino Windsor: Responsible Gambling Program," November 8, 1994, located in the Appellants' Appeal Book at 685.

[7] Ontario Casino Corporation, Annual Report, 1998-1999 at 25, located in the Appellants' Appeal Book at 692.

Problem-Gambling and Responsible Gaming Strategy of the Government of Ontario,[8] OLGC Chairperson, Stanley Sadinksy, stated that the CFCG was a "recognised leader on issues related to gambling and problem gambling" and put "problem and compulsive gambling issues on the public agenda."

[155] Ms. Stoltz's affidavit also points to the OLGC's knowledge about the dangers of its relationships with the private sector commercial casino operators who manage the gambling venues day to day. Reid Scott from the CFCG warned in a 1993 committee hearing that OLGC contracting out to the private sector "does add somewhat to the problem of controlling the operations of the casino."[9]

[156] There is some evidence that the OLGC was obtaining knowledge and information from the CFCG. The OLGC commissioned the CFCG sometime before 1999 to prepare two pamphlets entitled "When does gambling becomes "compulsive"?" and "Compulsive Gambling occurs much more frequently than Canadians realise."[10] These pamphlets were distributed to the public at many casinos.

[157] The public concerns and predictions about the growth of problem gambling appear to have come to fruition.

[158] In his October 2009 report, Dr. Robert Williams, the Appellants' expert witness opines that the prevalence of problem gambling in Ontario has doubled since the introduction of legalized gambling at OLGC venues. This evidence was not disputed by the Respondent.

[159] The directing minds of the OLGC have admitted knowledge of the dangers of problem gambling. There have been 9 other actions by other individuals suing OLGC. The Appellants went so far as to present a transcript for discovery in one of these proceedings, *Treyes v. OLGC*, when a representative from OLGC with knowledge of the program, Robert Stenton, the OLGC's Compliance Manager in 2002, was examined. He admitted that based on common sense, those who self-excluded had problems with gambling.

> Q. 189. Would you agree, based on common sense, that the people who are seeking to be self excluded at the OLGC had problems stopping themselves from gambling?
>
> A. Based on common sense that would make sense, yes. They would have that problem
>
> [Emphasis added]

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[8] Located in the Appellants' Appeal Book at 472.
[9] Standing Committee 1993, *supra* note 3 (Reid Scott) at 1019, located at the Appellant's Appeal Book at 458.
[10] Located in the Appellants' Appeal Book at 683-689.

[160] The Appellants argue that in response to the known consequences of legalizing gambling in Ontario, the OLGC established the self-exclusion program to target and to assist problem gamblers in 1994. The pleadings contain many allegations of the knowledge of OLGC that problem gamblers was the target group for the program:

- The document approving the program was entitled "Problem Gambling" (para. 33).
- The program was "targeted at problem gamblers" (para. 34).
- The policy included certain features "[f]urther to the OLGC's special knowledge of the risks ... of problem gambling and the vulnerability of its customers to develop problem gambling" (para. 38).
- Reinstatement is due to the "uncontrollable nature of the impulse to gamble experienced by problem gamblers" (para. 41).
- OLGC repeatedly acknowledged "the risks and harms of the Gambling Venues for problem gamblers; the vulnerability of its customers to develop problem gambling (and progressively more serious problem gambling and related harms) ... and that there were ascertainable signs and symptoms of problem gambling" (para. 30).

[161] In his cross-examination, Paul Pellizzari admitted that OLGC assumed a lead role in the Responsible Gaming Program and specifically, in the self-exclusion program.

> Q.76 And I'm going to suggest to you, sir, the successor corporations responsible for operating the casinos in Ontario similarly took a lead role in addressing legitimate concerns such as problem gambling?
>
> A. OLG as the successor organization to OCC takes a lead role in providing responsible gaming programs commensurate with its role as an operator.
>
> Q. 77. All right. And as part of those steps, given that it does so in its role as operator, it has a number of responsible gaming programs, one of which is the self-exclusion program?
>
> A. Correct.
>
> [Emphasis added]

[162] In its 1998-1999 annual report, the OCC referenced the self-exclusion program as a solution to problem gambling. It pointed to the difficulties of identifying a problem gambler and then identified its own expertise in doing so.

> All three [of the commercial] casinos have a "self exclusion program" in which an individual asks to be excluded from visiting the casino. He or she signs a contract enabling the casino security to intervene if they are found on the premises.

> Unlike other forms of addiction, compulsive gambling is invisible to an untrained observer. [...]
>
> The OCC ensures leading edge training for all gaming employees, especially those on the front lines, to recognize the signs of a problem gambler.
>
> [Emphasis added]

[163] In its 2000 Self-Exclusion policy, in the Policy Statement Regarding Responsible Gambling,[11] the OLGC committed itself to "take proactive steps which promote responsible gaming" and "treat persons who request information or assistance regarding problem gambling with courtesy, respect, understanding, and support".

The Appellants cannot know the facts until this matter is certified

[164] The witness who swore the affidavit on behalf of OLGC and was available for cross-examination by the Appellants, Paul Pellizzari, worked for OLGC after 2007 and had no responsibility relating to the self-exclusion program prior to 2007.

[165] OLGC shielded Ms. Susan Ramondt from production and cross-examination. Ms. Ramondt was the person responsible for the development and implementation of the self-exclusion program from 1995 to 2007 and was still an OLGC employee at the time of this litigation.

[166] The Appellants do not know the identities of the 10,428 people who signed the self-exclusion contract with OLGC between December 1, 1999 and February 10, 2005. Obviously, OLGC knows the identity of these individuals.

[167] OLGC asserts that 1000 violations of exclusions were enforced each year in Ontario. This assertion cannot be tested. Again, OLGC presumably knows the identity of those excluded, the number of repeat violators, but the Appellants do not.

[168] The Appellants cannot put more specific facts before the court at this time.

Vulnerability may be inferred or presumed by signing the self-exclusion contract.

[169] I am not convinced that the question of vulnerability and problem gambling arises in considering the issues of commonality and liability. The class consists of those who signed the self-exclusion contract. If the common issues of liability can be proved, then the issues of vulnerability and problem gambling become relevant later in this proceeding when considering

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[11] Located in the Appellant's Appeal Book at 706.

individual defences that may be raised, as well as individual issues of causation and proof of damages.

[170] However, based upon the reasons of the motions judge, the question of vulnerability and problem gambling is now clearly in issue when considering the question of commonality, and whether the Appellants have proved "some basis in fact" that those who signed the self-exclusion contract were problem gamblers. Therefore I will respond to the arguments made by both the Appellants and the Respondent in this Appeal.

[171] It is not disputed that the OLGC had expertise and sensitivity to know that problem gamblers would increase as a consequence of legalizing gambling and that the self-exclusion program specifically targeted problem gamblers.

[172] I conclude that this proof, that those who self-excluded were problem gamblers, is more than sufficient to meet the low threshold of proving "some basis in fact" to support the test of a rational connection between the class members and the proposed common issues: *Hollick* at para. 25; *Quiznos* at para. 44.

[173] The only reasonable inference from the undisputed facts is that the Appellants have provided some basis in fact that those who self-excluded were problem gamblers and that proof of vulnerability on an individual basis as a threshold issue is unnecessary.

[174] Respectfully, the conclusion of the motions judge that individual vulnerability as a problem or pathological gambler in accordance with psychiatric criteria needs to be proved was a pervasive error in principle that permeated his analysis of the common issues, the preferable procedure, and the litigation plan. As a result of this preliminary conclusion, the motions judge did not in any fulsome way address these other issues, evoking the reviewable error outlined in *Quiznos* at para. 38, that "there was effectively no independent analysis of those [common and individual] issues by the motion judge."

ISSUE 3: The motions judge erred in rejecting the evidence of the Appellants' expert that provided contextual information about characteristics of the class who signed the self-exclusion contract presumptive proof of vulnerability.

[175] In the alternative to, or in addition to the facts that were known to the OLGC, the Appellants argue that the motions judge erred in refusing to consider the statistical evidence of the experts tendered by both parties, which provides "some basis in fact" sufficient to meet the test of commonality to support the conclusion that those who self-excluded were problem gamblers.

[176] For the reasons that I have previously outlined, I conclude that this particular statistical evidence is not necessary to meet the test of commonality. The expert evidence simply bolsters the Appellants' position.

[177] The Appellants filed a report of Dr. Williams as an expert to first, provide context confirming that problem gamblers signed the self-exclusion contracts and second, to advance the claim for aggregate damages. I comment in this section of the reasons upon the first branch of Dr. William's evidence.

[178] The Appellants argue that the statistical evidence informs that problem gamblers signed the self-exclusion contracts and that it meets the test of relevance and reliability. Therefore, it should be admissible for the question of proving commonality in relation to the five global common issues that the motions judge identified including questions of duty, breach and causation.

[179] First, there appears to be significant inconsistencies in the use and reliance upon statistical evidence by both the motions judge and by the OLGC. On one hand, the motions judge rejects the consideration of the statistical evidence on any issues except for proof of aggregate damages. On the other hand, he appears to rely on the statistical evidence in support of his conclusion that all members of the class were not vulnerable problem gamblers and therefore the test of commonality had not been met.

[180] Similarly, the Respondent condemns the use of statistical evidence by the Appellants, yet is inconsistent in its approach as it relies upon statistical evidence in support of their suggestion that significant numbers who self-excluded did not return to gamble regardless of the adequacy of the enforcement measures utilized by the OLGC.

[181] Second, the motions judge was rightly concerned about the independence of Dr. Williams, the expert called on behalf of the Appellants. Dr. Williams is apparently an anti-gambling advocate, and he publicly predicted the outcome of the certification motion [as it turned out incorrectly] before the decision was released. I agree that this unusual fact colours the reliability and impartiality of Dr. Williams and is inappropriate conduct for any expert.

[182] There are new provisions the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194 to ensure that court experts provide impartial, non-partisan evidence. Section 4.1 confirms that this duty of impartiality prevails over any duty owed to the parties who retained the expert. Strathy, J. has confirmed in *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, [2011] O.J. No. 5049 at paras. 119-120 that the new procedures in rule 53.03(2.1) requiring experts to sign a form apply only to trials, not to certification motions, though he noted "one could make the case that it would be good practice on a motion to include the matters set out in Rule 53.03(2.1) in the expert's report."

[183] The partisan actions of Dr. Williams will and should impact on his credibility and what weight to attach to the calculations and assumptions made for a proposal to calculate aggregate damages.

[184] However, this inappropriate conduct does not undermine the opinion evidence about the predicted qualities as to who signed the self-exclusion document, as the experts for both of the parties shared virtually a common opinion.

[185] As the motions judge confirms at para. 197 of his decision, statistics on problem gambling are in its infancy and there is little reliable information presently available.

[186] With respect to the composition of Class A, Dr. Williams opined for the purpose of this motion, that of the 10,000 gamblers that signed the self-exclusion contract, 87% could be characterized as problem, or pathological gamblers, 10% were moderate gamblers, and 3% were not problem gamblers. By this calculation the Appellants argue that 97% were problem gamblers.

[187] Dr. Shaffer called by the Respondent, opined that from those that signed the self-exclusion contract, between 73% and 95% were severe problem gamblers at the pathological end of the spectrum of this progressive condition.[12]

[188] Dr. Shaffer relied upon two of the four studies cited by Dr. Williams as authoritative, and highlighted the following categorization of self-excluders in one of the studies in almost identical terms to Dr. Williams: 88.8% of the self-excluders met the criteria for pathological gambling, 6.8% were considered "at risk" gamblers, and 4.3% had no gambling problems.[13]

[189] I conclude that the motions judge erred in refusing to consider this statistical evidence given by the experts on both sides. This information that is relevant to the question of whether the Appellants had provided some basis in fact that members of Class A were problem gamblers, which helps the Appellants to meet the test of commonality in the 5(1)(c) analysis.

[190] Paradoxically, the motions judge appears to rely on this evidence which he has rejected in support of his conclusion that the class as defined is over-inclusive. He equates problem gamblers with pathological gamblers at para. 196 and appears to accept that based upon the available research, approximately 87% of those that self-exclude are pathological gamblers. However, he concluded at paras. 211-212 that it was inappropriate to rely upon the evidence of Dr. Williams to convert the class to a sufficiently determinative group of vulnerable persons as all those who self-excluded are not pathological gamblers and within the category of problem gamblers, there are degrees of severity with moments of clarity. He states at para. 212:

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[12] Ladouceur et al., "Brief Communications: Analysis of a Casino's Self-Exclusion Program" (2000) 16:4 *Journal of Gambling Studies* 453, located in the Respondent's Compendium at 1 [Ladouceur et al. 2000]; Ladouceur et al., "Self-exclusion program: A Longitudinal Evaluation Study" (2007) 23:1 *Journal of Gambling Studies* 85, located in the Respondent's Compendium at 175 [Ladouceur et al. 2007].

[13] Ladouceur et al. 2007, *ibid.* at 89.

> The CPA does not permit the requirement of commonality to be avoided by a statistical estimate that 87 per cent of the class members were pathological problem gamblers, or that there was an 87 per cent statistical probability that each class member was a pathological problem gambler. It is a procedural statute and it does not abrogate the requirement that a defendant can be found liable only to those persons who can prove their claims.

[191] Respectfully, I conclude that the analysis of the motions judge in paragraphs 212 and following to 226 interprets the use of statistics in class proceedings too narrowly. He appears to limit the consideration of statistical evidence to proof of aggregate damages as specifically referred to in section 23 of the *CPA*. That section states "the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived by sampling." Respectfully, I do not interpret section 23 as defining the exclusive limits of when statistical evidence may be considered in class actions.

[192] There is caselaw stating clearly that statistics should not be used to determine the entitlement of class or the liability of a defendant [*Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520, [2001] O.J. No. 1844 (Div. Ct.); *Parsons et al. v. the Canadian Red Cross Society* (2000) 51 O.R. (3d) 261, [2000] O.J. No. 4557].

[193] The motions judge cited *Parsons et al. v. the Canadian Red Cross* at para. 215 in support of his finding that statistical evidence was not admissible in this case. It appears that Winkler C.J.C. did not hold that statistical evidence could not be used to inform the context of entitlement. Rather, he held that probability evidence "may be part of a determination of causation" but could not be the "sole determining factor" used to reject a claimant.

[194] In this case, statistical evidence is not being used to exclude class members. The entitlement to class membership is based on the act of signing of the self-exclusion contract. Rather, statistical evidence, the projected number of problem gamblers among the self-excluders, is being used to inform the context of this act of signing.

[195] Statistics has been used in certification motions to inform the context of the case. In *Andersen v. St. Jude Medical, Inc.*, 2011 ONSC 2178, Lax J. allowed expert evidence to be submitted on the societal and economic impacts of the potential recognition of the waiver of tort doctrine. She has yet to release her final ruling on the doctrine.

[196] In *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (S.C.J.) at para. 76, leave to appeal ref'd [2009] O.J. No. 3438., Lax J. allowed expert evidence to determine the extent of alleged manufacturing defects through an examination of a sample of computers from class members, despite protests that the expert did not use a valid "statistical" method, pointing to the low threshold for expert evidence in certification motions.

[197] The Appellants are in the difficult position of not knowing who the other class members are, and the level of knowledge about problem gambling is in its infancy.

[198] I conclude that the expert evidence containing statistics meets the test for admissibility of evidence in general as required by *R. v. Mohan*, [1994] 2 S.C.R. 9 at para. 17, that is, it is relevant, necessary in assisting the trier of fact, not subject to any exclusionary rule and made by a properly qualified expert. Thus, it should be admitted to inform any issue in a class proceeding, not solely for proof of aggregate damages.

[199] The evidence of Dr. Williams and Dr. Shaffer as to the projected composition of Class A meets the lesser level of scrutiny required for expert evidence in certification motions, as set out by Lax J. in *Griffin* at para. 76:

> The court's "gatekeeper" role in respect to expert evidence was clearly articulated by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 S.C.R. 9 and urged upon trial judges in subsequent decisions. This role applies equally to judges hearing motions for certification: *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, 260 D.L.R. (4th) 488. However, where expert evidence is produced on a motion for certification, the nature and amount of investigation and testing required to provide a basis for a preliminary opinion will not be as extensive as would be required for an opinion to be given at trial. It follows that some lesser level of scrutiny is applied to the opinions offered, if they are otherwise admissible: *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 at para. 19 (Sup. Ct.).

[200] In this case, there can be no prejudice considering the statistics to inform the judge whether those who signed the self-exclusion contract were problem gamblers, as the statistical evidence of the two experts as to the composition of the class is consistent.

[201] In any event, for the reasons that I have previously outlined, the consideration of the statistical evidence of the two experts is not necessary for the Appellants to meet the test of "some basis in fact". This statistical evidence simply bolsters the other available evidence.

ISSUE 3: The Appellants assert that the motions judge's preliminary conclusion resulted in a failure to consider in a fulsome manner the proposed common issues and the individual issues pursuant to section 5(1)(c) and to determine whether a class proceeding was the preferred procedure in this case having regard to sections 5(1)(d) and (e) of the *CPA*.

[202] The motions judge did not analyze the various common issues in any detail in light of his preliminary conclusion that proof of individual vulnerability overwhelmed any common issues. He stated at para. 191, "In my opinion, the vulnerability of class members is essential to the validity of their claims."

[203] I respectfully conclude that this preliminary conclusion was incorrect, and that the motions judge did not address in a fulsome way the proposed common issues.

[204] The following issues as contained in the list of simplified issues outlined by Cullity, J. must be addressed:

(e) whether the self-exclusion forms are binding contracts that required OLG to take reasonable care to deny entry to OLGC's facilities to the primary class members, and to detect and remove any who gained entry;

(f) whether OLGC had a duty in tort to take such reasonable care;

(g) whether OLGC breached either, or each, of the duties in 1. or 2. or its duty under the OLA;

(h) whether damages sustained by class members as a consequence of any breaches of the above duties can be determined on an aggregate basis in whole, or in part; and

(i) whether OLGC can be required to account for gross revenues, or net income, derived from class members as a consequence of any such breaches of duty.

ISSUE 4: Did the motions judge err in determining the meaning of the waiver in the self-exclusion contract at the certification stage of a proceeding when there are alternative interpretations of the document?

[205] Before considering whether the contractual issues raise common or individual issues, I consider the ground of appeal that the motions judge prematurely interpreted the meaning of the self-exclusion contract.

[206] The Appellants argue that the motions judge should not have interpreted the meaning of the waivers in the self-exclusion contract at the certification motion; this was an error in principle, as alternative interpretations of the meaning of the waiver clauses were possible. The issue should be determined on a full factual record. The Appellants also argue that the motions judge erred in determining the individual factual issue of unconscionablity affecting Mr. Dennis based solely on the pleading.

[207] I agree with the Appellants' arguments on this issue.

[208] The self-exclusion contract signed by the representative plaintiff Mr. Dennis and other members of Class A provides:

We offer you the opportunity to self-exclude yourself from Ontario Lottery and Gaming

Corporation (OLGC) gaming venues. Self-exclusion will direct the OLGC, and commercial casino operators acting for OLGC, to use their best efforts to deny your entry, as a service, to all OLGC's gaming venues in the province of Ontario. The OLGC and commercial casino operators accept no responsibility, in the event that you fail to comply with the ban, which you voluntarily requested.

I hereby request that I be refused entrance to all OLGC gaming venues (a list of which has been provided to me), and be prohibited from entering on to, or in any way trespassing upon any of these gaming venues, for any reason whatsoever save solely to attend at my place of employment if applicable, as of this date. I understand that this form and my photograph will be shared with the other gaming venues.

This self-exclusion shall be for an indefinite time period and can be reinstated only after a minimum period of six months, at which point I may request in writing reinstatement in any of the venues. Once reinstatement is granted, it applies to all venues from which I was excluded. This self-exclusion form cannot be revoked or withdrawn until such time as I notify, in writing, the Security Office at any one of the gaming venues and only after the minimum period of six months. Upon signing a required reinstatement request I must wait an additional 30 days before being allowed to play at any of these venues. If this is the third request for self-exclusion at any of the gaming venues within the last three years, I will automatically be self-excluded for a minimum of five years at all the relevant gaming venues.

I understand that my failure to comply with this voluntary ban may mean that I will be apprehended for trespassing and dealt with according to law. I release and forever discharge the OLGC, and the commercial operators of any of the operator's parent companies, shareholders, subsidiaries or affiliates, or successors, as well as any and all of their directors, officers and employees, from any and all liability, causes of action, claims and demands whatsoever in the event that I fail to comply with this voluntary ban.

[Emphasis added]

[209] The self-exclusion contract's express wording articulates two different, but related, obligations on the part of OLGC to the class members who, by signing the agreement, stipulated that they were:

- to be refused entrance to all OLGC gaming venues;
- and to be prohibited from entering onto, or in any way trespassing upon any of these gaming venues, for any reason whatsoever, as of this date.

[210] The agreement also expressly commits OLGC to use its "best efforts" to fulfill these obligations:

> Self-exclusion will direct the OLGC, and commercial casino operators acting for OLGC, to use their best efforts to deny you entry, as a service, to all OLGC's gaming venues in the province of Ontario.

[211] There are two waiver provisions in the self-exclusion contract:

- The OLGC and commercial casino operators accept no responsibility, in the event that you fail to comply with the ban, which you voluntarily requested.

- I release and forever discharge the OLGC, and the commercial operators of any of the operator's parent companies, shareholders, subsidiaries or affiliates, or successors, as well as any and all of their directors, officers and employees, from any and all liability, causes of action, claims and demands whatsoever in the event that I fail to comply with this voluntary ban.

[212] The motions judge held at para. 94 that the first waiver provision was ambiguous and could be read as either generally disclaiming all responsibility in all cases, "irrespective of whether OLGC performed" its best efforts obligation or more narrowly "as addressing only non-compliance by the gambler and not a breach of OLGC's obligation."

[213] However, he held that the ambiguity of the first waiver is resolved by the clarity of the second waiver, which expressly disclaims all liability in all cases. The motions judge concluded at para. 96:

> When the form is read in its entirety, I believe it sufficiently discloses an intention of OLGC to offer an accommodation, or service, to assist the problem gambler while excluding any legal responsibility that might otherwise arise if it failed to do so.

[214] As a result, the motions judge concluded at paras. 97 to 99 that *prima facie*, the exclusionary clause was enforceable and that the context was adequately provided in the pleading. He stated at para. 97:

> It would not, in my opinion, be reasonable to interpret the form as intended to exclude OLGC's liability only in the event that it had used its best efforts to deny entry to the problem gambler. To do so would, in my opinion, be to give the language of the document the kind of strained and artificial interpretation condemned by Wilson J. in Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426 at para. 150.

[215] The Appellants argue that the waiver clauses only apply in the event that the OLGC used its best efforts to prevent persons who self-excluded from entering gambling venues. The memory based system of enforcement was woefully inadequate and did not meet the best efforts obligation. They further argue that to read the waiver clauses as disclaiming all OLGC responsibility irrespective of whether it has met its best efforts obligation would effectively gut the self-exclusion contract. Interpreting the meaning of the waiver clauses should be subject to the principle of *contra proferentum* with any ambiguity resolved in favour of the plaintiffs.

[216] In support of this argument, the appellants rely upon *Falcon Lumber Ltd. v. Canada Wood Specialty Co.* (1978), 23 O.R. (2d) 345 (H.C.J.) at p. 350. This decision has been upheld by the Court of Appeal in *Braun Estate v. Zenair*, [1998] O.J. No. 4841 at para. 10.

[217] *Falcon* held that a waiver must be strictly construed. The burden is on the party relying on a waiver to establish that it applies to any particular set of facts and any ambiguity in a waiver must be resolved *contra proferentum.* A similar approach has been recently applied in *Gallant v. Fanshawe College of Applied Arts and Technology*, [2009] O.J. No. 3977 (S.C.J.) at paras. 32-33, 37.

[218] The recent Supreme Court of Canada decision in *Tercon*, [2010] 1 S.C.R. 69, sets out a three-part test for the enforcibility of exclusion clauses. The Court confirms that the meaning of an exclusion clause should be interpreted in light of its purpose and the facts of the commercial context. The Court held at paras. 64 and 65:

> [64] The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context. .....
>
> In interpreting the privilege clause, the Court looked at its text in light of the contract as a whole, its purposes and commercial context. As Iacobucci J. said, at para. 44, "the privilege clause is only one term of Contract A and must be read in harmony with the rest of the tender documents. To do otherwise would undermine the rest of the agreement between the parties."
>
> [65] In a similar way, it is necessary in the present case to consider the exclusion clause in the RFP in light of its purposes and commercial context as well as of its overall terms. The question is whether the exclusion of compensation for claims resulting [page100] from "participating in this RFP", properly interpreted, excludes liability for the Province having unfairly considered a bid from a bidder who was not supposed to have been participating in the RFP process at all.

[219] It appears notwithstanding the principles outlined in *Tercon* that the motions judge prematurely embarked in a legal analysis as to the effect of the waiver provisions in the self-exclusion contract that is both factually and contextually dependent.

[220] In a certification motion, I respectfully conclude that it is not the role of the motions judge to determine the meaning of a disclaimer when alternative interpretations are possible: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158. As Doherty J.A. noted in Hickey-Button v. Loyalist College of Applied Arts & Technology, (2006) 267 D.L.R. (4th) 601, [2006] O.J. No. 2393 (C.A.) at para. 28, "A certification motion is not the time for an assessment of the merits of the claim."

[221] The question for a judge on a certification motion is procedural; it is not is "not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action": *Hollick* at para. 16.

[222] There were two possible interpretations of the waiver clauses in the self-exclusion contract: they could be applied only to situations when the OLGC used its best efforts to enforce the self-exclusion contract, or alternatively, that waiver clauses apply to all situations, with no interdependent obligation of OLGC to use its best effort to enforce the self-exclusion contract.

[223] Even if the motions judge is of the view that the Appellants' argument interpreting the waiver clauses may be weak, the determination of the issue requires the factual context presented in either a motion for summary judgment or a trial with the full necessary factual context.

[224] I conclude that the finding by the motions judge that the release clauses apply to all situations at this very preliminary stage is premature and is an error in principle.

[225] Similarly, I conclude that it was not appropriate at this stage of the proceedings for the motions judge to reach legal and factual conclusions at paras. 103-106 about unconscionablity involving questions of unequal bargaining power or detrimental reliance with respect to Mr. Dennis based solely upon the pleadings.

[226] I conclude that the meaning and interpretation of the self-exclusion contract, with the exception of the question of unconscionablity [which is an individual issue] is properly treated as a common issue in the section 5(1)(c) analysis.

[227] The motions judge correctly concluded that there are still common issues about the enforceability of the waiver clauses in light of potential overriding public policy concerns.

[228] He confirmed at para. 101 of his reasons that fundamental breach is no longer applicable to situations when the plaintiff seeks to avoid the effect of a waiver clause that is *prima facie* enforceable. He states that the correct analysis is reflected in *Tercon*:

> The first issue, of course, is whether as a matter of interpretation the exclusion clause even applies to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (Hunter, at p. 462) This second issue has to do with contract formation, not breach.
>
> If the exclusion clause is held to be valid and applicable, the court may undertake a third inquiry, namely whether the court should nevertheless refuse to enforce a valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs a very strong public interest in the enforcement of contracts. (paras. 122-123)

[229] In the list of 5 global questions, Justice Cullity stipulates the first proposed common issue of the Appellants as:

Question 1: whether the self-exclusion forms are binding contracts that required OLG to take reasonable care to deny entry to OLGC's facilities to the primary class members, and to detect and remove any who gained entry

[230] The following issues relating the first global question must be determined:

- Is the self-exclusion contract a binding contract? [this was admitted by the Respondent for the purpose of the certification motion only] [common issue]
- Did the self-exclusion contract require OLGC to make its best efforts to deny entry to OLGC's facilities to the primary class members and to detect and remove any who gained entry [common issue]
- Are the waiver clauses in the self-exclusion contract *prima facie* enforceable? [common issue]
- If the waiver clauses applies, was the exclusion clause unconscionable at the time it was signed and hence unenforceable? [individual issue]
- Even if the waiver clauses are *prima facie* valid, should the court refuse to enforce the waiver clauses because of an overriding issue of public policy? [common issue]

[231] Resolution of the question of the meaning and enforceability of the self-exclusion contract, particularly the question whether for public policy reasons the self-exclusion contract should be enforceable in accordance with the principles outlined in *Tercon*, would effectively resolve many common liability issues for all class members.

[232] The determination of these issues, though not conclusive in this appeal, is important in advancing the lawsuit as they may determine the outcome of the case.

[233] The Appellants acknowledge that if the waiver provisions are enforceable after considering all of the questions including the public policy issues, there can be no claim, be it in contract, tort or occupiers' liability.

Question 2: whether OLGC had a duty in tort to take such reasonable care

[234] The motions judge thoroughly examined the Appellants' negligence claim and concluded that it disclosed a cause of action under s. 5(1)(a). However, when examining common issues, he concluded at para. 189 that the "claims advanced on behalf of the class members are predicated, and dependent, on their vulnerability." This statement applies to the negligence claim.

[235] The Appellants contest the finding that the duty of care must be predicated upon proof of the individual vulnerability of class members.

[236] The Appellants framed their action against the OLGC based upon allegations of systemic breaches by the OLGC rather than individual breaches of the standard of care. Systemic negligence is defined in *Rumley v. B.C.*, [2001] 3 S.C.R. 184, at para 30 (S.C.C.) as "the failure to have in place management and operations procedures that would reasonably have prevented the [alleged harm]".

[237] The systemic breach alleged is introducing a self-exclusion system with a woefully inadequate screening system.

[238] In *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79, the Supreme Court held at para. 21 that once a duty of care is recognized in certain categories of cases, it becomes an established duty of care by law.

[239] In considering whether a new duty of care could be made out in the s. 5(1)(a) analysis, the motions judge pointed at para. 121 to the relevancy of an English case, *Calvert v. William Hill Credit Ltd.*, 2008 EWHC 454, [2008] All E.R. (D) 170 (Ch. Div.), affd [2009] 2 W.L.R. 1065, [2009] Ch. 330 (C.A.), in which Briggs J. found that a bookkeeper had a duty to a customer who is known to him to be a problem gambler by the signing of a self-exclusion form, namely because there is no risk of indeterminate liability. He did not definitively determine whether there is a recognized duty of care.

[240] Where a duty of care has not been previously recognised, courts must apply the test from *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) (now known as the "*Anns/Cooper* test") to determine if a new duty of care should be recognized: *Cooper v. Hobart* at para. 21; *Childs v. Desormeaux*, [2006] 1 S.C.R. 643 at para. 15.

[241] The Supreme Court held at para. 52 in *Odhavji Estate v. Woodhouse,* [2003] 3 S.C.R. 263, 2003 SCC 69 that the three inquiries of the *Anns/Cooper* test are as follows:

- that the harm complained of is a reasonably foreseeable consequence of the alleged breach;
- that there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and
- that there exist no policy reasons to negative or otherwise restrict that duty.

Anns/Cooper Question 1: Is the harm of continued gambling a reasonably foreseeable consequence of breach to enforce self-exclusion?

[242] The Appellants argue that it is reasonably foreseeable that if OLGC fail to use their best efforts to systemically implement an effective screening system preventing self-excluders from returning to gamble, these gamblers will continue to gamble and experience losses.

[243] The OGLC was privy to concerns about the rise of problem gamblers following legalization expressed in the 1993 committee hearings. It had identified problem gamblers as the target for their self-exclusion program in their annual reports. It had received in 2001 the Martin report, which unequivocally condemned the memory-based enforcement as inadequate.

[244] This knowledge establishes "some basis in fact" that it was reasonably foreseeable to the OLGC that its self-exclusion program targeting problem gamblers would be ineffective without an adequate enforcement mechanism.

[245] It follows that it was foreseeable that a significant number of the self-excluded gamblers would re-enter the gambling venues and experience losses.

[246] Therefore I conclude that the common issue of interest to all members of Class A that arises from the first branch of the Anns test is "whether continued gambling by those who signed the self-exclusion contact is a reasonably foreseeable consequence of the memory based system of enforcement."

Anns/Cooper test 2: Proof of proximity

[247] The question of sufficient proximity can also be established on a common basis once vulnerability is presumed.

[248] Proximity requires that the relationship between the parties is sufficiently close and direct that it is fair to require the OLGC to be mindful of the legitimate interests of the Appellants: *Cooper v. Hobart* at paras. 30-35; *Williams v. Canada* (2009), D.L.R. (4th) 710, [2009] O.J. No. 1819 at paras. 14-17.

[249] The Appellants rely on three arguments to prove a basis in fact for proximity. First, OLGC is a crown corporation created by statute as a result of legalizing gambling in Ontario with the responsible for implementing a system of gambling, knowing that some will succumb and become problem gamblers. Second, OLGC made public representations to be leaders in the field of responsible gambling. And third, OLGC implemented a system of self-exclusion with a contract including arguably mutual obligations.

[250] The Appellants argue that this case is equivalent to two situations described by McLachlin CJ.C. in *Childs v. Desormeaux* at paras. 35-37, in which proximity is established by looking at the defendant's conduct:

- where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls: Hendricks v. The Queen, [1970]

S.C.R. 237; Horsley v. MacLaren, [1972] S.C.R. 441; Arnold v. Teno, [1978] 2 S.C.R. 287; and Crocker v. Sundance Northwest Resorts Ltd., [1988] 1 S.C.R. 1186 .

- [where] defendants who either exercise a public function or engage in a commercial enterprise that includes [page660] implied responsibilities to the public at large: Dunn v. Dominion Atlantic Railway Co. (1920), 60 S.C.R. 310

[251] The determination of whether proximity applies on one or more of these bases will require a common inquiry. Once again, with the finding of presumed vulnerability, the focus in the proof of proximity inquiries will be narrowed to the systemic conduct of the Respondent, not on individual behavior of the members of Class A.

[252] A common issue is whether there is sufficient proximity between the Class A members, and the OLGC to meet the second branch in the Ann's test.

Anns/Cooper test 3: That there exist no policy reasons to negative or otherwise restrict that duty

[253] Again, once vulnerability is presumed for the purpose of certification, the question of whether policy reasons apply to negate or restrict any duty is also a common inquiry for all Class A members. This public policy analysis is similar but not symmetrical with the public policy issues raised in the contractual questions.

[254] I conclude that the Appellants have provided some basis in fact that there is no policy reason to negative a duty. The presumption of vulnerability arguably creates a common relationship between OLGC and all the self-excluded persons. The OLGC benefits financially from self-excluders who continue to gamble.

[255] The question of whether there are legitimate policy reasons to restrict a duty imposed in that relationship becomes a common issue.

[256] Therefore, under question 2 whether the OLGC owes a tort duty to the primary class to take reasonable care to deny them entry;

- whether it is reasonably foreseeable that that the self-excluders would experience losses if the OLGC used a memory-based enforcement system to screen them out [common issue]

- whether the OLGC was in a relationship of sufficient proximity with the persons who self-excluded [common issue]

- whether there are any residual policy reasons apply to negate or restrict a duty of care owed by the OLGC to the self-excluders [common issue]

Question 3: whether OLGC breached either, or each, of the duties in 1. or 2. or its duty under the Occupiers' Liability Act

[257] The Appellants have argued that the question of whether OLGC breached its duty of care under self-exclusion contract or in tort or under the *Occupiers' Liability Act,* R.S.O. 1990, c. O.2 [*OLA*] is a common issue. It can be determined by looking at the conduct of the OLGC in enforcing the self-exclusion contracts through memory-based enforcement.

[258] The Respondent has countered that the issue of breach requires an individual inquiry. It argues that any potential breach by the OLGC occurred only when an individual tried to enter a gambling venue after self-excluding. The OLGC's conduct in each such case can only be assessed on an individual basis.

[259] Low, J. has agreed with the Respondent, concluding, "If a self-excluder does not present himself at an OLGC facility, there is no occasion for performance or non-performance of the OLGC's duties toward him, and hence no breach of contract. "

[260] With respect, I do not agree that determining whether there is a systemic breach by OLGC is dependent on the attempted re-entry of the Class A members for the reasons that I will outline below.

[261] The caselaw is clear that allegations of a systemic breach of a duty hinge on the conduct of the defendant, not the conduct of the plaintiff. The conduct of the plaintiffs becomes pertinent when considering causation and damages.

[262] The Supreme Court of Canada held in *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114, 2008 SCC 27 at para. 7 that breach of a duty of care hinges on the defendant's conduct, not that of the plaintiff: "A defendant's conduct is negligent if it creates an unreasonable risk of harm (Linden and Feldthusen, at p. 130)."

[263] The principles outlined in *Cloud v. Canada (Attorney General)* (2004) 73 O.R. (3d) 401, [2004] O.J. No. 4924 (C.A.) confirm that cases of systemic breach do not engage individual questions of causation of harm when considering whether a duty of care was breached. *Cloud* was an appeal of a decision declining to certify a class action by former students in an aboriginal residential school against the government for vicarious liability, breach of fiduciary duty and negligence. Cullity, J. dissented in the Divisional Court decision. The majority upheld the decision to decline certification. In *Cloud*, Goudge J.A. explained that the breach hinged on the school's conduct, its policies and practices in place, despite that this conduct may not have *caused* harm to all of the class members. Causation would be determined on an individual basis after the determination of whether there had been systematic breach. Goudge J.A. held at paras. 60 and 69:

60 The respondents also say that the affidavit material shows that many of the appellants and other class members did not suffer much of the harm alleged, such as loss of language and culture. They argue that this underlines the individual nature of these claims and negates any commonality. Again, I disagree. There is no doubt that causation of harm will have to be decided individual by individual if and when it is found in the common trial that the respondents owed legal duties to all class members which they breached. However, this does not undermine the conclusion that whether such duties were owed, what the standard of care was, and whether the respondents breached those duties constitute common issues for the purposes of s. 5(1)(c).

69 Nevertheless, it is my view that whether the respondents owed legal obligations to the class members that were breached by the way the respondents ran the School is a necessary and substantial part of each class member's claim. No individual can succeed in his or her claim to recover for harm suffered because of the way the respondents ran the School without establishing these obligations and their breach. The common trial will take these claims to the point where only causation and harm remain to be established. In my view it will adjudicate a substantial part of each class member's claim by doing so. Hence the appellants have met the commonality requirement.

[Emphasis added]

[264] The question of a potential breach should be approached and framed on a systemic basis raising common issues. That is, "whether the OLGC breached its duty to the Appellants in contract or tort by failing to use its best efforts in the contractual claim, or by breaching its duty owed in tort by using an inadequate memory-based enforcement system for those who signed the self-exclusion contract."

Is the class definition over-inclusive? Do all members of the class have to return to gamble and experience losses?

[265] The Respondent asserts, based upon statistical studies conducted in Quebec and Connecticut and the 1000 violations that were discovered each year, that not all members of Class A returned to gamble. The Respondent argues that the determination of which class members successfully returned to gamble would require individual inquiries. Therefore, the Respondent argues that Class A is over-inclusive. The class as defined does not meet the test of commonality as forseeability of harm in the tort analysis becomes an individual issue, not a common issue applicable for all members of the class.

[266] I conclude that it is not appropriate to consider these questions as suggested by the Respondent in assessing the issue of systemic breach. To do so falls into the slippery slope of a merits-based definition of the class. The class definition is over-inclusive. This is not fatal and is the reality in most class proceedings.

[267] The questions of whether class members returned to gamble and experienced losses will properly be considered, if liability is proved, when considering the individual question of causation of damages and any individual defences raised by the Respondent.

[268] First, I note that it is not known how many of the 10,428 individuals that signed the self-exclusion document returned to gamble.

[269] It is possible, though not likely, that all returned to gamble and that the 1000 violations a year resulted in individuals simply changing their home casinos to continue their gambling habit in other venues where they would not be detected due to the inadequacies in the memory based system.

[270] The Respondent and the motions judge relied upon available research that indicates that not all those who signed the self-exclusion document would have returned to gamble. For some, the act of signing the self-exclusion document is sufficient to curtail gambling even with the alleged frailties in a memory based system. As well, some individuals may have been curtailed by the 1000 violations detected each year in the enforcement of the memory based system.

[271] The only statistical evidence available that appears to meet any sort of threshold test of potential reliability to consider the Respondent's argument is based upon a study conducted in Quebec, which indicated that 30% of self-excluders do not return to gamble, and 70% do. I note that the sample in the Quebec study was very small.[14]

[272] The Respondent suggests that up to 80% of those who self exclude do not return based upon a study conducted in Connecticut.[15] This statistic was generously used by the OLGC in argument. However, I am of the view that this statistic is very misleading. It does not appear that this study comes close to meeting the threshold test of reliability. In the Connecticut, study there were 184 individuals that self excluded, and only 20 of the 184 responded to the two surveys sent to them. Of the 20 that responded, 16 stated that they had not returned to gamble after signing a self-exclusion contract. The Respondent generalizes and suggests that based upon this study, 80% of those that self excluded did not return to gamble. The obvious question is what happened to the other 144 individuals who did not respond. One may presume that a significant number returned to their gambling ways.

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[14] Ladouceur et al. (2000) interviewed 220 people who had just enrolled in a self-exclusion program. From this pool, 54 participants had previously self-excluded. From these 54 participants, thirty percent self-reported that the self-exclusion was successful and they didn't return to gamble. The Appellant's expert, Dr. Williams, opined that due to the small sample size, this study had little generalizability: Appeal Book at 1214-1215.

[15] Marvin A. Steinberg, Connecticut Council on Problem Gambling, "Preliminary Evaluation of a Self-exclusion Program" (Power Point Presentation to Discover 2002, Niagara Falls, Canada), located in the Respondent's Compendium at 17.

[273] Basing upon the limited information available that perhaps 70% of Class A returned to gamble and OLGC found only 1000 violations per year, it appears that a very significant number in Class A returned to gamble and presumably experienced losses.

To certify a class action not all class members must suffer harm

[274] The Respondent's argument that Class A should be limited to those individuals who signed the self-exclusion document, came back, and suffered losses appears to have been accepted by the motions judge at paras. 226 to 228 of his decision.

[275] At this early stage of the proceeding, the class definition must meet the test of being determined by objective criteria. The motion judge concluded that for the class as defined- that is, those that signed the self-exclusion contract- the test of objectivity was met.

[276] In *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46, at para. 38, McLachlin C.J.C. explained the rationale for the requirement of an identifiable class as follows:

> ... Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.

[277] The cases are clear that merits based class definitions based upon outcome and proof of harm are not appropriate.

[278] In *Windsor v. Canadian Pacific Railway*, 2006 ABQB 348, the Alberta Court of Appeal confirms that merits-based definitions are unacceptable because "they are circular: only those with valid claims are members of the class, and only members of the class have valid claims". Therefore, a definition that includes reference to the members having been "affected" by the defendant's behaviour "arguably implies at least an element of causation, and even possibly implies a successful claim". If possible, terms like "affected" should be excised from the class definition.

[279] The comments of Cullity J. in *Lambert v. Guident Corp.*, [2009] O.J. No. 1910 (S.C.J.) confirm that class descriptions involving issues of negligence are initially inevitably over-inclusive:

> 102 As the passage [found at para. 21 of *Hollick*] indicates, the prohibition is not against over-inclusive class definitions *per se* but against those that are unnecessarily over-inclusive in the sense that any attempt to limit them would arbitrarily exclude some persons who have the same interest as other class members in a resolution of the common issues. It follows that, as classes cannot be limited to persons who suffered harm or damages, class descriptions in mass tort cases - and, in particular, cases involving claims for negligence - will almost inevitably be over-inclusive. The inevitability that acceptable class definitions will be over-inclusive was recognized by Winkler J. (now Winkler C.J.O.) in *Frohlinger v. Nortel Networks Corporation* (2007), 40 C.P.C. (6th) 62 (Ont. S.C.J.) ... [Emphasis added]

[280] The themes of avoiding merits based definitions and questions of necessary over-inclusiveness in class definitions are emphasized by Winkler, J. in *Frohlinger v. Nortel Networks Corp.* [2007] O.J. No. 148 (S.C.) as he cites with approval the test outlined in *Western Canadian Shopping Centres*:

> 21 ... Merits-based class definitions require a determination of each class member's claim as a pre-condition of ascertaining class membership. Carrying that concept to its logical conclusion, it would mean that at the conclusion of a class proceeding, only those individuals who were successful in their claims would be members of the class and, therefore, bound by the result. ...
>
> 22 The rationale for avoiding over-inclusiveness, on the other hand, is to ensure that litigation is confined to the parties joined by the claims and the common issues which arise.
>
> 23 Merits-based definitions are self-evident. Over-inclusive class definitions on the other hand Similarly, a proper class definition does not include only those persons whose claims will be successful are more elusive. It cannot be the case, as is evident here from the fact that approximately 150,000 claims had been filed as of the date of the hearing, that a class is over-inclusive simply by reason of its numerical size.. Rather, as the Chief Justice states in *Hollick*, the essence of a proper class definition goes to the "rational connection between the class as defined and the asserted common issues". It is neither express nor implied in that statement that a class member's "colourable" claim must be one that will ultimately be successful. Indeed, it is the purpose of a class action to resolve claims through the utilization of a common issue phase and an individual issue determination, if necessary.
>
> 24 .....The fact that any person so described may not ultimately be successful in advancing a claim for damages does not preclude their inclusion in the class....

> 27 Moreover, it would be a mistake in the context of a class definition analysis to interpret the terms "colourable" or "valid" claims as only those capable of success. The probability of success of a particular class member's claim cannot be a factor in determining whether a class is properly defined, either as a basis for inclusion or exclusion. To the contrary, a viable cause of action for the purpose of certification is one that is not "certain to fail" because of a "radical defect". (See: *Hunt v. Carey Canada*, [1990] 2 S.C.R. 959; *Hollick*). It would be contrary to the goals of the CPA to require each individual class member's claim to pass a higher threshold. If the terms "valid" or "colourable" are taken to mean a claim which will succeed, it will have the effect of imparting a de facto merits-based analysis into the certification test. [Emphasis added]

[281] In *Dumoulin v. Ontario* (2005), 142 A.C.W.S. (3d) 554 (Ont. S.C.J.), Cullity J. dealt with a request to certify a class action claim brought on behalf of employees at a court house that was alleged to have contained dangerous levels of asbestos.

[282] When considering the class definition, he concluded that it is not necessary for all members of the class to prove damages and that individual susceptibility to asbestos varies:

> 17. It is not part of the plaintiff's case that every member of the redefined class suffered compensatory harm as a result of the alleged exposure to toxic moulds. It was the opinion of Dr Ritchie D. Shoemaker who swore an affidavit contained in the motion record that susceptibility to illness caused by moulds varies among individuals and is affected by genetic factors. As I have indicated, the possibility, and even the likelihood, that some members of the class will not be able to prove that they suffered harm and, thereby, establish a claim is not, by itself, a reason for refusing to certify the proceedings on behalf of the class. The questions to be asked are, first, whether the class could be defined more narrowly without arbitrarily excluding persons who may have claims and whom the plaintiff seeks to represent; and, second, whether there is a required rational connection to the common issues. ...[Emphasis added]

[283] Applying the principles in *Dumoulin* to this case, it may be argued that individual susceptibility to return to gamble may vary, but should not preclude the common issue from being certified.

[284] In *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 267 D.L.R. (4th) 601 (Ont. C.A.), the Court of Appeal overturned both a motions judge's decision and the decision of the Divisional Court and certified the proposed action as a class proceeding.

[285] Former students of Loyalist College proposed a suit for breach of contract and negligent misrepresentation, arising out of an alleged promise by the school that a particular program would allow transfer to Queen's University's nursing faculty. The proposed class included all persons who entered the nursing program at Loyalist in the fall of 1997 and the fall of 1998.

[286] The motions judge took the position that there was no identifiable class, as it was necessary to prove as a preliminary issue that each student was going to avail himself or herself of the Queen's option and that therefore preliminary individual issues predominated the issues precluding certification of the action. The motions judge stated:

> One must be able to determine with ease who is and who is not a member of the class. If the merits in the individual circumstances of a person's claim must be looked at in order to determine whether that person is within the class, then the class is not identifiable. In this case, in order to find out if a student falls within the class, each student would have to be examined under oath because only those students who intended to participate in the Queen's option who would not have attended Loyalist had the Queen's option not been offered and who would have qualified to do so, would potentially have a cause of action. The class is not to include persons who do not have a claim. [citations omitted]

[287] In my view, this conclusion by the motions judge in *Hickey-Button v. Loyalist College of Applied Arts & Technology* is very similar to the conclusion by the motions judge in this case that proof on individual vulnerability and proof of returning to gamble and suffer losses must be proved as a prerequisite to be a member of Class A, thus creating a medley of individual issues.

[288] Doherty J.A. for the Court of Appeal took a different view from the motions judge of the definition of the class as proposed. He concluded that the individual issues were with respect to proof of damages and that screening need not take place to determine who was planning to pursue the Queen's option as preliminary to defining membership in the class:

> 35 None of the three prerequisites identified by the motion judge are as a matter of law, prerequisites to a successful claim by the students in contract or negligence. If the appellants could demonstrate that a contract existed between Loyalist and the students entering the nursing program in 1997 and 1998, and that the contract included the availability of the "Queen's" option, the students all had a claim for breach of contract if that option was not available as promised. The three factors identified by the motion judge could at the most have some impact on the damages available to individual students for the breach of the contract. The appellants have never contended that the quantification of damages raises a common issue in these proceedings.
>
> 43 In holding that there were no common issues raised, the Divisional court observed that reliance on the existence of the "Queen's" option would have to be established on a student-by-student basis. In my view, reliance is not a prerequisite to recovery in the breach of contract claim, although it is a precondition to recovery in the negligent misrepresentation claim and may have to be determined on a student-by-student basis. It is, however, no answer to a contention that common issues exist to demonstrate that there are some issues that are not common to all parties of the class. In most actions where certification is

> sought, there will be both common and individual issues: *Cloud, supra*, at paras. 73-75.
>
> 50 The appellants have used readily discernible objective criteria to describe the classes of persons that each proposes to represent. The classes are described by reference to enrolment in a specific course at a specific time at a specific educational institution. There cannot be any difficulty in identifying the persons who qualify for membership. The classes described by the appellants are the antithesis of an open-ended or undefined class.

[289] Applying the principles outlined by Doherty, J.A. in *Hickey-Button* to this case, I conclude that the class as proposed by the Appellants is objective and the test of commonality is met with respect to the tort claim. The necessity of proving that the individual returned to continue to gamble and experience losses is relevant to the issue of proof of damages and perhaps individual defences raised by the Respondent. This phase of the proceeding will engage individual issues if there is first a finding of liability, and if a method for calculation of aggregate damages is not possible once more reliable information is available.

[290] The comments made by Lax, J. in *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) are also helpful in confirming that the test of commonality with respect to the tort claim is met in this case and that not all members of the proposed class must suffer harm. She also reiterates that merits based definitions of a class are to be avoided.

[291] *Sauer* involves the Canadian government setting up reliable systems to protect Canadian cattle from contamination following the outbreak of Bovine Spongiform Encephalopathy (BSE or mad cow disease) in the United Kingdom. This case involves a crown corporation that introduced legalized gambling in Ontario subject to its public undertaking to introduce responsible gambling that is mindful of the problem gambler. The Appellants seek a declaration that the defendant is liable to all class members for damages in negligence, occupiers' liability and breach of contract, which would benefit all class members.

[292] Lax, J. referred to a decision of Cullity, J. in *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996 (S.C.J.), where there were 350,000 members of a class that had ingested a drug and an expected 2000 class members suffered harm.

> 32 Class membership identification is not commensurate with the elements of the cause of action. There simply must be a rational connection between the class member and the common issue. In the very recent case of *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996 (S.C.J.), Cullity J. accepted a class definition of all persons in Canada (except certain provinces) who were prescribed and ingested Vioxx in the face of defendants' evidence that of the estimated 350,000 class members, those who suffered problems from taking the drug would be about 2000 people. He pointed out that in any class action involving claims in tort for personal injury or economic loss, it is possible that the claims of some class

> members will be unsuccessful. As he said at para. 78, "This is virtually ordained by the authorities that preclude merits-based class definitions". He reminded us that in Hollick, the plaintiff satisfied the commonality requirement by providing evidence that complaints of harm had been received from 950 of the approximately 30,000 putative class members. [Emphasis added]

[293] She also concluded that if all members of a class have an interest in knowing whether HMQ caused or contributed to harm suffered by some that this is sufficient to show a rational connection between the class definition and the proposed common issues:

> 33 The class representative has done this. He produced evidence attesting to his personal losses as a result of the BSE crisis and the experience of others in his community [...] Their admissibility is not in issue. HMQ has known for some time that the plaintiff would be relying on them and is not prejudiced. They speak to the enormity of the economic consequences to cattle farmers from the discovery of BSE. Whether or not all class members were harmed by this, all class members share a common interest in ascertaining whether HMQ caused or contributed to this. This is sufficient to show a rational connection between the class definition and the proposed common issues. [Emphasis added]

[294] The Appellants seek a declaration that the OLGC were in breach of their various obligations, not just a claim for compensation.

[295] I find that the Appellants have proved that there is some basis in fact to support the argument that all the individuals who signed the self-exclusion document, whether or not they returned to gamble and experienced losses, share a common interest in ascertaining:

- whether OLGC lived up to its public undertaking to promote responsible gambling and to be a leader in the field,

- and whether the memory based system utilized met the undertaking given by OLGC to make its best efforts to exclude those who signed the self-exclusion document.

[296] The conclusion by Lax, J. in *Sauer* of all class members sharing a common interest in knowing what happened and why applies in considering the issues that arise in this case.

[297] The motions judge concluded that Class A met the test of objectivity, but found that as the class was over inclusive. He considered the need to prove a return to gambling and experiencing losses as being two intertwined individual issues along with the vulnerability issue. He concludes that the individual issues dominate and preclude certification. It appears he applied a merits based definition to the proposed class.

[298] I conclude that the question raised by the Respondent of those class members who did not re-attend and gamble or those who were excluded in the 1000 violations detected goes to the

issue of damages, not the question of systemic breach by the OLGC. I will discuss the damage issues in question 4.

Occupiers Liability Act

[299] The Respondent further argues that the wording of the *OLA* necessitates an individual inquiry. It points to s. 3(1) of the *OLA* that provides that "[a]n occupier of the premises owes a duty to take such care as in all the circumstances of the case is reasonable" and s. 4(1) of the *Act* that sets out that such a duty does not apply "in respect of risks willingly assumed by the person who enters on the premises."

[300] The Respondent argues that the phrases "all the circumstances of the case" calls for an individual-based inquiry and that that an assessment of willing assumption of risk similarly calls for an individual-based inquiry.

[301] I do not agree with this submission as to the meaning of the *OLA*. The determination under s. 3(1) of the *OLA* involves an examination of the defendant's conduct. The circumstances of the case are common issues: they call on the court to look at the duty owed by the OLGC to persons who self-excluded and are presumed to be vulnerable. There is no need to examine individual issues in assessing the statutory provisions of the *OLA*.

[302] Moreover, there is no language in s. 4(1) ("in respect of risks willingly assumed by the person who enters on the premises") that suggests that an individual inquiry is necessary. The question of whether there was a willing assumption of risk should be analyzed again in light of presumed vulnerability of Class A members when the self-exclusion contract that was signed. The focus is on the Respondent's conduct. Individual issues do not engage.

[303] Therefore, under question 3, the following issue must be addressed:

- whether the OLGC breached its contractual obligations and the particulars of the breaches [common issue]
- whether the OLGC breached its tort duty [common issue]
- whether the OLGC breached its duty as an occupier [common issue]

Question 4: whether damages sustained by class members as a consequence of any breaches of the above duties can be determined on an aggregate basis in whole, or in part

[304] Proof of damages *prima facie* raises individual issues, including proof that the individual returned to gamble after signing the self-exclusion contract and experienced losses. There may well be a variety of individual defences as referred to in the reasons of Low, J.

[305] The Appellants submit that the motions judge erred in failing to certify that the issue of aggregate damages could be made out as a common issue based upon the evidence before the Court.

[306] To justify an award of aggregate damages, the Appellants must meet the test set out by section 24 of the *CPA*:

> 24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. 1992, c. 6, s. 24 (1).
>
> (2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis. 1992, c. 6, s. 24 (2).
>
> (3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members. 1992, c. 6, s. 24 (3).

[307] Under section 23 of the *CPA*, the requirements of s. 24 can be satisfied by the appropriate statistical evidence:

> 23. (1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics. 1992, c. 6, s. 23 (1).

[308] Aggregate damages will be certified as a common issue where there is a "reasonable likelihood" that the elements of s. 24 of the *CPA* will be satisfied: *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Div. Ct.) at para. 102, aff'd [2010] O.J. No. 2683 (C.A.); *Glover v. Toronto (City)*, [2009] O.J. No. 1523 (S.C.J.) at para. 62.

[309] The Appellants argue that the motions judge erred by failing to consider that they could claim aggregate damages under s. 24 of the *CPA* by establishing liability for breach of contract. They further argue that motions judge applied an overly high standard that went above "a reasonable likelihood" to assess their methodology for the calculation of aggregate damages. Finally, they argue that the motions judge failed to consider the potential for a restitutionary award (e.g. through the waiver of tort) to resolve some of these aggregate damages issues.

[310] I agree with the motions judge that the Appellants' current methodology, as proposed by their expert witness Dr. Williams, is problematic and does not meet the requirements under s. 24(1)(c) for two reasons:

- first, the credibility and neutrality of Dr. Williams has been challenged based upon his conduct; and

- second, the methodology proposed is not based upon the facts of this case and does not at this point in time provide an accurate sampling.

[311] The Appellants' expert, Dr. Williams, estimated the total losses of primary class members to be $79,867,686.00 annually by extrapolating from academic studies in Ontario.[16] Williams points to two studies that use a phone survey of adults in Ontario to estimate annual gambling losses for severe problem gamblers to be $8 610; for moderate problem gamblers to be $718; and for non-problem gamblers to be $153. Dr. Williams averages the findings of four academic studies[17] and finds 87% of self-excluders are severe problem gamblers, 10% are moderate problem gamblers and 3% are non-problem gamblers. Putting these figures together, he does a simple mathematic calculation, multiplying the average annual loss of each category of gambler by their estimated proportion in the population of the self-excluders (e.g. ($8 610 X 0.87) + ($718 X 0.10) + (153 X 0.03) = $79 867 686).

[312] As argued by the Respondent, the telephone survey about gambling losses relied upon by Williams is of adults in Ontario. There is no evidence that any of these adults are self-excluders. Therefore, there is not a sufficient connection between the sample in that study and the primary class in this proceeding. Furthermore, as the Respondent points out in his calculation, Williams makes questionable assumptions, including significantly, that all self-excluders returned to gamble, which is not the Respondent's position. Additionally, some of Dr. Williams' estimations

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[16] R. Williams and W. Wood, "The proportion of Ontario gambling revenue derived from problem gamblers" (2007) 33:3 *Canadian Public Policy* 367, located in the Respondent's Compendium at 185; R.Williams and R. Wood, *Prevalence of Problem Gambling in Canada in 2006/200* (Manuscript in Preparation).

[17] Ladouceur et al. 2000, *supra* note 12; Ladouceur et al. 2007, *supra* note 12; Steinberg, *supra* note 15; Alberta Gaming and Liquor Commission (AGLC), "Casino and Racino Entertainment Centre Voluntary Self-Exclusion Program Evaluation: Final Report," January 30, 2007.

are taken from an unpublished manuscript, which was not included in the court record and therefore cannot be tested.

[313] Due to these frailties, the Appellants have not met the onus of proving a "reasonable likelihood" that the elements of s. 24 of the *CPA* will be satisfied at this point in the proceedings.

[314] However, it is quite possible that if the liability issues are resolved in favour of the Appellants, the Appellants will be able to develop a fair and accurate sampling of Class A, to calculate damages on an aggregate basis that is fair and reliable.

[315] Ultimately, the question of whether there may be an aggregate assessment of damages in the future based upon reliable facts with an analysis by an impartial expert should not be certified as a common issue at this juncture. It should be left to the common issues trial judge: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para 59.

[316] As Cullity J. confirmed in *Heward v. Eli Lilly*, (2007), 39 C.P.C. (6th) 153, [2007] O.J. No. 404 (S.C.J.) at para. 41, aff'd (2008), 91 O.R. (3d) 691, [2008] O.J. No. 2610 (Div. Ct.), even if aggregate damages could not be certified as a common issue, the proceeding should be certified nonetheless on the basis of the other important common issues raised:

> If, on a full evidentiary record, the trial judge were to find that proof of the amount of relief based in waiver of tort cannot be assessed in aggregate, a class action remains the preferable procedure. An aggregate award of damages is not a prerequisite for certification. If the other, unchallenged common issues related to the waiver of tort claim are resolved favourably, the proceeding will still have advanced the claims of the class as a whole. This is so particularly in consideration of s. 25 of the CPA which confers broad jurisdiction on the common issues trial judge to develop procedures for individual participation in determining the allotment of relief. It is not just the common issues trial which is to be considered in determining whether a class action is the preferable procedure.

[317] As OLGC has not yet filed their defence, there will in all probability be a range of individual defence issues that the Respondents may wish to raise that have been alluded to. It is premature at this stage before a defence has been filed to anticipate what these defences may be.

[318] Therefore, under question 4 the issue of damages, the following issue must be addressed:

- Potential individual defences that may be raised by the Respondents [individual issue]
- Determination of the damages sustained by Class A members owing to breaches of duty by the OLGC [individual issue]

Question 5: waiver of tort- whether OLGC can be required to account for gross revenues, or net income, derived from class members as a consequence of any such breaches of duty

[319] The Appellants argue that the motions judge failed to assess the potential of the waiver of tort for resolving damages as a common issue, as he was focused on the question of individual vulnerability. The Appellants have pleaded waiver of tort as either an alternative cause of action or as a remedy to breaches of the tort of negligence or occupiers' liability.

[320] Waiver of tort could potentially resolve some individual damage issues on a common basis, since the plaintiffs would not have to prove the quantum of their loss. It allows a plaintiff who can establish wrongdoing to make an equitable claim for a constructive trust or a personal remedy for an accounting or disgorgement of profits without having to prove a loss causally related to the defendant's conduct.

[321] In *Heward v. Eli Lilly & Co.* (2008), 91 O.R. (3d) 691, [2008] O.J. No. 2610 at para. 20, the Divisional Court explained the concept of a "waiver of tort" as follows:

> The nomenclature "waiver of tort" is somewhat confusing. A plaintiff is not waiving the right to sue in tort but rather, electing [page699] to base his/her claim in restitution. The plaintiff thereby seeks to recoup the benefits that the defendant has derived from the tortious conduct. For example, if the tortfeasor's gain exceeds the quantum of damages that the plaintiff might recover in an action in tort, the plaintiff might well choose to concurrently pursue the alternative (so-called "waiver of tort") remedy founded in restitution.

[322] It is still unsettled in Canadian law whether waiver of tort is a cause of action or whether it is simply an alternative remedy to a breach of an established tort. As the learned motions judge concluded in his 5(1)(a) analysis, it does require some proof of wrongdoing. The scope of the wrongdoing required is uncertain, for example, it is unclear whether it must be a wrong in equity.

[323] In *Serhan v. Johnson and Johnson* (2006), 85 O.R. (3d) 665 (Div. Ct.) at para. 69, Epstein J.A. left the question open whether waiver of tort is a cause of action itself or whether it is simply an alternative remedy to a breach of an established tort. She held that this question should be resolved "in the context of a factual background of a more fully developed record."

[324] Ontario courts have followed *Serhan* in certifying waiver of tort as a potential cause of action: *Heward v. Eli Lilly & Co.* (2007), 39 C.P.C. (6th) 153, [2007] O.J. No. 404 (S.C.J.), aff'd (2008), 91 O.R. (3d) 691, [2008] O.J. No. 2610 (Div. Ct.); *Peter v. Medtronic Inc.* (2007), 50 C.P.C. (6th) 133, [2007] O.J. No. 4828 (S.C.J.), leave to appeal to Div. Ct. denied (2008), 55 C.P.C. (6th) 242, [2008] O.J. No. 1916 (Div. Ct.); *Tiboni v. Merck Frosst Canada Ltd* (2008), 295 D.L.R. (4th) 32, [2008] O.J. No. 2996 (S.C.J.), leave to appeal certification to Div. Ct. denied in *Mignacca v. Merck Frosst Canada Ltd.* (2008), 304 D.L.R. (4th) 220, [2008] O.J. No. 4731 (Div. Ct.); *Robinson v. Medtronic Inc.* (2009), 80 C.P.C. (6th) 87, [2009] O.J. No. 4366 (S.C.J.).

[325] The Court of Appeal recently considered the status of waiver of tort in *Aronowicz v. Emtwo Properties Inc.* (2011), 98 O.R. (3d) 641, [2011] O.J. No. 990 at paras. 80 and 82. Blair

J.A. held that it is not clear whether the doctrine is an independent cause of action. However, it is clear a finding of wrongdoing must underpin the waiver of tort.

> [80] Waiver of tort is a restitutionary remedy. There is considerable controversy over whether it exists as an independent cause of action at all or whether it is "parasitic" in the sense that it requires proof of an underlying tort and -- since a tort requires damage -- proof of harm to the plaintiff. By invoking waiver of tort, a plaintiff gives up the right to sue in tort but seeks to recover on the basis of restitution, claiming the benefits the wrongdoer has derived from the wrongful conduct regardless of whether the plaintiff has suffered damages or not: see, for example, Serhan Estate v. Johnson & Johnson (2006), 85 O.R. (3d) 665, [2006] O.J. No. 2421 (Div. Ct.), at paras. 45-69, leave to appeal to S.C.C. dismissed [2006] S.C.C.A. No. 494.
>
> [82] While waiver of tort appears to be developing new legs in the class action field -- see Serhan Estate and Heward v. Eli Lilly & Co. (2008), 91 O.R. (3d) 691, [2008] O.J. No. 2610 (Div. Ct.), for example -- it is of no assistance to the appellants here. Whether the claim exists as an independent cause of action or whether it requires proof of all the elements of an underlying tort aside, at the very least, waiver of tort requires some form of wrongdoing.

[326] I have concluded above that there is a basis in fact to certify common issues regarding whether the OLGC breached its duty to those who self-excluded in tort, negligence and under occupiers' liability.

[327] Implicit in the allegations of the Appellants is that OLGC, a crown corporation with public duties, made a deliberate decision not to improve a deficient memory based system of exclusion to reap continued financial profits from vulnerable problem gamblers. This harsh allegation needs to be tested, but I conclude that the low threshold of some basis in fact has been met. Therefore, the question of whether there is a wrongdoing to found a finding of waiver of tort should also be certified as a common issue.

[328] The court must also be satisfied that there is a casual connection between the wrongdoing and the amount to be disgorged. In *Heward v. Eli Lilly*, Cullity J. held at para. 101 that

> the court must be satisfied that it is possible to determine on a class-wide basis whether a sufficient causal connection existed between the wrongful conduct and the amount for which the defendants could be ordered to account.

[329] As outlined earlier, it appears that a significant portion of the OLGC's revenue is provided by problem gamblers. Some of these people signed the self-exclusion contract. Certainly, there is a need for a rigorous analysis of the profits gleaned from self-excluders when the facts are clearer. However, this issue could be dealt with by the common issues trial judge. I

conclude that at this stage, there is enough evidence to certify the common issue of waiver of tort as either an independent cause of action or a form of restitution.

[330] Therefore, under question 5, the following common issues are raised:

- Whether the Class A Members may elect to "waive the tort" and require the OLGC to account for its gross revenues or, alternatively, its net income or profits owing to any of its breaches of duty (including restitutionary damages for breach of contract) [common issue];
- Whether OLGC engaged in wrongdoing that engages the waiver of tort [common issue];
- Whether there is sufficient causal connection between the wrongful conduct and the amount for which defendants could be ordered to disgorge [common issue];
- If so, what is the quantum of the restitution and how should it be distributed [common or individual issue].

Ancillary Common Issues

[331] The Appellants raised a variety of ancillary common issues, which were not argued, or were touched upon briefly in passing. None of these issues are determinative of the merits of this appeal. If this class proceeding is to be certified, these issues should be argued before the common issues judge to determine whether they are common or individual issues. The ancillary issues raised are:

1. Whether the OLGC delegated the conduct and/or management of one or more gambling activities at any of the Gambling Venues in breach of ss. 206 and 207 of the *Criminal Code,* R.S.C. 1985, c.C-46, as amended?
2. Whether the Class B members sustained damages pursuant to s. 61 of the *Family Law Act* payable by the OLGC owing to any of its breaches referred to in issues 7 and 8 and, if so, the quantum and how they should be distributed?
3. Whether the primary class members (Class A) and/or Class B Members are entitled to a punitive damages award against the OLGC and, if so, the quantum and how they should be distributed?
4. Whether the OLGC should pay prejudgment and post-judgment interest on any damages awarded and, if so, in what amounts and how should it be distributed?
5. Whether the OLGC should pay the costs of administering and distributing any monetary judgment and/or the cost of determining eligibility and/or individual issues and if so, in what amount or on what bases?

5(1)(d): Is a class proceeding the preferable procedure to resolve the common issues?

[332] The principles to apply in the section 5(1)(d) of the *CPA* are confirmed by the Divisional Court in *Quiznos* at para. 140, reflecting the analysis in *Hollick* at paras. 27 to 30 and *Cloud* at para. 73:

> Whether a class action would be fair, efficient and manageable, and preferable to any alternative to resolving the claim, is to be assessed in the context of the entire action in the light of the objectives of the Act. This requires a practical cost-benefit approach, which takes account of the impact of a class proceeding on class members, the defendant and the court in terms of access to justice, judicial economy and behaviour modification.

[333] The motions judge considered these principles. However, due to his conclusion about the necessity to prove problem gambling on an individual basis, Justice Cullity concluded that the Appellants had not met the test that a class action was the preferred procedure. He concluded in paras. 232 to 240:

- As the class definition was over-inclusive and did not meet the test of commonality for the proposed common issues, it was not necessary to consider the question of the preferred procedure;
- He reiterated his view that problem or pathological gambling must be proved on an individual basis;
- He referred to many of the defences that must be considered on an individual basis and concluded that the individual issues are not appropriately dealt with pursuant to section 25 of the *CPA*;
- Judicial economy would not be advanced due to the numerous individual issues. Further, as nine cases have been launched over the self-exclusion program and settled for average payments of $167,000.00, this is not a case where amounts in dispute are so small that it would be prohibitive to launch a claim; and
- Behavior modification is not a weighty factor. It has already been addressed by the publication of results of individual actions and by the steps that the OLGC have taken in 2007 and 2008 to find effective self-exclusion programs.

[334] As I have concluded that proof of individual vulnerability and harm is not a prerequisite to class membership, I have reached a different conclusion about the common issues capable of being certified, which dramatically changes the preferability analysis.

[335] I conclude that the common issues related to liability identified in Schedule A may be dealt with in a manageable fashion for all class members. The resolution of the common issues is important and will significantly advance the litigation and may determine the outcome of this action as a class proceeding. Determination of these common issues promotes judicial economy.

[336] It is obvious that the liability aspect of the proceeding and the fact-finding that it will require will be lengthy, expensive and complicated. I am sure that the actual legal costs to date have been crushing. These complicated and important issues should proceed and be determined once, not in a variety of actions, with the possibility of conflicting decisions.

[337] Allowing this matter to proceed as a class proceeding promotes access to justice. Low, J. and Cullity, J. considered that nine cases that have settled for reasonably substantial sums: an average claim of $167,000.00. These settlement figures are pittance compared to the cost of an individual litigating this claim. This appears to be a true David and Goliath case, for which class actions are designed. The plaintiffs are individuals who are problem gamblers. Many will have and probably lost fortunes, destroyed relationships, and placed in jeopardy their homes, their employment, and their families.

[338] The emotional and financial difficulties facing an individual in these circumstances who is required to take on the OLGC, a crown corporation with limitless funds, is one of the very reasons that class actions exist- to promote access to justice.

[339] The Appellants seek declaratory relief as to the conduct of the OLGC. Of particular importance to the Class A participants and to the public in general is the question of whether there is a valid disclaimer in the self-exclaimer document or whether it should not be enforced for overriding public policy reasons.

[340] The preliminary determination of the public policy issue with respect to contract and of the third branch of the Anns/Cooper test, with all of the facts revealed, in my view justifies this matter proceeding as a class action.

[341] So little reliable information is known and available about problem gambling. In the 1998-1999 annual report, the OCC (predecessor to OLGC) presented the self-exclusion program as a solution to problem gambling. It pointed to the difficulties of identifying a problem gambler and then identified its own expertise in doing so: "Unlike other forms of addiction, compulsive gambling is invisible to an untrained observer [...]The OCC ensures leading edge training for all gaming employees, especially those on the front lines, to recognize the signs of a problem gambler."

[342] Allowing this lawsuit to proceed as a class action would generate much more reliable information about the consequences of legalizing gambling in Ontario. This is a huge potential benefit, not just to the members of the class as defined, but to the public in general, both gamblers and non-gamblers.

[343] The issue of behavior modification is significant. OLGC, as a crown corporation, undertook to the public to protect the weak who would inevitably succumb to the illness of problem gambling once gambling was legalized. Did they fulfill that undertaking? What was known and what decisions were made?

[344] Was there a conflict of interest as alleged by the Appellants between OLGC's obligations to the public and its motive to maintain enormous profits with an eye to the bottom line? Why does it appear that so few steps were taken after the release of the Martin report in 2001 that condemned in no uncertain terms the inadequacies of the memory based system for self-excluders? Why is the OLGC so vigorously defending the request to certify this proceeding?

[345] Class actions are complex cases, and this case certainly is no exception. Clearly when it comes to defences and proof of loss, a variety of individual issues arise. The OLGC has not yet filed a Statement of Defence. Understandably, it is playing its cards close to the vest. Concern about proposed defences is at this stage theoretical only.

[346] If there is a finding of liability in favour of the Appellants, it may well be that the individual issues with respect to damages and defences raised overwhelm the common issues. It is at that point in time that the OLGC may object to the matter continuing as a class proceeding. In *Western Canadian Shopping Centres*, McLachlin C.J. held at paras. 55-56:

> [55] ... A class action should not be foreclosed on the ground that there is uncertainty as to the resolution of issues common to all class members. If it is determined that the investors must show individual reliance, the court may then consider whether the class action should continue.
>
> [56] The same applies to the contention that different defences will be raised with respect to different class members. Simply asserting this possibility does not negate a class action. If and when different defences are asserted, the court may solve the problem or withdraw leave to proceed as a class.

[347] Although the proposal for the calculation of aggregate damages is presently problematic, it may well be once facts are known and preliminary common liability issues determined, that a fair and efficient method for determining damages on an aggregate basis is developed.

[348] It must be remembered that class proceedings, as unwieldy and difficult as they may be, are intended to promote access to justice. An overly rigid technical approach to defining the class and the common issues may defeat the purpose of this legislation. Winkler, J. in *Frohlinger v. Nortel Networks Co* confirms at para. 28 the need for a flexible approach in assessing issues of the class definition to fulfill the purpose of the CPA:

> It must be remembered that the CPA is a procedural statute meant to provide a mechanism for the resolution of mass claims. As such, certification is a procedural step in the litigation and not a substantive determination. The statute

> must be interpreted liberally and a rigid approach to class definition based on concerns about over-inclusiveness may well defeat its purposes.

[349] Cullity, J. in *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (S.C.J.) at para. 101. confirmed that the definition of a class may evolve when the facts are known:

> Sections 8 and 10 of the CPA contemplate that certification orders may need to be amended, and it may well be found possible to reduce the size of the class as the litigation proceeds towards trial.

[350] For these reasons I confirm that a class action for the variety of common issues certified is clearly the preferable procedure, meeting the objectives of promoting access to justice, judicial economy and behaviour modification.

The s. 5(1)(e) analysis of the litigation plan

[351] Section 5(1)(e) considers whether the litigation plan proposed is appropriate for certification as "there is a representative plaintiff or defendant who,

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1)."

[352] The motion judge found that Mr. Dennis and his wife would fairly and intelligently represent the interests of the class. There is no evidence that on any of the proposed common issues, there is any conflict between his interest and the interest of other class members.

[353] The Respondent objected to the litigation plan, asserting that the individual issues dominated the common issues and therefore there was no workable method to advance the proceedings on behalf of the class.

[354] In light of my finding that there are a significant number of common issues at the liability stage at least, I conclude that the litigation plan proposed is reasonable and meets the criteria of section 5(1)(e) of the *CPA*.

[355] Section 5 of the *CPA* uses mandatory language. "The court shall certify a class proceeding on a motion if" the five part prerequisites in 5(1)(a) to (e) are met. I conclude that the Appellants have met the five part test.

[356] For these reasons, I would allow the appeal, set aside the decision of Cullity, J. dated March 15, 2010, and would certify the Appellants' claim as a class action.

J. Wilson J.

Released: December 2, 2011

SCHEDULE A

DISSENTING REASONS

LIST OF GOBAL ISSUES PROPOSED BY MOTIONS JUDGE

1. **Whether the self-exclusion forms are binding contracts that required OLG to take reasonable care to deny entry to OLGC's facilities to the primary class (Class A) members, and to detect and remove any who gained entry;**

    (a) Is the self-exclusion contract a binding contract? [common issue]

    (b) Did the self-exclusion contract require OLGC to make its best efforts to deny entry to OLGC's facilities to the primary class members and to detect and remove any who gained entry [common issue]

    (c) Are the waiver clauses in the self-exclusion contract *prima facie* enforceable? [common issue]

    (d) If the waiver clauses applies, was the exclusion clause unconscionable at the time it was signed and hence unenforceable? [individual issue]

    (e) Even if the waiver clauses are *prima facie* valid, should the court refuse to enforce the waiver clauses because of an overriding issue of public policy? [common issue]

2. **Whether OLGC owes a tort duty to the primary class (Class A) to take such reasonable care to deny them entry;**

    (a) whether it is reasonably foreseeable that that the self-excluders would experience losses if the OLGC used a memory-based enforcement system to screen them out [common issue]

    (b) whether the OLGC was in a relationship of sufficient proximity with the persons who self-excluded [common issue]

    (c) whether there are any residual policy reasons apply to negate or restrict a duty of care owed by the OLGC to the self-excluders [common issue]

3. **Whether OLGC breached either, or each, of the duties in 1. or 2. or its duty under the *Occupier's Liability Act*, R.S.O. 1990, c.O.2;**

   (a) whether the OLGC breached its contractual obligations and the particulars of the breaches [common issue]

   (b) whether the OLGC breached its tort duty [common issue]

   (c) whether the OLGC breached its duty as an occupier [common issue]

4. **Whether damages sustained by class members as a consequence of any breaches of the above duties can be determined on an aggregate basis in whole, or in part;**

   (a) Potential individual defences that may be raised by the Respondents [individual issue]

   (b) Determination of the damages sustained by Class A members owing to breaches of duty by the OLGC [individual issue]

5. **Whether OLGC can be required to account for gross revenues, or net income, derived from class members as a consequence of any such breaches of duty;**

   (a) Whether the Class A Members may elect to "waive the tort" and require the OLGC to account for its gross revenues or, alternatively, its net income or profits owing to any of its breaches of duty (including restitutionary damages for breach of contract) [common issue];

   (b) Whether OLGC engaged in wrongdoing that engages the waiver of tort [common issue];

   (c) Whether there is sufficient causal connection between the wrongful conduct and the amount for which defendants could be ordered to disgorge [common issue];

   If so, what is the quantum of the restitution and how should it be distributed [common or individual issue].

CITATION: Dennis v. Ontario Lottery And Gaming Corporation, 2011 ONSC 7024
DIVISIONAL COURT FILE NO.: DC-10-00000188-0000
DATE: 20111202

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

J. Wilson, Swinton and Low JJ.

BETWEEN:

PETER AUBREY DENNIS AND ZUBIN PHIROZE NOBLE

Plaintiffs (Appellants)

– and –

ONTARIO LOTTERY AND GAMING CORPORATION

Defendant (Respondent on Appeal)

REASONS FOR JUDGMENT

Low and Swinton JJ. (concurring)
J.Wilson J. (dissenting)

Released: December 2, 2011

Court File No. DC-10-00000188-0000

ONTARIO
DIVISIONAL COURT, SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	FRIDAY, THE 2nd DAY
	)	
JUSTICES J. WILSON, SWINTON AND LOW JJ	)	OF DECEMBER, 2011

B E T W E E N:

[redacted] PETER AUBREY DENNIS and ZUBIN PHIROZE NOBLE

Plaintiffs/Appellants

-and-

ONTARIO LOTTERY AND GAMING CORPORATION

Defendant/Respondent

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6

ORDER

THIS APPEAL, brought by the Plaintiffs/Appellants was heard on April 6 and 7, 2011, at the courthouse at 130 Queen Street West, Toronto, Ontario M5H 2N5, the decision was reserved and given this day. ~R

ON READING the Plaintiffs'/Appellants' Appeal Book and Compendium, the Defendant's/Respondent's Appeal Book and Compendium, the Exhibit Book and the facta and authorities of both parties, all filed, on hearing the oral submissions of the lawyers for the parties, and on reading the written submissions of the lawyers for the parties regarding costs, filed,

1. THIS COURT ORDERS that the Plaintiffs'/Appellants' appeal be dismissed;

2. THIS COURT ORDERS that no costs are awarded for the appeal.

Rosemarie Shah
Assistant Registrar

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO: 17
LE / DANS LE REGISTRE NO.:
MAR 08 2012 604
PER / PAR:

DENNIS et al.
Appellants / Plaintiffs

- and - ONTARIO LOTTERY AND GAMING CORPORATION
Respondent / Defendant

Court File No.: DC-10-00000188-0000

149

ONTARIO
DIVISIONAL COURT,
SUPERIOR COURT OF JUSTICE

Proceedings commenced at Toronto

ORDER

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COURT OF APPEAL FOR ONTARIO

CITATION: Dennis v. Ontario Lottery and Gaming Commission, 2012 ONCA 368
DATE: 20120531
DOCKET: M41367 (M40972)

Gillese J.A. (In Chambers)

BETWEEN

Peter Aubrey Dennis and Zubin Phiroze Noble

Responding Parties/Plaintiffs (Appellants)

and

Ontario Lottery and Gaming Corporation

Moving Party/Defendant (Respondent on Appeal)

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6

James Doris and Matthew Milne-Smith, for the moving party

Jerome R. Morse and Lori Stoltz, for the responding parties

Heard in writing

On a motion to strike the appellants' Reply Factum on the motion for leave to appeal from the judgment of the Divisional Court (Swinton and Low JJ., Wilson J. dissenting) dated December 2, 2011, with majority reasons by Low J. reported at 2011 ONSC 7024, 286 O.A.C. 329.

[1] The plaintiffs/appellants (the "appellants") have brought a motion for leave to appeal the decision of the Divisional Court, in which it upheld Cullity J.'s denial of certification in this proposed class proceeding. In support of their motion, the appellants filed a 30-page factum. In their factum, the appellants allege three errors on the part of the majority decision of the Divisional Court.

[2] The Ontario Lottery and Gaming Commission (the "respondent") filed a responding factum which focussed largely on whether leave to appeal was appropriate, rather than the merits of the proposed appeal itself.

[3] The appellants purport to file a reply factum.

[4] The respondent moves to strike the reply factum on the basis that its factum raised no issue on which the appellants had not already taken a position in their moving factum.

Analysis

[5] Rule 61.03.1(11) of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, provides:

> (11) If the responding party's factum raises an issue on which the moving party has not taken a position in the moving party's factum, that party may serve a reply factum.

[6] I have carefully reviewed both parties' factums. Having done so, I accept the respondent's submission on this matter. While its responding factum does cite facts and cases not mentioned by the appellants in their factum, it does not

raise any new issues. Put another way, the respondent's factum is entirely responsive to the issues raised by the appellants.

[7] As rule 61.03.1(11) makes clear, reply is not a matter of right. It is confined to responding to an **issue** raised by the responding party on which the moving party has not taken a position. In responding to the issues raised by the appellants, the respondent refers to facts and cases to which the appellants made no reference. However, this does not amount to raising an issue on which the appellants have not taken a position. It amounts to arguing the issues as raised by the appellants, with a focus on different facts and points of law.

[8] There is value in giving rule 61.03.1(11) its plain meaning and restricting reply factums to those in which the moving party responds to an issue raised by the responding party and on which the moving party has not taken a position. Self-evidently, the point of reply factums is to ensure that each party has had a fair and equal opportunity to argue the issues. A reply factum should not be permitted where it merely confirms or reinforces points already made or which could have been made in the moving party's initial factum.

[9] If, as the appellants contend, the respondent has misstated the evidence and/or set out partial statements of fact, in light of the considered reasons for decision at first instance and those of the Divisional Court, both majority and dissent, this will be apparent to the panel that considers the motion for leave. To

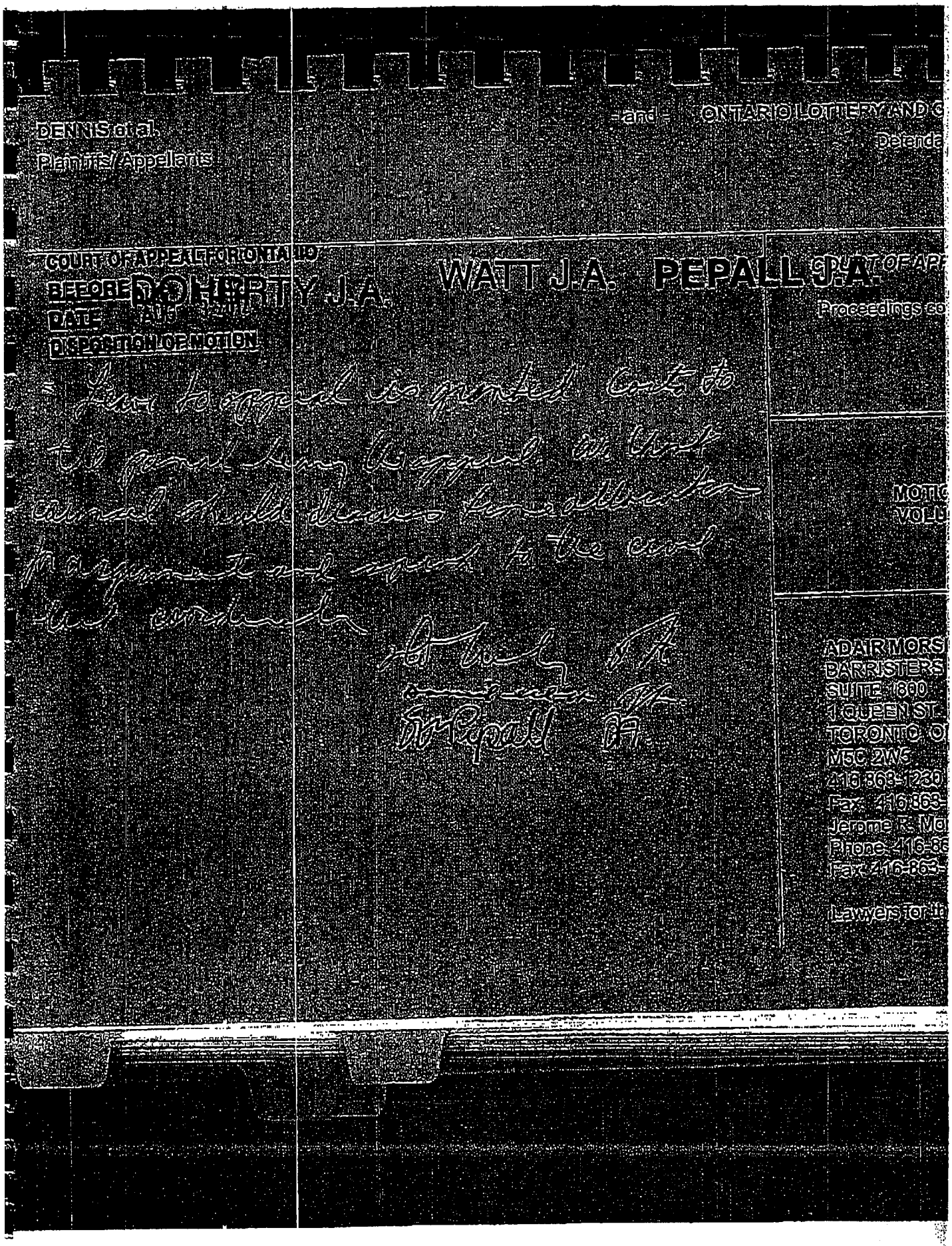
reiterate, a reply factum should not be permitted when it amounts to re-argument of issues raised in the moving party's factum.

Disposition

[10] Accordingly, I would grant the motion and make the order as sought, striking the appellants' reply factum.

Released: May 31, 2012 ("E.E.G.")

"E.E. Gillese J.A."


DENNIS et al.
Plaintiffs/Appellants
and
ONTARIO LOTTERY AND
Defenda
COURT OF APPEAL FOR ONTARIO
BEFORE: DOHERTY J.A. WATT J.A. PEPALL J.A.
DATE:
DISPOSITION OF MOTION
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Court File No. M40972

ONTARIO
COURT OF APPEAL FOR ONTARIO

THE HONOURABLE JUSTICE DOHERTY)	FRIDAY, THE 3rd DAY
THE HONOURABLE JUSTICE WATT)	
THE HONOURABLE JUSTICE PEPALL)	OF AUGUST, 2012

B E T W E E N:

PETER AUBREY DENNIS and ZUBIN PHIROZE NOBLE

Plaintiffs
(Appellants)

-and-

ONTARIO LOTTERY AND GAMING CORPORATION

Defendant
(Respondent)

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6

ORDER

THIS MOTION, brought by the plaintiffs/appellants for leave to appeal was considered on this day at Osgoode Hall, 130 Queen Street West, Toronto, Ontario M5H 2N5.

ON READING the plaintiffs'/appellants' notice of motion for leave to appeal and motion record, facta and authorities of both parties, filed,

1. THIS COURT ORDERS that leave to appeal is granted.

2. THIS COURT ORDERS that the costs of the motion be addressed by the panel hearing the appeal.

Registrar
Court of Appeal for Ontario

DENNIS et al.

Plaintiffs
(Appellants)

- and - ONTARIO LOTTERY AND GAMING CORPORATION

Defendant
(Respondent)

Court File No.: M40972

157

COURT OF APPEAL FOR ONTARIO

Proceedings commenced at Toronto

ORDER

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COURT OF APPEAL FOR ONTARIO

CITATION: Dennis v. Ontario Lottery and Gaming Corporation, 2013 ONCA 501
DATE: 20130731
DOCKET: C55923

Weiler, Sharpe and Rouleau JJ.A.

BETWEEN

Peter Aubrey Dennis and Zubin Phiroze Noble

Plaintiffs (Appellants)

and

Ontario Lottery and Gaming Corporation

Defendant (Respondent)

Jerome R. Morse and Hassan Fancy, for the appellants

James Doris and Matthew Milne-Smith, for the respondent

Heard: April 15, 2013

On appeal from the order of the Divisional Court (Justices Wailan Low and Katherine E. Swinton, Justice Janet Wilson (dissenting)), dated December 2, 2011, with reasons reported at 2011 ONSC 7024, 344 D.L.R. (4th) 65, dismissing an appeal from the order of Justice Maurice C. Cullity of the Superior Court of Justice, dated March 15, 2010, with reasons reported at 2010 ONSC 1332, 318 D.L.R. (4th) 110.

Sharpe J.A:

[1] Peter Aubrey Dennis was a problem gambler. He signed a self-exclusion form provided by the Ontario Lottery and Gaming Corporation ("OLG"). In the self-exclusion form, OLG undertook to use its "best efforts" to deny signatories entry to its facilities, but excluded liability if it failed to do so. Despite signing the form,

Dennis returned to OLG facilities on a regular basis for over three years to gamble and lost significant sums of money. His claim against OLG is based on the allegation that OLG failed to exercise its best efforts to exclude him from its facilities. The action is framed in breach of contract, negligence, occupiers' liability and, on behalf of Dennis's spouse, Zubin Phiroze Noble, for damages under s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*").

[2] Dennis and Noble seek certification of their claims under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*"). Dennis wishes to represent a primary class of approximately 10,428 individuals (Class A Members), who are defined in the Amended Amended Statement of Claim as all residents of Ontario and the Unites States, or their estates, who signed a self-exclusion form between December 1, 1999 and February 10, 2005. Noble seeks to represent family members who suffered *FLA* damages (Class B Members).

[3] The motion judge refused certification essentially on the ground that all significant issues of liability turned on proof that individual class members were vulnerable, pathological problem gamblers who returned to OLG facilities despite signing the self-exclusion form. On appeal to the Divisional Court, the majority agreed with the motion judge and dismissed the appeal. The dissenting judge was of the view that signing the self-exclusion form was sufficient proof of vulnerability and that the issues of OLG's alleged fault in relation to problem gamblers who signed self-exclusion forms were common and certifiable.

[4] For the following reasons, I would dismiss the appeal. In my view, the motion judge and the majority of the Divisional Court correctly concluded that this was not a proper case for certification as a class action.

FACTS

[5] This proposed class action is brought to recover damages flowing from gambling losses incurred as a result of OLG's alleged failure to exercise its best efforts, and to take adequate care, to exclude individuals who signed self-exclusion forms from its gambling venues.

[6] The appellants plead that Dennis and each of the Class A Members were "problem gamblers" who suffer from a progressive behavioural disorder that causes them to become preoccupied with gambling and to engage in excessive gambling. The behaviour, known as "problem gambling", is alleged to cause a range of harm to them and their family members, including emotional, social, financial, legal, employment, education and health-related harms. The pleadings allege that OLG had special knowledge of the risks and harms of its gambling venues, including the nature of problem gambling. The pleadings further assert that Dennis and the Class A Members gave notice to OLG of their vulnerability as problem gamblers when they signed the self-exclusion forms.

[7] The pleadings assert that Dennis signed a self-exclusion form on May 23, 2004, after gambling well over $350,000 at OLG slot machines. It is alleged that after Dennis signed the form, OLG repeatedly failed to deny him entry to OLG

venues and to detect and remove him once he gained entry. As a result of OLG's failure, he claims to have suffered financial losses of approximately $200,000, and various other specified losses.

(1) OLG's Self-Exclusion Program

[8] OLG's gambling facilities have offered a self-exclusion program since their inception. Paul Pellizzari, the Director of Policy of OLG, described the program as follows:

> Self-exclusion is a self-help tool to enable patrons to take positive action to address problems they may be experiencing with gambling. The objective of the self-exclusion program is to help patrons acknowledge their responsibilities over their gambling behaviour, and the potential implications of excessive gambling. Self-exclusion is a form of positive action patrons can take to address problems they may be experiencing with gambling.
>
> The patron initiates the self-exclusion process. To date, over 17,000 patrons have chosen to do so, and currently, approximately 12,500 remain self-excluded. In most cases a patron will identify himself or herself on the gaming floor to casino staff or security indicating that he/she wants to self-exclude. In administering its program, and when handling requests for self-exclusion enrolment, OLG makes no determination of an individual's state or possible condition. The self-exclusion process does not require judgment, assumption or assessment that a self-excluded patron is in fact a problem gambler or a pathological gambler.

[9] Under OLG's practices at the relevant time, patrons who wished to self-exclude were interviewed by casino staff and required to provide photo identification

and to sign a self-exclusion form. The self-excluder's photograph was taken and circulated to security officers at gaming facilities around the province. OLG's practice was to use memory-based enforcement. Members of the security staff were responsible for recognizing self-excluded persons from their photographs and refusing them entry or removing them from gambling venues.

(2) OLG's Self-Exclusion Form

[10] OLG has used a number of different self-exclusion forms from 1994 to the present. The forms signed by Dennis and approximately 10,000 other Class A Members between December 1, 1999 and February 10, 2005 were identical in all material respects. OLG's commitment is described in the following manner:

> We offer you the opportunity to self-exclude yourself from Ontario Lottery Corporation ("OLC") and Ontario Casino Corporation ("OCC") gaming venues. Self-exclusion will direct the OLC and commercial casino operators acting for OCC to use their best efforts to deny you entry, as a service, to all OLC and OCC gaming venues in the province of Ontario.

[11] The forms also state that if self-excluders are detected, they can be ejected from the gaming facility.

[12] The forms specifically state that OLG "accept[s] no responsibility, in the event that you fail to comply with the ban, which you voluntarily requested" and contains the following release on the part of the signatory:

> I release and forever discharge the OLC, OCC, and the commercial operators and any of the operators' parent

> companies, shareholders, subsidiaries or affiliates, or successors, as well as any and all of their Directors, Officers and employees, from any and all liability, causes of action, claims and demands whatsoever in the event that I fail to comply with this voluntary ban.

(3) The Statement of Claim

[13] The Amended Amended Statement of Claim asserts that Dennis and each Class A Member were problem gamblers who signed the self-exclusion form, thereby giving notice to OLG of their vulnerability as problem gamblers, but were nonetheless permitted entry to a gambling venue after signing the form where they engaged in gambling and suffered injuries and losses as a result.

[14] The pleadings allege that OLG "knew or ought to have known that the measures it had implemented to deny Self-Excluded Customers entry to its Gambling Venues were ineffective or likely to prove ineffective" for various specified reasons, including the "obvious" limitations of using memory-based enforcement when millions of customers enter OLG facilities annually. The appellants allege that OLG failed to implement other reasonable measures, such as requiring gamblers to present photo identification to enter.

(i) Negligence

[15] The claim alleges that it was reasonably foreseeable that Dennis and the Class A Members would suffer harm, that they were in a relationship of proximity with the OLG, and that OLG owed them a duty of care as a commercial host or otherwise to take reasonable steps to exclude them from its gambling venues. It is

alleged that OLG's breach of its duty of care to Dennis and each of the Class A Members caused serious injuries and losses to the appellants and the other class members, which are wholly due to OLG's negligence.

(ii) Occupiers' Liability

[16] In the alternative, the appellants plead that the injuries and losses of class members were caused by OLG's failure as an occupier of premises to take such due care as was reasonable to ensure that the appellant Dennis and Class A Members were reasonably safe while on the gambling premises, in breach of the relevant provisions of the *Occupiers' Liability Act*, R.S.O 1990, c. O.2 ("*OLA*").

(iii) Breach of Contract

[17] In the alternative, the appellants plead that OLG breached both its contractual obligations to Dennis and the Class A Members under the self-exclusion forms and its duty to exercise good faith in discharging those obligations, amounting to fundamental breaches which caused serious and permanent injuries and losses to the class members.

(iv) Relief Requested

[18] The pleadings seek various forms of relief including, in respect of Class A and B Members, general and special damages of $2.5 billion and punitive damages of $1 billion. There is also a claim that Dennis and Class A Members are entitled to

"waive the tort" claim and elect to claim payment of OLG's revenues or net income or profits from problem gamblers engaging in gambling activities.

(4) Proposed Common Issues

[19] The appellants' proposed 15 common issues were aptly summarized by the Divisional Court, at para. 22:

1. Whether the self-exclusion forms are binding contracts;
2. Whether OLG owes a tort duty to Class A Members to take reasonable care to deny them entry;
3. Whether OLG owes a duty as an occupier of premises to detect and remove Class A Members;
4. Measures taken by OLG to deny entry in the period from December 1, 1999 to date and the duration of such measures;
5. Whether OLG breached its contractual obligations and the particulars of the breaches;
6. Whether OLG delegated the conduct/management of its gaming facilities in breach of ss. 206 and 207 of the *Criminal Code*;
7. Whether OLG breached its tort duty;
8. Whether OLG breached its statutory duty as an occupier;
9. Whether OLG may avoid liability by reason of the expiration of the applicable limitation periods;

10. Whether the damages sustained by Class A Members owing to any breaches of duty by OLG can be determined on an aggregate basis, and if so, how they should be distributed;
11. Whether Class A Members may elect to "waive the tort" and require OLG to account for its gross revenues or net profits, and if so, the quantum and how they should be distributed;
12. Whether Class B Members sustained damages pursuant to s. 61 of the *FLA*, and if so, the quantum and how they should be distributed;
13. Whether the class members are entitled to punitive damages and how they should be distributed;
14. Whether OLG should pay pre and post-judgment interest, and if so, how it should be distributed; and
15. Whether OLG should pay the costs of administering and distributing any judgment.

STATUTORY PROVISIONS

[20] The *CPA* governs class proceedings in Ontario. The provisions relevant to this appeal are:

> 5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

...

23. (1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

...

24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

JUDGMENTS

(1) Superior Court of Justice

[21] The motion judge concluded that the proposed class action did disclose a cause of action but failed to satisfy all other criteria required for certification. The central and fatal problem identified by the motion judge was that, at their core, all the claims rested on the proposition that each Class A Member is a vulnerable, pathological problem gambler. That is something that can only be determined on an individual, case-by-case basis and it follows that the claim was not one that could be certified.

(i) Cause of Action – s. 5(1)(a)

[22] Applying the "plain and obvious" test, and reading the claim generously, the motion judge found that pleadings disclose a cause of action and that s. 5(1)(a) was satisfied.

Contract

[23] The motion judge found that it is not plain and obvious that the self-exclusion form was not a contract, or that the claim for breach of contract could not succeed as framed. The key issue is the exclusion of liability clause. OLG offered a service to assist problem gamblers while excluding any of its legal responsibility if it failed to

do so. It is arguable that if OLG knew its program was ineffective and offered it only for public relations purposes, the exclusion of liability clause may be ineffective as unconscionable and contrary to public policy.

Negligence

[24] The appellants allege that OLG could reasonably foresee that problem gamblers would suffer harm if not excluded from gambling premises and that it breached its duty of care by persisting in using an ineffective system. The motion judge found that it is arguable that OLG was in a relationship of proximity with Dennis because OLG established the self-exclusion program and held the program out as assisting problem gamblers. He further found that, on the basis of the pleadings, it is not plain and obvious that policy considerations ought to negative the resulting duty of care.

Occupiers' Liability

[25] The appellants argue that OLG breached s. 3(1) of the *OLA* which imposes a duty on an occupier to take such care as is reasonable in the circumstances to ensure the safety of those entering the occupier's premises. The motion judge found that it is not plain and obvious that gambling cannot be a dangerous activity for a problem gambler or that such a gambler would "willingly" assume the risks of gambling. While economic loss is not compensable under the *OLA*, Dennis pleaded that he suffered psychological harm, and it is not plain and obvious that this type of injury is not compensable under the *OLA*.

Waiver of Tort

[26] The appellants request the restitutionary accounting of profits obtained by OLG from problem gamblers within the class. The motion judge noted that this area of law is uncertain. He found that it is not plain and obvious that Dennis has not made out the requirements for such a cause of action.

(ii) Class Definition – s. 5(1)(b)

[27] The motion judge found that, in respect of the Class A Members, the proposed class definition employs objective criteria but fails to meet the requirements of s. 5(1)(b) because it is over-inclusive as it cannot be assumed that everyone who signed the form is a vulnerable pathological gambler.

[28] The motion judge also found that there is an absence of a rational connection between the class definition and the proposed common issues. The motion judge concluded, at para. 189, that:

> 1. the claims advanced on behalf of the class members are predicated, and dependent, on their vulnerability;
>
> 2. vulnerability is not a condition of class membership. As defined, and, in consequence, causes of action that are addressed by the proposed common issues are not confined to compulsive gamblers;
>
> 3. the problem of over-inclusiveness of the class definition, and the consequential individualistic nature of the proposed common issues, cannot be resolved by the use of statistical evidence to characterize a percentage of the class members as pathological problem gamblers; and

4. in consequence, the requirement of a class in section 5(1)(b) and of common issues in section 5(1)(c) of the *CPA* are not satisfied and certification must be denied.

(iii) Common Issues – s. 5(1)(c)

[29] The vulnerability of each individual Class A Member is essential to the validity of their claims. While it can be presumed that most self-excluded patrons were at least apprehensive about their vulnerability, the degree of their addiction, if any, and the significance to be attributed to the concept of personal autonomy could only be determined on an individual basis.

[30] The motion judge rejected the contention that the problem of the heterogeneity of the proposed class could be overcome by statistical evidence indicating that approximately 87 per cent of self-excluded individuals would likely be pathological gamblers. The motion judge explained, at paras. 211-12, that OLG's liability could not "be determined on the basis of statistical probability" as the *CPA* is a procedural statute that "does not abrogate the requirement that a defendant can be found liable only to those persons who can prove their claims."

[31] In the motion judge's view, liability could only be established by an inquiry into the personal circumstances of each class member at particular times, their gambling history, the extent of their addiction or compulsion to gamble, and their likely behaviour if OLG had exercised its best efforts or reasonable care.

[32] For example, determining whether OLG breached its duty to employ its best efforts to exclude self-excluded individuals would depend on whether the individuals

attempted to gain entry. That is an individual inquiry. Experts agreed that a significant number of class members would not have attempted re-entry and, in the view of the motion judge, the issue of breach of duty could not be decided on the basis of expert evidence of the statistical probability that class members would attempt re-entry. The issue of causation would also require an individual inquiry into whether there was a causal link between losses incurred by class members and the alleged breaches by OLG. Further, the other proposed common issues would depend on the issues identified by the motion judge as lacking commonality. As a result, the motion judge found that these issues would have to be so truncated that their resolution would not significantly advance the proceeding.

[33] Given the questions of law and fact that would remain to be determined after the trial of the common issues, there would be no possibility of an aggregate assessment of damages pursuant to s. 24 of the *CPA*.

[34] The motion judge summarized his discussion of the common issues requirement, at paras. 192 and 231:

> If Mr Dennis, or any of the other class members, had advanced the same claims in individual actions, [OLG] would have been entitled to raise issues relating to personal autonomy and degrees of vulnerability in connection with elements of liability such as reasonable foresight of harm; proximity; unconscionability; a willing assumption of risk for the purposes of section 4(1) of the OLA; causation of proven losses; contributory negligence; and punitive damages. The right of [OLG] to pursue such issues on an individual basis is not, in my opinion, excluded by pursuing the claims under the procedure of

> the CPA and defining the class, and the common issues, without reference to the vulnerability of the class members. Nor, for the reasons I will give, can the issues be resolved by reference to statistical probabilities.
>
> ...
>
> For the reasons given, I am of the opinion that the attempt to define the common issues in a manner that would avoid an inquiry into the status of each class member as a "problem gambler" has not been successful. I am satisfied that a proceeding that requires a consideration of the nature, degree and consequences of each class member's gambling propensities is individualistic to an extent that it is not amenable to resolution under the procedure of the CPA. The common issues would have to be so truncated that their resolution would not sufficiently advance the claims of the class members. They would, for the most part, be limited to the interpretation of the forms and the adequacy of [OLG]'s efforts to enforce self-exclusion.

(iv) Preferable Procedure – s. 5(1)(d)

[35] Finally, the motion judge found that the preferable procedure requirement was not met. None of the three goals of class proceedings – judicial economy, access to justice and behaviour modification – would be served. Given the preponderance of individual issues relating to the degree of vulnerability of each of the class members for the purpose of determining whether actionable breaches of duty occurred, a class proceeding would offer no gain in judicial economy. The amounts at stake are large enough that individual actions could be viable and therefore access to justice is not an issue. OLG is already subject to persistent scrutiny and has taken significant steps to improve its self-exclusion and

responsible gaming programs, rendering behaviour modification relatively unnecessary.

(v) Litigation Plan – s. 5(1)(e)

[36] Given his conclusions on the foregoing issues, it was apparent that the litigation plan was not satisfactory and that the requirements of s. 5(1)(e) were not met.

(2) Divisional Court

(i) Majority

[37] The majority agreed with the motion judge that the test for certification was not met. Even if the interpretation of the self-exclusion form is a common issue, entry without ejection by each class member is a necessary element of the alleged breach of contract. There was evidence that some class members did not try to re-enter and some who did so were stopped by security. This issue must be proved on an individual basis. Further, the issue of unconscionability relating to OLG's attempt to exclude liability is an individual issue dependent on the vulnerability of each class member and the degree to which they may have been victims of unequal bargaining power. Nor can damages for breach of contract be assessed in the aggregate.

[38] The execution of the self-exclusion form is not proof of existence of the illness of problem gambling in each person who signed. The presence of illness and

the consequent vulnerability in each class member is a factual issue that can only be decided on an individual basis. The duty of care is alleged as being rooted in OLG's knowledge of the vulnerability of individual class members, which also goes to foreseeability of loss or harm to each individual class member.

[39] The issue of liability for breach of duty of care is also individual. Answering whether OLG owes a tort duty to take reasonable care to deny entry to class members depends on the individual circumstances of class members and the knowledge of OLG of those circumstances. Even if executing the self-exclusion form raises a tort duty, determining that issue does not really advance the action because of the individuality of the issue of breach. Moreover, there will be significant individual issues involving contributory negligence and causation.

[40] Similar problems arise with respect to the occupiers' liability claim which rests on the proposition that gambling is a dangerous activity for problem gamblers.

[41] Quite apart from the frailty of the studies underlying the appellants' statistical evidence that 87 per cent of those who signed self-exclusion forms would be pathological gamblers, the *CPA* does not permit the requirement of commonality to be avoided by statistical estimates of probability.

[42] Finally, the motion judge's conclusion that a class action is not the preferable procedure reveals no error and is reasonable on the facts of this case. Regarding access to justice, it is common ground that there have been a number of individual lawsuits launched against OLG by persons similarly situated to the appellants in

this action. None have been tried. The settlements have been significant, with payments of $167,000 on average. This suggests that claimants are not averse to litigating with OLG when significant amounts are in issue.

(ii) Dissent

[43] The dissenting judge rejected the proposition that vulnerability as a problem gambler had to be proved on an individual basis. OLG was well aware of the issue of problem gambling and the self-exclusion program was designed to address that issue. By signing the self-exclusion form, Dennis and class members provided "some basis in fact" to meet the test of commonality. The statistical evidence was admissible and simply bolstered the other available evidence establishing some basis in fact for the common issues.

[44] The dissenting judge stated that the focus should be on OLG's conduct when considering the common issues and preferable procedure criteria. In her view, the common issues include whether OLG committed systemic breaches of duty in tort or contract by using the memory-based enforcement system despite its ineffectiveness. She concluded that the appellants had shown that there is some basis in fact to support the argument that everyone who signed a self-exclusion form shares a common interest in ascertaining whether OLG breached its obligations under the self-exclusion form.

[45] She found, however, that damages cannot be assessed in the aggregate under s. 24 of the *CPA*, using statistical evidence pursuant to s. 23 of the *CPA*, and would therefore have refused to certify damages as a common issue.

[46] In her view, a class proceeding is the preferable procedure. The costs of individual actions would be crushing and make it impossible for plaintiffs to litigate these issues individually. Certifying the class action would promote access to justice and the public would benefit from the lawsuit's generation of reliable information on the consequences of the legalization of gambling. Certification would also serve the goal of behaviour modification.

ISSUES

[47] The issues raised by the appellants are as follows:

1. Did the motion judge and the Divisional Court err in finding that the class definition was objectively over-inclusive to satisfy s. 5(1)(b)?
2. Did the motion judge and the Divisional Court err in finding that the common issues requirement of s. 5(1)(c) was not met?
3. Did the motion judge and the Divisional Court err in finding that the preferred procedure and litigation plan requirements of s. 5(1)(d) and (e) were not met?

[48] By way of cross-appeal, the respondent raises the following issue:

4. Did the motion judge and the Divisional Court err in finding that the claim discloses a cause of action as required by s. 5(1)(a)?

ANALYSIS

(1) Individualized Inquiry or Systemic Wrong?

[49] Before turning to an item-by-item consideration of the specific requirements for certification under s. 5 of the *CPA*, I will set out what I consider to be the central issue that arises on this appeal: is this a case in which the need for individualized inquiry is so pervasive that it overwhelms the appellants' attempt to treat it as a case of systemic wrong?

[50] The motion judge's central finding, upheld by the Divisional Court, is that the claims advanced inevitably require an individualistic inquiry into the nature, degree and consequences of each class member's gambling propensity.

[51] The appellants submit that the issue of certification should focus not on the individual circumstances of the class members but rather on the allegations of wrongdoing by OLG. The claim is described as one of systemic wrong. It is submitted that certification should be granted in order to permit the proposed class to litigate the issue of the alleged systemic wrong and that individual issues of vulnerability, causation and damages can then be determined on a case-by-case basis in subsequent proceedings. The appellants focus on several issues they argue are suitable for resolution on a class-wide basis including the interpretation of

the self-exclusion form, whether the exclusion of liability clause is enforceable, whether OLG breached its contractual best efforts obligation, and whether OLG owed and breached a duty of care in tort.

[52] The motion judge and the majority of the Divisional Court gave detailed reasons for rejecting the appellants' argument. I essentially agree with those reasons.

[53] There are certainly cases in which a class action will be an appropriate procedure to deal with a "systemic wrong", a wrong that is said to have caused widespread harm to a large number of individuals. When a systemic wrong causes harm to an undifferentiated class of individuals, it can be entirely proper to use a class proceeding that focuses on the alleged wrong. The determination of significant elements of the claims of individual class members can be decided on a class-wide basis, and individual issues relating to issues such as causation and damages can be dealt with later on an individual basis, especially when the assessment of damages can be accomplished by application of a simple formula.

[54] The case law offers many examples in which a class action has provided an appropriate procedural tool to resolve claims when all class members are exposed to the same risk on account of the defendant's conduct. These include claims arising from:

- overtime policies that impose more restrictive conditions for overtime compensation than permitted by statute (*Fulawka v. Bank of Nova Scotia,* 2012 ONCA 443, 111 O.R. (3d) 346; *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444, 111 O.R. (3d) 501);
- defective products (*Lambert v. Guidant Group* (2009), 72 C.P.C. (6th) 120 (Ont. S.C.));
- illegal or unauthorized charges to credit card customers (*Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321; *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401); or
- the operation of a school designed to create an atmosphere of fear, intimidation and brutality (*Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.)).

In these cases, liability essentially turns on the unilateral actions of the defendant, is not dependent to any significant degree on the individual circumstances of class members, and the only remaining issues requiring individualized determination are whether and to what degree that conduct harmed the class members.

[55] The claim at issue here does not fit that category. The central problem is that the alleged fault of OLG does not turn solely on the execution of the contract. It is inextricably bound up with the vulnerability of the individual class members. The complaint against OLG is that it failed to prevent them from harming themselves.

The harm suffered by Dennis and other Class A Members resulted from their own actions. They were the ones who returned to OLG premises to gamble and to lose money. In that regard, they were like the thousands upon thousands of individuals who frequent OLG premises to gamble and, more often than not, lose money. Unsuccessful OLG gamblers have no recourse against OLG for their losses.

[56] The entire premise of the statement of claim and the causes of action pleaded is that because they signed the self-exclusion form Dennis and the other Class A Members are different from other OLG gamblers: they are vulnerable and OLG was obliged to protect them because of their vulnerability. In my view, it is inescapable that to assess whether OLG was at fault and liable to them for the self-inflicted harm they suffered, the court could not decide the case simply on the basis that they had signed the form. Rather, the court would have to engage in a detailed inquiry into the particular circumstances of individual gamblers including: their gambling history; the nature and severity of their addiction and vulnerability to gambling; whether and to what extent they experienced moments of clarity; whether they returned to OLG facilities to gamble despite signing the self-exclusion form; if they did return, the nature and extent of their gambling and whether they returned because of their addiction; whether they could have been prevented from gambling or suffering losses; whether and to what extent their failure to self-exclude contributed to the loss; and whether the exclusion of liability clause is enforceable against the particular individual.

[57] The issue of OLG's alleged fault cannot usefully or fairly be considered in the abstract and without reference to the circumstances of each individual class member. As the motion judge observed, assessment of each Class A Member's claim will necessarily involve careful, individualized consideration of legal and factual issues relating to his or her personal autonomy and responsibility. Without answers to those specific and individualized questions, it would be impossible to assess whether OLG was at fault or whether OLG bears any legal responsibility to protect them from their own actions. Similarly, whether a Class B Member sustained damages and the quantum thereof involves an individual inquiry and depends on a finding that OLG is liable to the Class A Member from whom the claim derives.

[58] I recognize that certification may be appropriate in cases in which individualized inquiries will be required after resolution of the common issues, so long as resolution of the common issues would "significantly advance the action": *Cloud*, at para. 76. I am persuaded, however, that the claims advanced in this case and the allegations of fault against OLG are so heavily infused with the issues of individual vulnerability that resolution of those allegations in terms of a generalized systemic wrong would not significantly advance the claims of the individual class members.

[59] Rather than providing an effective procedural tool to advance the resolution of the claims of the proposed class members, a class proceeding would amount to

little more than a general commission of inquiry into the prevention of problem gambling. It may well be the case that OLG could and should have done more to protect problem gamblers from the disastrous consequences of their affliction. But even if that is the case, a general determination of shortcomings in OLG policies would not address in a meaningful way the narrower specific legal issue of OLG's liability to individual problem gamblers for the losses they have suffered. The claims advanced inevitably require an individualistic inquiry into the nature, degree and consequences of each class member's gambling propensity.

[60] Before considering OLG's cross-appeal as to the cause of action requirement of s. 5(1)(a), I will consider the appellants' attack on the findings relating to the other four criteria for certification.

(2) Class Definition – s. 5(1)(b)

[61] I agree with the motion judge that the proposed class definition of Class A Members is fatally over-inclusive. It includes all individuals who signed self-exclusion forms over a period exceeding five years. That class will include many individuals who have no claim, even if a potentially actionable failure on the part of OLG to enforce the self-exclusion form is made out. It is apparent that the problem of the class definition raises very similar issues to the question of common issues.

[62] It is conceded that some individuals who signed the form did not return to gamble. Plainly, they have no claim. Nor do those who attempted re-entry but were excluded. Further, it cannot be the case that an individual who signed the form but

returned to lose money is thereby automatically entitled to claim those losses from OLG. An OLG patron cannot immunize himself or herself from gambling losses by singing a self-exclusion form. It follows that to make out a claim, a class member would have to establish, on an individual basis, that he or she returned to an OLG facility, lost money and suffers from vulnerability produced by the affliction of pathological gambling, and that OLG could and should have prevented the particular harm from having occurred.

[63] I cannot agree with the appellants' contention that, assuming it can be established that OLG committed an actionable failure to use its "best efforts" to exclude those who signed the self-exclusion form, everyone who signed the form has a "tenable" claim for breach of contract, negligence, occupiers' liability and waiver of tort. The gap between a finding that OLG failed to use best efforts to exclude and an actionable claim in law is unacceptably wide. That gap could only be filled with detailed inquiries into the individual circumstances of each and every class member, revealing the fatally over-inclusive nature of the proposed class definition.

[64] This case is distinguishable from *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 267 D.L.R. (4th) 601 (Ont. C.A.) in which the court certified a claim by college students for breach of contract based on the college's failure to provide an option it had promised. In *Hickey-Button*, the college had promised every student a program option and allegedly failed to provide that option.

The class definition was not over-inclusive as the contract of every student was breached by the defendant's unilateral failure to provide the option it had promised. Liability did not hinge upon the individual circumstances or conduct of the students. Damages might vary depending upon the likelihood that the individual student would have taken the option, but all students had a claim for failure to provide the option.

[65] I do not agree that all signatories of the self-exclusion form are in the same position as the students in *Hickey-Button.* The failure of the college to provide the option in *Hickey-Button* deprived all students of a promised benefit. The students had paid their fees for a program that included that option and, in and of itself, the failure to provide that promised option constituted a breach. In the case of OLG and self-excluders, once again, we encounter the problem that any claim is dependent upon the actions of the members of the proposed class. The promised benefit of the promise to use "best efforts" to exclude is, by its very terms, directly tied to the actions of the self-excluder. Taking the claim at its highest, OLG promised self-excluders that if they attempted re-entry, best efforts would be made to exclude them. Any value attached to the promise to use best efforts could only come into play if and when the obligation to use best efforts was triggered by the self-excluder's attempt and success in gaining re-entry. If the self-excluder did not attempt entry or attempted and was excluded, it is difficult to see how there could be an actionable breach. Nor could failure to use best efforts, without more, ground

a claim in negligence or occupiers' liability as damages are an essential element of a claim in tort.

(3) Common Issues – s. 5(1)(c)

[66] Several recent decisions of this court identify a list of the key factors used to assess whether a proposed common issue is capable for certification. In *Fulawka,* Winkler C.J.O., writing for the court, stated, at paras. 80-81:

> What then is an appropriate common issue for certification purposes? As noted above, s. 1 of the *CPA* defines common issues as issues that are: (a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts. Section 5(1)(c) includes as a condition for certification that the claims or defences of the class members raise common issues.
>
> There are a number of legal principles concerning the common issues requirement in s. 5(1)(c) that can be discerned from the case law. Strathy J. provided a helpful summary of these principles in *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, 87 C.P.C. (6th) 276. Aside from the requirement just described that there must be a basis in the evidence to establish the existence of the common issues, the legal principles concerning the common issues requirement as described by Strathy J. in *Singer*, at para. 140, are as follows:
>
> > The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis[.]
> >
> > An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution[.]

There must be a rational relationship between the class identified by the plaintiff and the proposed common issues[.]

The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim[.]

A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class[.]

With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class[.]

A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant[.]

Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis[.]

Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the

> proceeding less fair and less efficient"[.]
> [Citations omitted.]

[67] While this list is "by no means exhaustive", it provides a useful summary of the legal principles used to decide whether there are suitable common issues: at para. 82.

[68] In my view, resolution of the issue of OLG's alleged systemic wrong fails on all of the listed factors. There is no "rational relationship between the class identified by the plaintiff and the proposed common issues" and the class definition is overly inclusive. Resolving the issue of whether OLG should have done more by way of enforcement of the self-exclusion forms does not make up even "a very limited aspect of the liability question" given the inherently and inescapably individual nature of the claims at their core. The significance of any determination as to OLG's allegedly wrongful conduct is dwarfed by the need to focus on the individual issues of vulnerability and would not amount to "a substantial ingredient of each class member's claim" nor would its resolution sufficiently "advance the litigation for (or against) the class". The answer to the proposed common issue would not "be capable of extrapolation, in the same manner, to each member of the class" as the issues of duty, breach and causation are inextricably bound up with the individual circumstances of the class members. OLG's alleged wrongdoing is entirely "dependent upon individual findings of fact that have to be made with respect to each individual claimant". There is no "workable methodology" to determine issues of causation or damage on a class-wide basis. Finally, as I have already explained,

OLG's alleged misconduct is framed in "overly broad terms" and it is inevitable that the action will "ultimately break down into individual proceedings".

[69] As in *Kumar v. Mutual Life Assurance Co. of Canada* (2003), 226 D.L.R. (4th) 112 (Ont. C.A.), the "vanishing premium" case involving insurance sold in the expectation that high interest rates would cover the cost of premiums, establishing that the defendant was systemically negligent "would not represent a substantial ingredient in each of the class members' claims" and would not "move the litigation forward": at para. 47 (citation omitted). This court held that each class member would still have to show that misrepresentations had been made to him or her, that those representations "constituted negligent misrepresentations about the premium offset feature, and that the prospective policyholder reasonably relied upon the representation": at para. 47. The court concluded that "[i]nevitably such an action would ultimately break down into individual proceedings": at para. 47 (citation omitted). I reach the same conclusion here.

[70] The majority judgment of the Divisional Court, at paras. 51-65, conducted a detailed, item-by-item assessment of each of the 15 proposed common issues and concluded that none would significantly advance the litigation to warrant certification. The majority found that all proposed common issues either required individual inquiry or involved issues such as damages that are dependent upon a finding of liability. For the reasons given above, I agree with that analysis.

(4) Preferable Procedure – s. 5(1)(d)

[71] Even if the class definition and common issue requirements were satisfied, it is my view that a class action is not the preferable procedure. A general finding of "systemic wrong" would not avoid the need for protracted individualized proceedings into the vulnerability and circumstances of each class member. A more efficient and expeditious way to adjudicate these claims would be to proceed directly by way of individual actions as it is inevitable that a class proceeding will break down into individual proceedings in any event.

(5) Litigation Plan – s. 5(1)(e)

[72] Little more need be said regarding this criterion as it is follows from what I have already written the given the nature of the claims advanced, the appellants' litigation plan is inadequate.

(6) OLG's Cross-Appeal – s. 5(1)(a)

[73] As the motion judge made clear, there are many significant legal hurdles for the appellants to overcome in making out a claim, in particular, the exclusion of liability clause and the release in the self-exclusion form as well as the difficult issue of proximity and duty of care in negligence. However, as the motion judge also pointed out, the pleading is to be read generously and a claim will fail at this stage only when it is plain and obvious that it cannot succeed. The legal issues were fully addressed by the motion judge. I have summarized his reasons above and I am

not persuaded that he erred in concluding that the claim survived the minimal scrutiny for substantive adequacy mandated by s. 5(1)(a).

[74] Accordingly, I would dismiss the cross-appeal.

DISPOSITION

[75] For these reasons, I would dismiss both the appeal and the cross-appeal. Counsel for OLG indicated at the conclusion of oral argument that OLG was not seeking costs if successful. In these circumstances, the appropriate order is to dismiss both the appeal and the cross-appeal without costs.

"Robert J. Sharpe J.A."
"I agree K.M. Weiler J.A."
"I agree Paul Rouleau J.A."

Released: July 31, 2013

COURT OF APPEAL ORDER TO INCLUDED ONCE ISSUED AND ENTERED