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)	*Jerome R. Morse* and *Hassan A. Fancy*, for the Plaintiffs (Appellants)
– and –	
ONTARIO LOTTERY AND GAMING CORPORATION Defendant (Respondent on Appeal)	*James Doris* and *Matthew Milne-Smith*, for the 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.

[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);

---

[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.

- 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

---

[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.

> 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 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 [...]

---

[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.

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 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?

---

[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.

A. Based on common sense that would make sense, yes. They would have that problem

[Emphasis added]

[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

---

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

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 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:

> 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.

---

[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.

[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]

---

[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.

[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.

[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.

---

[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.

[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

---

[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.

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 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