

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

Dennis and Noble - and - Ontario Lottery and Gaming Corporation

ENDORSEMENT ON COSTS

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

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

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

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


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

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

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

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

Released: May 21, 2010


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