

2009 01 T-0732 CP
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:
GREG RICE **PLAINTIFF**

AND:
ATLANTIC LOTTERY CORPORATION INC. -
SOCIÉTÉ DES LOTTERIES E L'ATLANTIQUE **DEFENDANT**

AND:
VLC, INC. **FIRST THIRD PARTY**

AND:
SPIELO MANUFACTURING ULC **SECOND THIRD PARTY**

AND:
HI-TECH GAMING.COM LTD. **THIRD THIRD PARTY**

AND:
IGT-CANADA INC. **FOURTH THIRD PARTY**

AND:
INTERNATIONAL GAME TECHNOLOGY **FIFTH THIRD PARTY**

AND:
TECH LINK INTERNATIONAL ENTERTAINMENT
LIMITED **SIXTH THIRD PARTY**

AND:
GTECH CORPORATION **SEVENTH THIRD PARTY**

SUMMARY OF CURRENT DOCUMENT	
Court File Number:	2009 01T 0732 CP
Date of Filing of Documents:	December 15, 2011
Name of Filing Party or Person:	Defendant
Application to which Document being filed relates:	Interlocutory application of the defendant under Rules 7A and 32
Statement of purpose in filing:	To seek production of medical documents prior to the certification hearing

INTERLOCUTORY APPLICATION (Inter Partes)

The application of the defendant says that:

A. Procedural history

1. This action was commenced by a statement of claim issued on February 12, 2009 naming the estate of Susan Piercey, represented by Keith Piercey, as plaintiff. It was first amended on December 4, 2009.
2. This proceeding has been under case management before Mr. Justice Dymond.
3. In December 2009 the plaintiff issued an Interlocutory application for certification of this proceeding as a class action with the plaintiff, the estate of Susan Piercey, as representative plaintiff for the class.
4. On January 26, 2010 the defendant issued an interlocutory application under Rules 14.24 and 38 claiming that the plaintiff estate and certain causes of action and claims, including causes of action under the *Competition Act* and the *Statute of Anne (Gaming Act), 1710*, should be struck from the amended statement of claim and that this proceeding should consequently be dismissed. The defendant requested that its application be heard and decided before the plaintiff's certification application.
5. On February 16, 2010 the plaintiff issued an interlocutory application for leave to amend the statement of claim to add Greg Rice as plaintiff.
6. By a decision dated April 23, 2010, Mr. Justice Dymond decided that the plaintiff's certification application, the defendant's application to strike and the plaintiff's application to amend would be heard at the same time.
7. The defendant issued third party notices to the first to sixth third parties on May 6, 2010 and a third party notice to the seventh third party on May 28, 2010.
8. On or about November 10, 2010 the plaintiff, with the leave of the Court, filed a further amended statement of claim adding Greg Rice as plaintiff in substitution of the estate of Susan Piercey, represented by Keith Piercey.

9. The plaintiff's application for a stay of the third party claims was dismissed on April 28, 2011.
10. By correspondence to the case management judge dated October 27, 2011, counsel for the defendant advised of the agreement of the parties on a schedule for procedures leading to the hearing of the applications on April 11 to 17, 2012, which schedules the completion of cross examinations of the deponents of affidavits between February 6 and 17.
11. By correspondence dated November 25, 2011, the defendant requested certain medical documentation pertaining to the plaintiff be disclosed to the defendant prior to the defendant's cross-examination of the plaintiff. (Attached to the Affidavit of Raelene L. Lee as Appendix 1).
12. By correspondence dated December 5, 2011, the plaintiff refused to disclose same. (Attached to the Affidavit of Raelene L. Lee as Appendix 2).
13. Coincidental with the filing of this Application, the defendant has filed an amended application for orders under Rule 14.24 striking out portions of the further amended statement of claim, and under Rule 38 for determination of issues of law and fact.

B. Defendant's Application under Rules 7A and 32

14. As a result of the plaintiff's refusal to provide disclosure of medical documentation prior to the defendant's cross examination of the plaintiff, the defendant applies for an order under Rule 7A and 32 for the plaintiff to produce the complete medical, health care and treatment records relating in any way to the plaintiff's compulsive or addictive behaviours, his mental health and any psychiatric or psychological matters, and any matters involving the prescription of medications that are subject to the *Controlled Drugs and Substances Act* (S.C. 1996, c. 19). In particular:
 - a. Complete health care records from all health care practitioners and hospitals from whom or where the plaintiff was provided with care from January 1, 1992 to the present. This includes all records from his family physicians, each specialist and counsellor who treated the plaintiff, and of any hospitalization, and specifically any documentation pertaining to the plaintiff's discussions and

disclosures with medical advisors referencing the plaintiff's history with gambling and video lottery terminals.

- b. Detailed records from all pharmacies, hospitals or other health institutions showing all prescription drugs dispensed to the plaintiff from January 1, 1992.
- c. A complete decoded list of services from the Medical Care Insurance Plan and the Hospitals Services Plan, any private insurance plans (e.g. Blue Cross), and the WHSCC if applicable, from January 1, 1992 to the present.

C. Grounds for pre-certification disclosure

15. Rule 7A.01(3) of the *Rules of the Supreme Court, 1986* provides that the rules of court and general practice and procedure of the General Division apply to class proceedings except when they are inconsistent with the *Class Actions Act, SNL 2001 c. C. 18-1* or Rule 7A. Rule 7A.01(1)(c) defines class proceedings as including proceedings prior to certification.
16. Rule 7A.04 sets out the necessary contents of an application for certification.
17. Rule 32.02 and 32.07 of the *Rules of Supreme Court, 1986* allows the Court to make an order for production of documents at any time, including prior to the close of pleadings.
18. The Plaintiff has made an application for the certification of the action pursuant to the *Class Actions Act, SNL 2001 c. C-18.1*, and has proposed the plaintiff, Greg Rice, as the representative plaintiff for the proposed class.
19. The plaintiff alleges in his Further Amended Statement of Claim that he has unsuccessfully attempted to stop playing video lottery games. In his affidavit in support of the Application for certification he states that he has had suicidal thoughts that he attributes to despair over the effect of playing video lottery games on his life. He says that he began trying to stop playing the games in 1994 and for that purpose has had group therapy and has been treated by psychologists.
20. In his Statement of Claim, the plaintiff has asserted that Video Lottery Terminals ("VLTs") are potentially addictive resulting in known and expected harms including suicide attempts, suicide, suicidal ideation and addiction (paragraph 28), has asserted causes of action and claimed remedies connected to those claims, and has claimed a

continuing injury with respect to s. 6 of the *Limitations Act*, SNL 1995, c. L-16.1 (paragraph 71).

21. The plaintiff has not provided any evidentiary record related to his claims related to addiction and suicide.
22. The defendant has requested documentation related to those claims to allow the defendant to adequately cross examine the plaintiff in respect of issues relevant to the claims of the plaintiff and the application for certification of the plaintiff's claim as a class action, and to ensure that there is an adequate evidentiary record before the court at the certification hearing, which request has been refused by the plaintiff.
23. The defendant states that in the plaintiff's refusal correspondence, he confirmed the relevance of evidence of injury to class members at the common issues trial by stating that although the plaintiff is not asserting a claim for personal injury damages that "evidence of injury from Mr. Rice and perhaps a small number of class members may be relevant at the common issues trial to demonstrate lack of safety in the games, as a class-wide matter relevant to the common issues."
24. The defendant says that evidence of injury from Mr. Rice is equally relevant to the question of whether there are sufficient common issues to merit certification of his action as a class proceeding, and to provide an adequate evidentiary record for the certification hearing.
25. The defendant states that production of the plaintiff's medical documentation is required to allow the defendant to fairly and adequately respond to the proposed class certification issues and in particular to allow a proper assessment of the following matters which must be determined at certification pursuant to the *Class Actions Act*:

(a) The proper class definition;

(b) Definition of and existence of common issues, in particular the significance of individual factors to the development of pathological gambling, as identified in the Affidavit of Marc Potenza dated December 14, 2011 to the proposed common issues as follows:

- (i) Individual biological factors set out at paragraphs 33- 46 of Appendix B to the Affidavit of Marc Potenza including, norepinephrine systems, serotonin systems, opioid systems, dopamine systems, glutamate systems, neural systems, and genetics;
- (ii) Other individual differences set out at paragraphs 51- 52 of Appendix B to the Affidavit of Marc Potenza including medical and neurological considerations;
- (iii) Co-occurrent psychiatric disorders as described in paragraphs 53- 56 of Appendix B to the Affidavit of Marc Potenza;
- (iv) Definition of suicidality, suicidal thoughts and the contributions thereto as described in paragraphs 61, 64 and 65 of Appendix B to the Affidavit of Marc Potenza.

- (c) Determination as to whether the class proceeding is the preferable procedure,
- (d) the appropriateness of Mr. Rice as representative plaintiff, and
- (e) potential conflicts of interest that may exist.

26. The defendant further states that the disclosure of medical documentation is also required to allow the defendant to properly assess whether any portion of the defendant's claim is barred by virtue of the *Limitations Act*, SNL 1995, c. L-16.1 as a result of his attribution of his personal and medical difficulties to his use of VLTs.
27. The defendant further states that the disclosure of this documentation by 30 days prior to the date to be scheduled for the cross examination of Mr. Rice should not cause any delay in the timelines set for this matter, however, in the event that there is some delay to the current timeline caused by this disclosure, the defendant states that such delay is not one which would impose a burden on the plaintiff or would impact on judicial economy or access to justice.
28. The defendant states that the timely disclosure of the requested documentation will have the positive effect of ensuring that all proper evidence is before this Honourable Court in order to allow for the defendant to adequately prepare for and reply to the certification application and to allow for a proper and timely determination of the matter.

E. Orders Sought

29. The defendant applies for an order under Rule 32.07 for the production of the following documentation by 30 days prior to the date to be scheduled for the cross examination of Mr. Rice:

(a) the complete medical, health care and treatment records relating in any way to the plaintiff's compulsive or addictive behaviours, his mental health and any psychiatric or psychological matters, and any matters involving the prescription of medications that are subject to the *Controlled Drugs and Substances Act* (S.C. 1996, c. 19). In particular:

- i. Complete health care records from all health care practitioners and hospitals from whom or where the plaintiff was provided with care from January 1, 1992 to the present. This includes all records from his family physicians, each specialist and counsellor who treated the plaintiff, and of any hospitalization and specifically any documentation pertaining to the plaintiff's discussions and disclosures with medical advisors referencing the plaintiff's history with gambling and video lottery terminals.
- ii. Detailed records from all pharmacies, hospitals or other health institutions showing all prescription drugs dispensed to the plaintiff from January 1, 1992.
- iii. A complete decoded list of services from the Medical Care Insurance Plan and the Hospitals Services Plan, any private insurance plans (e.g. Blue Cross), and the WHSCC if applicable, from January 1, 1992 to the present.

(b) Such further and other relief as this Honourable Court may deem just.

Dated at St. John's, in the Province of Newfoundland and Labrador, this 15th day of December, 2011.



Raelene L. Lee
Ottenheimer Baker
Solicitors for the Defendant
P.O. Box 5457, 10 Fort William Place
St. John's, NL A1C 5W4

- To: Chesley Crosbie Q.C.
Ches Crosbie Barristers
Solicitors for the Plaintiff
169 Water Street, 4th Floor
St. John's, NL A1C 1B1

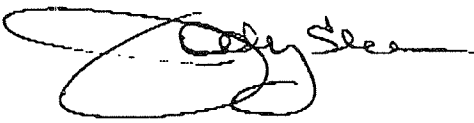
- To: Ian Kelly Q.C.
Curtis Dawe
Solicitors for the First, Fourth and Fifth
Third Parties
P.O. Box 337, 11th Floor, Fortis Building
St. John's, NL A1C 5J9

- To: Daniel Boone
Stewart McKelvey
Solicitors for the Second and Seventh
Third Parties
P.O. Box 5038, 11th Floor, Cabot Place
St. John's, NL A1C 5V3

- To: Gregory F. Kirby
O'Dea Earle
Solicitors for the Third Third Party
P.O. Box 5955
323 Duckworth Street
St. John's, NL A1C 5X4

- To: Thomas O'Reilly Q.C.
Cox & Palmer
Solicitors for the Sixth Third Party
235 Water Street, Suite 1000, Scotia Centre
St. John's, NL A1C 1B6

Issued at St John's, NL this 15 day of December 20 11



COURT
OFFICER

2009 01 T-0732 CP

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
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BETWEEN:**GREG RICE****PLAINTIFF****AND:****ATLANTIC LOTTERY CORPORATION INC. -
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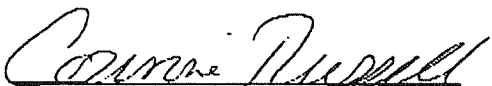
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AFFIDAVIT

I, Raelene L. Lee, of St. John's, in the Province of Newfoundland and Labrador, solicitor for the defendant, **MAKE OATH AND SAY** as follows:

1. **THAT** I am a partner at the law firm Ottenheimer Baker.
2. **THAT** I have read and understand the foregoing Application.
3. **THAT** attached hereto as Appendix 1 is a copy of correspondence to Chesley F. Crosbie, Q.C., dated November 25, 2011, wherein Daniel W. Simmons, for the defendant, requested certain medical documentation pertaining to the plaintiff be disclosed to the defendant.
4. **THAT** attached hereto as Appendix 2 is a copy of correspondence from Chesley F. Crosbie, Q.C. to Daniel W. Simmons dated December 5, 2011 refusing to provide medical documentation as requested.
5. **THAT** I have personal knowledge of the facts contained therein and they are true to the best of my knowledge, information and belief.

SWORN TO at St. John's, in the
Province of Newfoundland and
Labrador, this 15th day of December,
2011, before me:



CORINNE RUSSELL
A Commissioner for Oaths in and for
the Province of Newfoundland and Labrador.
My commission expires on December 31, 2011


RAELENE L. LEE

Appendix 1

OTTENHEIMER | BAKER
BARRISTERS & SOLICITORS

Daniel W. Simmons

T: 709 570 7328
F: 709 722 9210
dsimmons@ottenheimerBaker.com
www.ottenheimerBaker.comBalne Johnston Centre
10 Fort William Place
P.O. Box 5457
St. John's, NL A1C 5W4

November 25, 2011

Mr. Chesley Crosbie, Q.C.
Ches Crosbie Barristers
Barristers and Solicitors
169 Water Street
St. John's, NL
A1C 1B1

Dear Mr. Crosbie:

Re: 2009 01 T-0732CP
Greg Rice v. Atlantic Lottery Corporation

In February 2010 we had written you concerning our request for medical records concerning Ms. Piercey, whose estate was then proposed to be the representative plaintiff in this action. This is to confirm our request for production of similar information regarding the new proposed representative plaintiff, Mr. Rice.

Mr. Rice has pleaded in the further amended statement of claim that he has unsuccessfully attempted to stop playing video lottery games. In his affidavit he states that he has had suicidal thoughts that he attributes to despair over the effect of playing video lottery games on his life. He says that he began trying to stop playing the games in 1994 and for that purpose has had group therapy and has been treated by psychologists.

Mr. Rice's alleged addictive behaviours are relevant to the certification application, in particular but not only with respect to class definition, common issues, preferable procedure, the choice of Mr. Rice as representative plaintiff and potential conflicts of interest.

In order to allow us to complete the cross examination of Mr. Rice within the time allotted, can you please arrange to provide us as soon as possible with his complete medical, health care and treatment records relating in any way to compulsive or addictive behaviours, his mental health and any psychiatric or psychological matters, and any matters involving the prescription of medications that are subject to the *Controlled Drugs and Substances Act* (S.C. 1996, c. 19). In particular, those records should include:

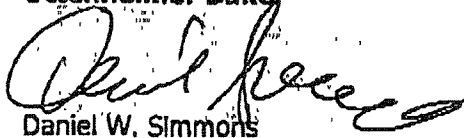
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1. Complete health care records from all health care practitioners and hospitals from whom or where Mr. Rice was provided with care from January 1, 1992 to the present. This includes all records from his family physicians, each specialist and counsellor who treated Ms. Rice, and of any hospitalization.
2. Detailed records from all pharmacies, hospitals or other health institutions showing all prescription drugs dispensed to Mr. Rice from January 1, 1992.
3. A complete decoded list of services from the Medical Care Insurance Plan and the Hospitals Services Plan, any private insurance plans (e.g. Blue Cross), and the WHSCC if applicable, from January 1, 1992 to the present.

Can you also please confirm whether Mr. Rice is asserting a claim for personal injury damages. If so, then can you please advise us whether a subrogated claim is being advanced for the costs of any treatment or services provided under the Medical Care Plan and/or the Hospital Services Plan, and provide us with a statement of those costs from the Department of Health.

Please feel free to call should you have any question.

Yours truly,
Ottenheimer Baker



Daniel W. Simmons

DWS/cw

Appendix 2**CHES CROSBIE**
BARRISTERS

Accidents Malpractice | Class Actions

Chesley F. Crosbie OC
Master of the Supreme Court
ccrosbie@chescrosbie.net169 Water Street
St. John's, NL A1C 1B1(709) 579-1000 PH
(709) 579-9671 FX
www.chescrosbie.com

December 5, 2011

Daniel W. Simmons
Ottenheimer Baker
10 Fort William Place
PO Box 5457
St. John's, NL A1C 5W4

Dear Mr. Simmons:

Re: 2009 OIT 0732 CP
Rice v. Atlantic Lottery Corporation Inc.

This will respond to your letter of November 25, 2011.

Most of your letter sets out a request to be provided with complete healthcare records, including pharmacy records and MCP and private insurance services lists. We respond that the request is premature and decline to produce these records for substantially the same reasons as stated in *Pardy v. Bayer Inc.*, 2003 CarswellNfld 218 (T.D.), paras. 30-52.

The further question is raised whether Mr. Rice is asserting a claim for personal injury damages. At the present stage of legal development, personal injury in tort is accepted to mean bodily injury or a recognized psychological disorder. On our theory of the case, medical diagnosis of injury is not a necessary element for success, although evidence of injury from Mr. Rice and perhaps a small number of class members may be relevant at the common issues trial to demonstrate lack of safety in the games, as a class-wide matter relevant to the common issues.

The short answer is no, Mr. Rice is not asserting a claim for personal injury damages.

Yours truly,

CHES CROSBIE BARRISTERS


Chesley F. Crosbie, Q.C.

CFC/sg

2009 01 T-0732 CP

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SIXTH THIRD PARTY

AND:

GTECH CORPORATION

SEVENTH THIRD PARTY

NOTICE TO RESPONDENT(S)

You are hereby notified that the foregoing Application will be made to the Supreme Court of Newfoundland and Labrador, Trial Division, at 313 Duckworth Street, St. John's, Newfoundland and Labrador, on Thursday, December 29, 2011 at 10:00 AM or so soon after as the Application can be heard. _{for}

TO: Chesley Crosbie, Q.C.
Ches Crosbie Barristers
Solicitors for the plaintiff
169 water Street, 4th Floor
St. John's, NL A1C 1B1