

2009 01T 0732 CP

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:

THE ESTATE OF SUSAN PIERCEY, as
represented by KEITH PIERCEY PLAINTIFF

AND:

ATLANTIC LOTTERY CORPORATION INC. –
SOCIÉTÉ DES LOTERIES DE L'ATLANTIQUE DEFENDANT

BROUGHT UNDER THE *CLASS ACTIONS ACT*
BEFORE THE HONOURABLE MR. JUSTICE DYMOND,
CASE MANAGEMENT JUDGE

INTERLOCUTORY APPLICATION FOR CLASS CERTIFICATION

(Inter Partes)

SUMMARY OF CURRENT DOCUMENT

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| Court File Number: | 2009 01T 0732 CP |
| Date of Filing of Document: | December 11, 2009 |
| Name of Filing Party or Person: | Plaintiff |
| Application to which Document being filed relates: | Application of Plaintiff for certification as a class action. |
| Statement of purpose in filing: | Application. |

THE PLAINTIFF will apply to the Court, on a date to be fixed.

PROPOSED METHOD OF HEARING:

The application is to be heard orally.

THE APPLICATION IS FOR:**CERTIFICATION**

1. An Order certifying this action as a Class action.

CLASS AND CLASS REPRESENTATIVE

2. An Order describing as a “Class”:

“Natural persons and their estates, resident in Newfoundland and Labrador, who, during the Class Period, paid the Defendant to gamble on VLT games, excluding video poker games and keno games, in Newfoundland and Labrador.

The Class Period is the period from six years before the bringing of this action, up to the opt-out date set by the Court in this action.

Excluded from the class are directors, officers and employees of the Defendant.”

3. An Order appointing the estate of Susan Piercey, as represented by Keith Piercey as the representative plaintiff of the Class.
4. An Order appointing the firm of Ches Crosbie Barristers as counsel to the Class (“Class Counsel”).

NATURE OF THE CLAIMS

5. An Order stating the nature of the claims asserted on behalf of the Class to be:

(a) breach of the *Criminal Code*;

- (b) breach of the *Competition Act*;
- (c) breach of the *Statute of Anne*;
- (d) breach of contract;
- (e) breach of the duty to warn in tort;
- (f) unjust enrichment; and,
- (g) waiver of tort

RELIEF SOUGHT

6. An Order stating the relief sought by the Class members to be:
- (a) All issues of the Defendant's liability and the remedies available against the Defendant.

COMMON ISSUES

7. An Order stating the "Common Issues" to be:
- (1) Has the Defendant delegated the conduct and management of video lotteries to siteholders and, if so, is this a valid delegation?
 - (2) Does the *Criminal Code* authorize the operation of video lotteries by siteholders, in view of s. 206(1)(g) which prohibits games similar to "three card monte"?
 - (3) Does the *Criminal Code* authorize the operation of video lotteries by siteholders, in view of s. 201, which prohibits keeping a common gaming house?
 - (4) Has the Defendant been unjustly enriched?
 - (5) Has the Defendant breached s. 52 of the *Competition Act*?
 - (6) Has the Defendant breached a duty owed in contract or tort?

- (7) Can damages be measured on an aggregate, class-wide basis and, if so, what are the aggregate damages?
- (8) If the answer to Issue 7 is no, can loss or damage be measured by the gain to the Defendant and, if so, what is the appropriate restitutionary remedy and in what amount?
- (9) Should the full costs of investigation in connection with this matter, including the cost of the proceeding or a part thereof, be fixed or assessed on a global basis pursuant to s. 36 of the *Competition Act* and, if so, in what amount?
- (10) Should punitive or exemplary damages be awarded against the Defendant and, if so, in what amount?

NOTICE

8. An Order approving the form and content of notice to the Class (the “Notice”).
9. An Order specifying that the following means shall be used to publish the Notice:
 - (a) the Notice shall be forwarded by Class Counsel to any person who requests it or who has retained Class Counsel and has provided contact information;
 - (b) the Notice shall be published in newspapers as agreed to by the parties, or failing agreement, as determined by the Court; and
 - (c) the Notice shall be posted on Class Counsel’s website.
10. An Order requiring the Defendant to pay the cost of the Notice Programme.

OPT-OUTS

11. An Order specifying that class members may opt out of this Class action by sending a written election by mail to Class Counsel before a date to be fixed by the Court.

THE GROUNDS FOR THE APPLICATION ARE:

12. The *Class Actions Act*;
13. The Court should certify this proceeding as a class action because the Statement of Claim discloses a cause of action, there is an identifiable class of two or more persons, there are Common Issues raised in the pleadings, a class action is the preferable procedure, and the proposed representative plaintiff fairly and adequately represents the interests of the Class, has produced a workable plan for advancing this litigation and notifying other class members, and does not have an interest in conflict with the interests of other Class members;
14. Rule 7A.01(4) of the *Rules of the Supreme Court*;
15. Such further and other grounds as counsel may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (i) the pleadings;
- (ii) the affidavits of Keith Piercey, Robert Tucker, Sheri Geehan and Kevin A. Harrigan, Ph.D.; and
- (iii) such further and other evidence as counsel may advise and this Honourable Court permit.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 11th day of December, 2009.

CHES CROSBIE BARRISTERS
Solicitors for the Plaintiff
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Attention: Chesley F. Crosbie, Q.C.

TO: OTTENHEIMER BAKER
Solicitors for the Defendant
10 Fort William Place
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Attention: Daniel Simmons

ISSUED at St. John's, in the Province of Newfoundland and Labrador, this _____ day of December, 2009.
