

October 5th, 2007



**MINISTRY OF PUBLIC
INFRASTRUCTURE RENEWAL**

6TH Floor
900 Bay Street
Toronto, Ontario, M7A 1L2

Attention: The Honorable Minister Kaplan

Dear Sir:

**Re: Ontario Lottery & Gaming ("OLG")
Responsible Gambling: Self-Exclusion**

Thank you for your letter dated August 31st 2007 received September 13th 2007.

With great respect, it is not fair or correct to suggest that the OLG is "committed to continuously assessing the full scope of the problem gambling programs to ensure they are effective in their impact." Common sense and the Australian Gambling Research Panel made clear that memory based enforcement is a farce. Moreover, it is well known, which you do not deny, that the OLG did nothing to improve the self-exclusion program despite the Responsible Gaming Code of Conduct (the "Code").

Approximately, two years after the Code was adopted with the OLG professing "social responsibility" the Provincial Ombudsman found that the OLG was "*fixated on profit*" and that "[n]ot only did the OLG know there was a problem with insider fraud, it was fully aware that the measures it put in place to guard against retailer fraud were woefully inadequate". In such circumstances Sir, you should not ask the public to place stock in the Code in respect of a self-exclusion program that is well known to also be woefully inadequate.

The thought that we should take solace in the suggestion that self-exclusion is only one of many programs is to prize form over substance. Take for example the OLG's much touted "**Know Your Limit Play Within It**" awareness program. Would you even as a layperson be satisfied telling a heroin addict to know his limit and inject within it? The thought is preposterous and yet we are told it is quite acceptable to tell pathological gamblers the slogan and be content, even though the two illnesses are quite comparable to the OLG's express knowledge.

We are equally surprised by your reference to the Responsible Gambling Council's ("RGC") alleged "national research initiative". The RGC is packed with casino insiders including top corporate officers from Ontario Lottery & Gaming, Nova Scotia Gaming, Manitoba Lotteries, and Woodbine Entertainment. Moreover, this questionable non-arms

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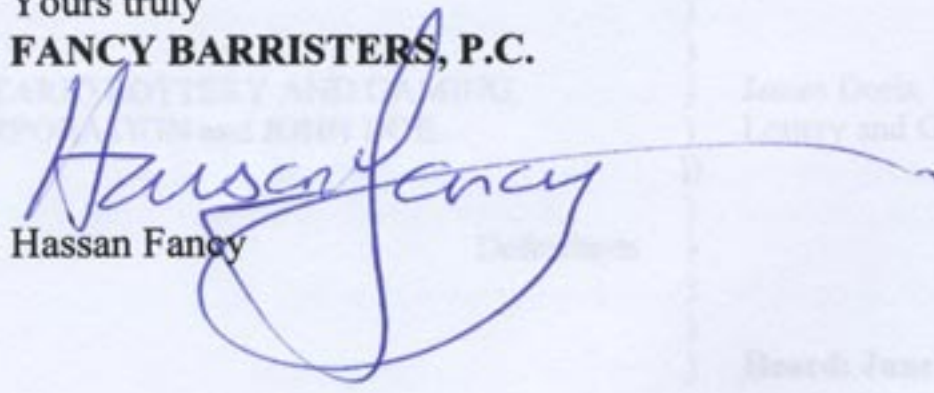
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length entity speaks of "measuring impact" on its website in connection with the "initiative" not "increasing overall effectiveness" of self-exclusion programs. Indeed we were advised by Mr. Boxenbaum, recognized as an expert by Madam Justice MacDonald in her decision on Mr. Treyes' action against the OLG, that Mr. Kelly denied his request to observe in the Montreal component of the alleged "national research initiative" (we enclose a copy of the decision in *Treyes v. OLG* for ease of reference). The whole matter of the "initiative" strikes the writer as yet another dodgy camouflage much like the professed Code. Was there any bidding or tendering process before the RGC was awarded the alleged "national research initiative"?

We respectfully refer you to Mr. Tory's press release dated August 6th 2007 (a copy of which is enclosed for ease of reference) issued three weeks before your letter to the writer confirming that the OLG continues to place **"profit before people"**. Mr. Tory properly announced that if the OLG was *"serious about combating problem gambling and ending their own disgraceful dependence on money coming from people with serious gambling problems they would move immediately to consider the following measures in place elsewhere."* To his credit, Mr. Tory then went on to point out the electronic methods used to enforce self-exclusion in both the Netherlands and British Columbia.

It is apparent to us that we need to again get this matter before the Court, and we shall do so, but after the election. Sir, as a senior Minister of the provincial Liberal Party, which has an admirable history of protecting Canadians, you of all people should understand the need to genuinely stop the exploitation of vulnerable people in Ontario and set a strong Canadian precedent for the entire world regardless of how the extracted money is finally applied.

Yours truly
FANCY BARRISTERS, P.C.


Hassan Fancy

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Treyes v. Ontario Lottery and Gaming Corporation, 2007 CanLII 27587 (ON S.C.)

PDF Format

Date: 2007-07-11

Docket: 05-CV-290238PD1

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Reflex Record (noteup and cited decisions)

COURT FILE NO.: 05-CV-290238PD1

DATE: 20070711

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JOSEPH TREYES

Plaintiff

- and -

ONTARIO LOTTERY AND GAMING
CORPORATION and JOHN DOE

Defendants

H. Fancy, for the Plaintiff

M. Chakravarti, for the Plaintiff

James Doris, for the Defendant, Ontario
Lottery and Gaming Corporation

Heard: June 15, 2007

Ellen Macdonald J.

REASONS FOR DECISION

[1] The issue on this motion is the entitlement of the Plaintiff's solicitors to a premium for their professional services in this action. The premium sought is 14.5% of Mr. Treyes' damages. The court is asked to award a costs premium as a part of the contingency fee agreement, on consent of the Plaintiff, pursuant to s. 28.1(8) of the *Solicitors Act*, R.S.O. 1990, c. S.15. Section 28.1(8) reads as follows:

(8) A contingency fee agreement shall not include in the fee payable to the solicitor, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs

retained as part of a settlement, unless;

- (a) the solicitor and client jointly apply to a judge of the Superior Court of Justice for approval to include the costs or a proportion of the costs in the contingency fee agreement because of exceptional circumstances; and
- (b) the judge is satisfied that exceptional circumstances apply and approves the inclusion of the costs or a proportion of them [emphasis added].

[2] The action was an unprecedented claim by the Plaintiff, Mr. Treyes, for recovery of his gambling losses, over the course of several years. These losses largely occurred at the Defendant's gaming facilities located at Woodbine Racetrack and Mohawk Raceway. There was and is no case law that directly supported the action brought by Mr. Treyes.

[3] Mr. Treyes was diagnosed with Parkinson's disease in 1992. As a result of the medications prescribed to treat the symptoms of Parkinson's disease, Mr. Treyes became a pathological gambler and was diagnosed as a pathological gambler in 1999. Pathological gambling is heavily laden with stereotypes, the most notorious of which is the notion that a gambler is the author of his or her misfortune and displays a lack of willpower.

[4] Mr. Treyes' losses were all in cash. The result was that there was a lack of records supporting his losses at any of OLGC's facilities. Mr. Treyes played slot machines. Mr. Treyes became impecunious and had no ability to fund this litigation. Indeed, Fancy Barristers felt morally compelled to lend Mr. Treyes money to pay his rent during the course of the litigation. He underwent two bankruptcies and was living "hand to mouth". He was living on a small disability pension and CPP. His pension from his former employer will not be available to him until he is 65. He is now 61.

[5] Prior to retaining Fancy Barristers, one lawyer who attempted to represent Mr. Treyes was faced, in response to a demand letter for \$100,000.00 in losses, with the Self Exclusion Agreement signed by Mr. Treyes in favour of OLGC.¹ OLGC took the position that Mr. Treyes' claim was totally lacking in merit. It maintained that there was no precedent for a court imposing a duty of care on a gaming venue to find and exclude individuals who identify themselves as problem gamblers.

[6] Fancy Barristers had a program to take on one or two apparently impossible cases each year to aid the disadvantaged and impecunious litigant who would otherwise have no access to justice. After several months of research at their firm's expense, Fancy Barristers agreed to represent Mr. Treyes and entered into a Contingency Fee Retainer Agreement ("CFA") with him. The CFA is dated January 17, 2005. Aside from the serious evidentiary and proof hurdles, there were 13 critical issues in this novel action as set out at pages 3 and 4 of the affidavit of Monica Chakravarti dated June 10, 2007:

i. Pathological Gambling: OLGC's Knowledge of Illness & Policy

- a. Whether Joe was a pathological gambler ("PG")?
- b. Whether PG was an illness such that fault did not lie with Joe, regardless of the stereotypes associated with PG or problem gamblers?
- c. Whether Parkinson's disease played a role in Joe's PG?
- d. Whether the OLGC was knowledgeable about the consequences of PG and the financial, psychological, marital, and sometimes suicidal consequences thereof?
- e. Whether slot machines at the OLGC facilities contained addictive features?
- f. Whether the OLGC created a policy to combat PG?

ii. Proximity: Relationship Between OLGC & Joe

- g. Whether there was a special relationship between the OLGC and Joe to create the foundation for a duty of care?
- h. What was the nature of the duty?

iii. **Implementation of Policy**

- i. If there was a policy to combat PG, and there was a proximate relationship between the OLGC and Joe, whether the OLGC took "operational" steps to implement the policy?
- j. Whether the implementation, if any, of the OLGC's policy was reasonable in the circumstances?

iv. **Joe's Economic Loss, Causation & Release**

- k. Whether Joe attended the OLGC's facilities after proximity arose, gambled, lost, and the quantum of all his **cash losses** [sic]?
- l. Whether Joe's depression, after diagnosis of PG, was due to Parkinson's disease or PG?
- m. Whether Joe was contributorily negligent in connection with the gambling losses?
- n. Whether Joe had released the OLGC from all claims and losses by signing a form drafted by the OLGC years before the within action?

[7] Mr. Treyes' attracted the attention of the CBC and the National Post both of whom reported on the details of Mr. Treyes' claim. On one occasion, Mr. Treyes asked a National Post reporter for a \$5.00 loan so that he get home from Woodbine.

[8] Between January 17, 2005 to June 2007, Mr. Fancy, a Director of the Ontario Trial Lawyers Association with 15 years post-call experience, Ms. Chakravarti with 5 years post-call experience, and Mr. S. Hahzad Siddiqui with 2 years post-call experience, spent well in excess of 500 hours preparing for, researching, conducting investigations, examining, and litigating this action. They spent \$30,000 in disbursements. There were some weeks where all three lawyers plus law clerks worked exclusively on Mr. Treyes' case to the prejudice of the balance of their firm's practice. Mr. Treyes consents to and joins his legal team in support of the order sought in this motion.

[9] Prior to the bringing of this motion and following a one-day mediation, paid for by OLGC, a settlement was reached. The settlement is confidential. I am aware of the contents of the settlement agreement.

[10] Mr. Fancy and his colleagues used a new advocacy model called Demonstrative Advocacy (D.A. Model) to prove Mr. Treyes' claim. I agree with the point made by Ms. Chakravarti that the D.A. Model goes a long way in constraining subjective interpretations, reducing acrimony and expediting settlement. The utilization of the D.A. Model demonstrated the state of Mr. Treyes' life before his addiction and diagnosis with Parkinson's disease. He was an electrical engineer and worked at Delphax Systems for over a decade. He was married and had one daughter. When the diagnosis of Parkinson's was initially made, his family was very supportive but matters became more difficult when he was forced to go on long-term disability and was withdrawn from his workplace due to the severity of the disease.

[11] Mr. Fancy and his colleagues extensively researched Mr. Treyes' pre-pathological gambling life. Lay and expert Witnesses were identified. In 1999, he was diagnosed with pathological gambling. His treating neurologist, Dr. Guttman, whose report is contained in the record, confirmed this diagnosis. The firm also retained Dr. Williams of the Albert Gaming Research Institute at the University of Lethbridge. He correlated pathological gambling and Parkinson's disease in his report dated April 18, 2007. He opined that the diseases are almost the mirror image of each other. I will mention one other expert, Mr. Sol Boxenbaum, a well-respected, independent anti-gambling consumer advocate. He is an expert on the issue of the OLGC's self-exclusion program. His report is dated June 10, 2007 and is contained in the record. He became familiar with the D.A. Model from reading the affidavits filed on behalf of Mr. Treyes in support of this motion. He stated that in all of his years as a consumer advocate in the gambling industry, he had never come across such an innovative methodology.

[12] Before I deal with the legal questions posed in this case, I comment on a recent and comprehensive article that the Plaintiffs included as an exhibit on this motion: William V. Sasso and Jasmina Kolajdzic, "Do Ontario and Its Gaming Venues Owe a Duty of Care to Problem Gamblers?" (2006) 10 Gaming L. Rev. at 552. The article addresses many, if not all, of the issues that arise in cases such as this one including the Voluntary Self Exclusion Program undertaken by the OLGC, and the duty of care of gaming venues. The authors conclude at page 570:

The ramifications of [*Edmonds v. Laplante* (15 March 2005), Toronto 02/CV226280 (Ont. S.C.J.)] remain to be seen. Will other courts, including appellate courts, follow *Edmonds*? What steps could the

LGC take to meet its duty of care? For the time being, at least one question has probably been answered by *Edmonds*: Do Ontario and its gaming venues owe a duty of care to problem gamblers? Under the current state of the law, the answer would appear to be "yes".

[13] The content and conclusions of this article are likely to have influenced the confidential settlement of this action.

Disposition

[14] The legal considerations in this case are similar to those dealt with in *Christian Brothers of Ireland in Canada (Re.)* 2003 CanLII 18327 (ON C.A.), (2003), 68 O.R. (3d) 1 (C.A.). In his judgment, Laskin J.A. observed that the financial risk assumed by Weir Foulds alone supported a premium. Awarding a reasonable premium to a law firm that assumes a large risk gives lawyers an economic incentive to take on the litigation and "to do it well": *Christian Brothers, supra* at para. 21. Equally as important is the fact that awarding a premium enhances access to justice and promotes access to justice in future cases.

[15] I allow the 14.5% premium. Mr. Fancy and his colleagues did exemplary work at enormous risk to their firm as detailed above. This was a novel action. For it to succeed, as it did, it required great temerity and commitment to a difficult case by Fancy Barristers.

[16] This is a case of exceptional circumstances for all of the reasons set out above. The Plaintiff consented to the premium as part of the contingency fee arrangement. By correspondence dated June 22, 200, Mr. Fancy, with the consent of Mr. Doris brought to my attention the recent decision of the Ontario Court of Appeal in *Kramer Henderson (Re)* 84 O.R.(3d) , 241. I agree that *Kramer* is factually opposite to case asserted by Mr. Treyes in this motion. I have endorsed the motion record accordingly.

Ellen Macdonald J.

Released: July 11, 2007

COURT FILE NO.: 05-CV-290238PD1
DATE: 20070711

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JOSEPH TREYES

Plaintiff

- and -

ONTARIO LOTTERY AND GAMING
CORPORATION and JOHN DOE


Defendants

REASONS FOR DECISION

Ellen Macdonald J.

1 Mr. Treyes signed a Self Exclusion agreement with the OLGC on September 2, 2000. In this agreement OLGC contracted to use its best efforts to deny Mr. Treyes entry to all of OLGC's gaming venues in the province of Ontario. Contrary to the agreement Mr. Treyes was permitted access to Woodbine and Mohawk where he sustained the losses claimed in the Statement of Claim dated May 26, 2005.

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by **LexUM** for the  Federation of Law Societies of Canada

on News Editors:

Problem gambling report shows troubled agency still rolling the dice with taxpayers' money

Tory calls for changes to OLG to increase transparency, improve efforts to combat problem gambling

TORONTO, Aug. 6 /CNW/ - Progressive Conservative Party Leader John Tory today renewed his call for action to clean up the unaccountable and wasteful culture at Ontario Lottery and Gaming (OLG) in the wake of a report of further problems at the troubled corporation.

"Once again we learn about a secretive OLG more concerned about itself than the people who own it, some of whom are ultimately hurt by its practices," said Tory. "As we saw with the ticket scandal (where we have scant detail as to what has actually been done to clean up that mess which cost the ticket buying public up to \$100 million) OLG's first instinct is to cover up."

A Toronto Star article revealed this weekend that several million-dollar plus lawsuits against the OLG have been secretly settled out of court. The OLG refuses to disclose the cost of the settlements and it appears they were settled out of court to prevent further scrutiny of OLG's inadequate efforts to combat problem gambling.

"This is a crown corporation and public money is involved, so details of these settlements should be made public immediately. There can be no excuse for keeping this information from the public since it could involve millions of their dollars," said Tory. "The McGuinty Liberals have repeatedly promised greater transparency. Instead, just like the lottery ticket scandal, we're seeing more secret settlements, and an effort to cover things up instead of fixing them up."

Tory also said that beyond the court cases, the OLG has again placed their own self interest ahead of strong, effective policies to deter compulsive and problem gamblers.

"The habits and addictions of these gamblers is taking a huge toll on these people themselves, their families, their employers and others and yet the OLG continues to place profit before people," said Tory. "If they were serious about combatting problem gambling and ending their own disgraceful dependence on money coming from people with serious gambling problems they would move immediately to consider the following measures in place elsewhere."

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- In the Netherlands, gamblers have to use a card to sign in each time they visit a casino. If they visit more than nine times a month, they're called in for an interview in a process that identifies problem gamblers. In Ontario, many frequent gamblers also use a card each time they visit and casinos could take similar measures as they do in the Netherlands.
- In British Columbia, facial recognition cameras which Ontario has in its casinos to spot cheaters are also used to spot problem gamblers who have self-identified.
- Ontario casinos should be taking some responsibility for their own self-exclusion forms. They should make it easier for people to sign them without having to go to a place of gambling and should no longer try to wash their hands of the problem once the form has been signed. At present, virtually the entire onus is placed on the gambler as opposed to the casinos. What use is the self-exclusion form if problem gamblers fill them out, and then OLG maintains they have no responsibility to do anything as a result?

up
 Ontario should look at a greater degree of independence for its problem gambling oversight organization so that a suitable distance is maintained between those who benefit from gambling and those who determine how best to deal with problem gamblers.

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"Families are being torn apart, jobs are being lost, sometimes even lives are being lost," said Tory. "For the sake of a really small amount of lost business from problem gamblers, Ontario could be a leader in addressing this problem, not a secretive excuse-maker settling any and every claim so as to continue to avoid taking responsibility. The McGuinty Liberals should be ashamed of this latest scandal and cover up at OLG, should bring these practices to an end immediately and bring in some strong, effective and sensitive policies which actually help problem gamblers and their families."

For further information: Brendan Howe, (416) 319-1418

JOHN TORY - More on this organization



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FROM: Bansa Pacey

To: MINISTRY OF PUBLIC INFRASTRUCTURE RENEWAL

Attention: The Honourable Minister Eggen

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Date: October 4, 2007

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