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Court File No. 02/CV-22628^SAM3

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ROBERT EDMONDS

Plaintiff

- and -

PHYLLIS LAPLANTE, SCOTT LAPLANTE,
861039 ONTARIO LIMITED operating as COBY VARIETY
and ONTARIO LOTTERY AND GAMING CORPORATION

Defendants

Before The Honorable Madam Justice Sachs at 361 University
Avenue, Toronto, Ontario, on the 15th day of March, 2005.

R U L I N G

A P P E A R A N C E S:

A.L. RACHLIN, ESQ.

for the Plaintiff

L. GAVENDO, ESQ.

for Phyllis Laplante, Scott Laplante
and 861039 Ontario Limited operating
as Coby Variety

MS. J. WALL

for Ontario Lottery and Gaming
Corporation

MARCH 15, 2005

R U L I N G

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SACHS J. (Orally): The OLGC is a corporation established pursuant to the Ontario Lottery and Gaming Corporation Act, S.O. 1999 c.12 (the Act"). By virtue of section 2(3) of the Act the OLGC is an agent of Her Majesty. Section 3 of the Act provides that:

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"One of the objects of the OLGC is to develop, undertake, organize, conduct and manage lottery schemes on behalf of Her Majesty in right of Ontario."

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Section 15 of the Act provides that the Lieutenant Governor in Council may make regulations regarding the lottery schemes the OLGC is authorized to conduct and manage and section 7 of the regulations states that the OLGC is to establish game rules.

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DOES THE OLGC OWE A DUTY OF CARE TO MR. EDMONDS?

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The OLGC is a government agency. In Just v. British Columbia [1989] 2 S.C.R. 1228 the Supreme Court of Canada affirmed that in cases where allegations of negligence are brought against a government agency the

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5 courts are to consider and apply the test set out by Lord
Wilberforce in Anns v. Merton London Borough Council
[1978] A.C. 728. At pages 751 to 752 of that decision
Lord Wilberforce articulated that test as follows:

10 "... the position has now been reached that
in order to establish that a duty of care
arises in a particular situation it is not
necessary to bring the facts of that
situation within those of previous
15 situations in which a duty of care has been
held to exist. Rather the question has to
be approached in two stages. First, one
has to ask whether as between the alleged
wrongdoer and the person who has suffered
20 damage there is a sufficient relationship
of proximity or neighbourhood such that in
the reasonable contemplation of the former
carelessness on his part may be likely to
cause damage to the latter - in which case
25 a prima facie duty of care arises.

30 Secondly, if the first question is answered
affirmatively it is necessary to consider
whether there are any considerations which
ought to negative or to reduce or limit the
scope of the duty or the class of persons

to whom it is owed or the damages to which
a breach of it may give rise."

5 The first part of the Anns test requires the court to
direct itself to whether a prima facie duty of care arises
and in doing so to ask whether there is a "sufficient
10 relationship of proximity and neighbourhood" between the
defendant and the plaintiff to impose that duty.

In Cooper et al v. Hobart et al (2001) 206
15 D.L.R. 4th 193 at 203 (S.C.C.) McLachlin C.J.C. made it
clear that in order to pass the threshold imposed by the
first stage of the Anns test both reasonable
foreseeability of harm and proximity must be established.
With respect to the former, the question to be asked is
20 "Was the harm that occurred the reasonably foreseeable
consequence of the defendant's act?"

The OLGC contracts with retailers to sell
and validate other people's lottery tickets. At the same
time, the OLGC does not prohibit retailers from
25 participating in their lottery games. The question
becomes whether or not it was reasonably foreseeable that
a retailer could attempt to gain some unfair advantage
over a customer? In my view it was and, further, the OLGC
has recognized this to be the case by adopting an "insider
30 win policy". The purpose of that policy is stated to be:

"It is paramount that the corporation be

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perceived by the public of Ontario as
ensuring the utmost integrity in the
conduct of its lottery games and that no
unfair advantage is gained by any
individual who was directly or closely
affiliated with the conduct of the
corporation's games."

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Pursuant to the policy insiders, who are defined as
including retailers and their employees, are subjected to
a higher level of scrutiny when they come to claim their
prizes. In my view, by adopting the policy the OLGC has
acknowledged the real possibility that a retailer could
gain an unfair advantage in the conduct of the games and
try to claim a customer's ticket as their own. This is
consistent with the evidence of two of the OLGC's own
witnesses, Suzy Tan and Chris Cooney.

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Mr. Campbell's evidence was less clear on
the point. He seemed to suggest that the purpose of the
policy was to manage perception, not reality. Taken to
its logical conclusion, this would imply that while it was
not reasonably foreseeable that an insider could gain an
unfair advantage over a customer, the public might believe
this was the case and, while this belief might be
unreasonable, the OLGC was going to enact a policy to deal
with it. In my view, if this was Mr. Campbell's position,

5 it was an implausible one. In enacting the policy the
OLGC was recognizing that the public's perception that an
insider could gain an unfair advantage over a customer was
a reasonable one.

10 With respect to the issue of proximity,
McLachlin C.J.C. made two points at page 203 of the Cooper
v. Hobart decision.

15 "The first is that 'proximity' is generally
used in the authorities to characterize the
type of relationship in which a duty of
care may arise. The second is that
sufficiently proximate relationships are
20 identified through the use of categories.
The categories are not closed and new
categories of negligence may be introduced
but generally proximity is established by
reference to these categories. This
25 provided certainty to the law of negligence
while still permitting it to evolve to meet
the needs of new circumstances."

30 In this case we have a governmental agency that has
undertaken a policy with respect to insider win
investigations. This is analogous to one of the
recognized categories listed in Cooper v. Hobart, namely,
governmental authorities who have undertaken a policy of

5 road maintenance have been held to owe a duty of care to execute the maintenance in a non negligent manner. Given this, and my findings as to reasonable foreseeability, a prima facie duty of care arises.

10 This brings me to the second stage of the Anns test. It is at this stage I am required to consider the issues raised by the OLGC in their submissions that I should not find a duty of care. One, that the OLGC is exempt from liability for negligence by virtue of the governing legislation and the rules governing the game in question. Two, that government actors are not liable for policy decisions, and three, that to recognize a duty of care in this case would create the spectre of unlimited liability to an unlimited class.

20 The section of the Act relied upon by the OLGC in support of its submission that the OLGC was exempt from liability for negligence asserted was section 8.

Section 8 reads:

25 "No action or other proceeding may be instituted against any member of the corporation or person appointed to the service of the corporation for any act done in good faith in the execution or intended execution of the person's duty or for any
30 alleged neglect or default in the execution

in good faith of the person's duty."

5 This section does not provide an exemption of liability to the OLGC itself.

The rules relied upon were rules 5.1 and 5.4. Rule 5.1 reads:

10 "In communicating the player's selection to the corporation a retailer shall be deemed to be acting on behalf of the player and not on behalf of the corporation. The corporation shall not be liable to anyone
15 for any loss attributable to the retailer."

20 This rule operated to provide an exemption from liability for any acts of the retailer in communicating the player's selection to the OLGC. Construed in context the exemption does not go beyond that. Rule 5.4 reads:

25 "The corporation will not award a prize for tickets which are void unless the corporation in its discretion deems it appropriate to do so. Tickets are void if lost, stolen, unissued, illegible ...
30 acquired or presented in or upon violation of the Act the regulations or these rules."

The OLGC argued that if Mr. Edmonds' ticket was stolen by the Laplantes it was a void ticket under the rules and the corporation had no obligation to award him a prize. It is

5 the duty of the court to avoid any interpretation that
would result in a commercial absurdity. In my view, a
reasonable construction of this rule, given the whole of
10 the contract, is to restrict the right of a person to
claim a prize if the ticket is a stolen one and is
presented by the wrongdoer or if the ticket is stolen and
is never recovered. It would be inconsistent and
unreasonable if this rule were to operate to restrict the
right of a person to claim a prize where the OLGC had the
15 ticket and the person could prove that the ticket belonged
to him, but had been stolen by someone else. Furthermore,
the rule, by its terms, does not exempt the OLGC from
liability for negligence.

20 With regard to the second submission made
by the OLGC, this is analogous to the example used in Just
with respect to lighthouse inspections. The decision to
adopt an insider win policy and to include retailers in
that policy might well be characterized as a policy
25 decision. However, the plaintiff's claim is based on what
he alleges was the negligent implementation or execution
of that policy in his case.

30 With respect to the defendant's third
submission, I do not accept that to recognize a duty of
care in this case would be to create the spectre of an
unlimited liability to an unlimited class of people.

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5 There was no evidence of this and nothing beyond a bald
assertion by the OLGc that this was the case.

10 Finally, there are no other reasons of
broad policy that would suggest that a duty of care should
not be recognized in this case. For these reasons I find
that the OLGc did owe a duty of care to the plaintiff.

Certified Correct

Lennox T. Brown

15 Lennox T. Brown
Court Reporter

[Signature]

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