SCC File No.: 38521

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR)

BETWEEN:

ATLANTIC LOTTERY CORPORATION INC.

APPELLANT
(Appellant)

-and-

DOUGLAS BABSTOCK and FRED SMALL

RESPONDENTS
(Respondents)

-and-

BALLY GAMING CANADA LTD. and
BALLY GAMING INC.

INTERVENERS
(Interveners)

AND BETWEEN:

VLC, INC., IGT-CANADA INC.,
INTERNATIONAL GAME TECHNOLOGY,
SPIELO INTERNATIONAL CANADA ULC, and
TECH LINK INTERNATIONAL ENTERTAINMENT LIMITED

APPELLANTS
(Respondents)

-and-

DOUGLAS BABSTOCK and FRED SMALL

RESPONDENTS
(Respondents)

-and-

BALLY GAMING CANADA LTD. and
BALLY GAMING INC.

INTERVENERS
(Interveners)

FACTUM OF THE APPELLANTS
VLC, Inc., IGT-Canada Inc., International Game Technology, Spielo International Canada ULC, and Tech Link International Entertainment Limited

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. This appeal involves a class claim brought on behalf of virtually all persons who paid to play video lottery games (VLTs) in Newfoundland and Labrador since 2006. The claim seeks disgorgement of the revenue or profits derived from VLT play for the benefit of the entire class. The claim is based on the core allegation that Atlantic Lottery Corporation Inc. (ALC) offered deceptive games. The Plaintiffs either do not plead, or have disclaimed, reliance on any alleged deception by ALC as well as causation of any loss or damage to the Plaintiffs. Consequently, there can be no claim in negligence. In addition, without reliance upon the alleged deception and without any loss or damage to the Plaintiffs, there is no causal connection between the alleged deception and ALC's profit. No viable cause of action exists. The Plaintiffs' plea of waiver of tort cannot save the action.

2. The debate over waiver of tort/disgorgement for wrongdoing, either as a cause of action or a remedy, has been ongoing for many years. The traditional view has been that waiver of tort is a remedial device that applies to certain torts, and is dependent upon the establishment of a complete cause of action. In recent years, it has been proposed that waiver of tort should be considered a separate cause of action. But there has been no consensus concerning the underlying principle or the constituent elements for such a cause of action.

3. In upholding the certification order, the majority of the Newfoundland and Labrador Court of Appeal has chosen to recognize a broad, new cause of action for disgorgement of benefits or profits based only upon an ill-defined "wrong", which can include the mere breach of a duty of care, notwithstanding that the plaintiff has suffered no injury, harm, loss or damage caused by the alleged breach. In doing so, the majority also either rejects or ignores the requirement of a causal connection between the "wrong" to the plaintiff and the benefit derived by the defendant from the breach.

4. This Court should reject the creation of a new cause of action for disgorgement for wrongdoing. The compensatory principle is firmly enshrined in Canadian law. This Court has accepted that restoration, not punishment or deterrence, is the guiding principle. Treating disgorgement for wrongdoing as a separate cause of action, disconnected from compensatory

principles, runs counter to established jurisprudence, undermines important principles in our civil justice system, has negative economic effects and frustrates legitimate public policy initiatives by Parliament, Legislatures and regulators.

5. In a negligence claim, the required causal connection would be: *Did ALC breach a duty of care owed to the plaintiff, that caused the plaintiff to play VLT games, that resulted in loss or damage to that plaintiff?* If an individual claim for disgorgement were recognized (which the Appellants oppose), the required causal connection should be: *Did ALC breach a duty of care owed to the plaintiff, that caused the plaintiff to play VLT games, that resulted in benefits or profits derived by ALC from that plaintiff?*

6. In this case, there would be little practical difference between causation for compensation and causation for disgorgement. The plaintiff must prove that "but for" the breach of duty, he or she would not have played VLT games, which resulted in either a loss to the plaintiff or a profit to ALC. It is difficult to see why a plaintiff would give up a claim for compensation to instead pursue disgorgement of the profit to ALC. More importantly, neither the compensatory claim nor the disgorgement claim would be appropriate for certification since both require proof of individual causation; either causation of loss or causation of profit. The compensatory claim would fail certification; so too would the disgorgement claim.

7. The majority of the Court of Appeal either rejects or ignores the requirement for individual causation. It would permit a plaintiff to obtain disgorgement of profits merely upon proof that ALC breached a duty of care owed to the plaintiff, but without the plaintiff having to address the difficult causation issues that arise concerning why a person chooses to play VLTs. Further, the plaintiff may sue, not only for the profits derived from his or her own VLT play, but for the profits derived from all persons who played VLTs, without having to establish causation in relation to those persons. The majority's approach is an extreme position. It is a radical departure from existing jurisprudential principles; it is not an "incremental" change in the law.[1]

[1] *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 40; *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at paras. 29-35

8. In this factum, we focus first on the compensatory principle and examine why disgorgement for wrongdoing should be rejected as a cause of action. Next, we consider why there is no reasonable cause of action, either in negligence, for breach of the *Criminal Code*, for breach of contract or for unjust enrichment. Then we consider in more detail why there is no reasonable cause of action for disgorgement for wrongdoing (if such a cause of action were recognized) because there is no private law duty of care and no causal connection. Finally, we consider why certification of a class action must fail because there is no identifiable class, individual issues predominate over common issues, and the claims inevitably break down into individualistic determinations both with respect to liability and quantum.

Statement of Facts

9. The Appellants adopt the statement of facts set forth by ALC and supplement those facts with the following.

10. The Appellants are manufacturers and suppliers of VLTs who have supplied VLTs to ALC during the proposed class period.

11. ALC conducts and manages a constitutionally permissible lottery scheme as agent for the governments of the four Atlantic Provinces. The *Lotteries Act*[2] and the *Video Lottery Regulations*[3] establish the powers and authority given to ALC in Newfoundland and Labrador. By virtue of the *Regulations*, ALC is empowered to approve which VLTs may be operated in the Province and the sites for such operation.[4] All VLTs operated in the Province have been approved by ALC for play by residents of Newfoundland and Labrador.

12. The Statement of Claim alleges that VLTs are inherently deceptive, inherently addictive and inherently dangerous when used as intended.[5] It further alleges that the defective and unsafe design features of VLT line games are essential or fundamental features of this category or class of games, and line games cannot be designed to be acceptably safe; VLT line games should not

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[2] *Lotteries Act*, SNL 1991, c. 53
[3] *Video Lottery Regulations*, CNLR 760/96
[4] Court of Appeal Decision, Welsh JA, paras. 29-33; **Joint Appellants' Record, Vol. II, Tab 5, pgs. 13-14**
[5] Statement of Claim, paras. 12 and 30; **Joint Appellants' Record, Vol. II, Tab 8, pgs. 94, 97**

have been offered for purchase.[6] In other words, all VLT line games (the predominant category of VLT games) are alleged to be, by their very nature, irredeemably deceptive, addictive and dangerous. The Statement of Claim does not allege that those characteristics apply to only some *particular* VLT line games; those characteristics are alleged to apply to all VLT line games.

13. The Statement of Claim alleges that the terms "addicted gambler", "pathological gambler" and "problem gambler" are used as synonyms. The Plaintiffs do not allege that they are problem gamblers. It is alleged that 8.6% of VLT players in Newfoundland and Labrador are problem gamblers; that is, gamblers who have impaired control of their gambling behavior. [7] Consequently, over 90% of VLT players have full control of their gambling behavior.

14. The Plaintiffs expressly disavowed reliance, causation and loss or damage in the hearing before the Applications Judge. Their litigation plan contemplates only a common issues trial: "…there will be no individual issues to be resolved following a common issues trial. Liability and remedy will be determined for the class as a whole. No individual trials will be necessary."[8] The Certification Order reflects these positions. The class which was certified includes "natural persons and their estates, resident in Newfoundland and Labrador, who, during the Class Period (from April 26, 2006 to an opt out date to be set), **paid** the Defendant to gamble on VLT games, excluding video poker games and keno games, in Newfoundland and Labrador, excluding directors, officers and employees of the Defendant." The Certification Order expressly provides that: **"The plaintiffs claim entitlement to a restitutionary remedy for the class without proof of reliance or individual harm. The plaintiffs do not claim individual damages."**[9]

15. In effect, the Certification Order defines a class of virtually all persons who paid to play any VLT in Newfoundland and Labrador, since April 26, 2006, and presents a claim for disgorgement of profits or revenues, without proof of reliance, causation or harm to the class members.

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[6] Statement of Claim, para. 66; **Joint Appellants' Record, Vol. II, Tab 8, pg. 105**
[7] Statement of Claim, paras. 10, 11 and 33; **Joint Appellants' Record, Vol. II, Tab 8, pgs. 93, 94, 98**
[8] Plaintiffs' Litigation Plan, para. 31; **Joint Appellants' Record, Vol. III, Tab 14E, pg. 11**
[9] Certification Order; **Joint Appellants' Record, Vol. I, Tab 4, pg. 116**

16. The Applications Judge certified a class action on the basis of each of the causes of action alleged in the Statement of Claim. The Court of Appeal struck out the claims relating to the *Statute of Anne (Gaming Act), 1710* and the *Competition Act*, but let stand the claims in negligence (failure to warn), breach of the *Criminal Code*, breach of contract and unjust enrichment. The claim under the *Competition Act* was struck, *inter alia*, because the Plaintiffs "specifically disclaimed consequential loss or damage".[10]

PART II – STATEMENT OF QUESTIONS IN ISSUE

17. The following issues arise in this appeal:

a) Should this Court recognize a new cause of action for disgorgement of benefits or profits based upon the commission of a "wrong" (the mere breach of a duty), without the requirement for proof of causation of any resulting loss or damage?

b) Does the Statement of Claim disclose any reasonable cause of action in negligence, breach of the *Criminal Code*, breach of contract or unjust enrichment?

c) Does the Statement of Claim disclose any reasonable cause of action for disgorgement for wrongdoing if this Court recognizes in principle a cause of action for disgorgement requiring a causal connection between the alleged breach and the benefit or profit to the defendant?

d) Should certification of the class action have been denied pursuant to sub-sections 5(1)(b)-(e) of the *Class Actions Act*?

PART III – ARGUMENT

Introduction

18. The Appellants adopt all of ALC's submissions contained in its factum. These submissions are supplementary.

19. Since 2004, the issue of waiver of tort has bedeviled class action litigation in Canada. Plaintiffs' class action counsel have sought to breathe new life into this ancient concept in an attempt to side-step the individualistic issues which would otherwise preclude many class actions.

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[10] Court of Appeal Decision, paras. 49-52; **Joint Appellants' Record, Vol. II, Tab 5, pgs. 18-19**

20. The issue, at its heart, boils down to a simple proposition: Is waiver of tort a separate cause of action entitling a plaintiff to a disgorgement remedy where the defendant has committed a "wrong", notwithstanding that the plaintiff has suffered no injury, harm, loss or damage caused by the "wrong"? Or is waiver of tort (or disgorgement of profits) merely a remedial device, that applies to certain torts, dependent upon proof of a completed cause of action?

21. The simple proposition requires consideration of the fundamental purpose of the law of negligence. Is it intended to provide compensation for loss and harm actually caused by "wrongful" conduct, or is it intended to punish "wrongful" conduct by stripping away and disgorging profits regardless of whether the act or omission has caused any loss or harm to the claimant?

The Court of Appeal Decision

22. The majority of the Newfoundland and Labrador Court of Appeal erred in recognizing this new cause of action for disgorgement of benefits or profits based only upon the commission of a "wrong", notwithstanding that the plaintiff has not suffered any injury, harm, loss or damage as a result of the "wrong". The majority decision takes a conflicting approach to determining the essential elements of its new cause of action, and specifically the causation connection that must be established between the plaintiff, the defendant, the "wrong" and the benefit. At paragraph 170, the majority sets out six key parameters of the new cause of action; items 3 and 4 are as follows:

> 3. The defendant acquired a benefit (an accretion of wealth or saving of expense) that he or she would not have acquired <u>but for the commission of the wrong</u>;
> 4. The benefit need not have been a result of a deprivation of or loss to the plaintiff but may be acquired from other sources <u>so long as it has been derived from the commission of the tortious wrong against the plaintiff</u>;[11] [Emphasis added]

23. In other words, there must be a causal connection between the wrong done to the plaintiff by the defendant and the benefit received by the defendant from that wrong. At paragraph 173, the majority again contemplates that causation between the wrong and the benefit is a necessary element of their disgorgement cause of action. The majority first recognizes that the wrong must flow from a duty of care <u>owed to the claimant</u>. They then stipulate a causation condition: "The

[11] Court of Appeal Decision, para. 170; **Joint Appellants' Record, Vol. II, Tab 5, pg. 57**

defendant… has acquired a benefit to which he or she would not otherwise have been able to acquire but for the breach of duty of care."[12] Translated into the specific circumstances of this case, the cause of action would require the answer to the following question: *Did ALC breach a duty of care owed to the plaintiff, that caused the plaintiff to play VLT games, that resulted in benefits or profits derived by ALC from that plaintiff?*

24. In the facts of this case, there would be little practical difference in the causation requirement between a traditional negligence cause of action and the disgorgement cause of action. Both would require the establishment of a causal connection between the "wrong" done by ALC to the plaintiff and that plaintiff's decision to play VLT games. The plaintiff must establish that "but for" the breach of duty, he or she would not have played VLTs and hence he or she would not have suffered a loss (negligence cause of action) or ALC would not have derived a profit (disgorgement cause of action). Either way, the breach has to causally affect the plaintiff's conduct to play or continue to play VLTs. Otherwise, neither the loss to the plaintiff nor the benefit to ALC occurred "but for" the "wrong".

25. If causation is required, a plaintiff may be better off with a compensatory claim than a disgorgement claim. The loss to the plaintiff may exceed the profit gained by ALC. More importantly, if causation is required, the plaintiff gains nothing in relation to certification by jumping from a compensation claim to a disgorgement claim. If the need for a causation requirement between the breach of duty and individual damage precludes certification of a class action on a compensatory basis, then equally the need for a causation requirement between the "wrong" to the plaintiff and the profit derived by ALC precludes certification on a disgorgement basis.

26. The majority appears to suggest that the mere fact that a person may be within the "ambit of the risk" somehow overcomes or eliminates the requirement for causation. It does not. If a person could claim ALC's profits just because he or she was within the ambit of the risk, then every VLT player could claim profits simply because he or she paid to play a VLT game. A person could play with impunity; take home his or her winnings and still claim ALC's profit. More is required. The "wrong" must have caused the person to play or to continue to play VLTs when he

[12] Court of Appeal Decision, para. 173; **Joint Appellants' Record, Vol. II, Tab 5, pg. 58**

or she otherwise would not have done so. Once that is recognized, a disgorgement cause of action suffers from exactly the same certification problems as does a compensatory cause of action.

27. The majority's confusion leads them to abandon or ignore the requirement of a causal connection between a breach of duty to a particular claimant and a benefit derived by the defendant as a result of that "wrong". At paragraph 174, the majority seems to suggest that "…all that is needed is for the claimant to fall within the ambit of the risk".[13] That drives the majority to have to consider the issue of "multitudinous plaintiffs". Who can sue for the benefit or profit? The majority concludes that a first-past-the-post approach may not be unfair.[14] In effect, one claimant can sue for the benefits or profits presumably derived from a "wrong" to another. And all without having to prove that the "wrong" was the causative factor which led the specific individuals to play VLT games from which ALC derived the profit.

28. The majority then compounds that error by suggesting that class action procedure can resolve such multiple-plaintiff claims on a proportionate basis.[15] Causes of action belong to an individual, not a class. The elements of a cause of action must exist on an individual basis. A class action is only a procedural device. A class action enables the court to deal with common issues where there is an identifiable class and sufficient commonality. But it does not permit the creation of a class claim in substitution for the claim of each individual. The *Class Actions Act* neither modifies nor creates substantive rights.[16]

29. This case cannot be regarded as a class action for aggregate damages. Having disclaimed individual loss and damages to get around the certification difficulties, there can be nothing to aggregate. If each member of the class has no individual damage, there can be no aggregate damages. In any event, aggregate damages cannot be used to establish any aspect of liability,[17]

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[13] Court of Appeal Decision, para. 174; **Joint Appellants' Record, Vol. II, Tab 5, pg. 58**
[14] Court of Appeal Decision, para. 175; **Joint Appellants' Record, Vol. II, Tab 5, pgs. 58-59**
[15] Court of Appeal Decision, para. 176; **Joint Appellants' Record, Vol. II, Tab 5, pg. 59**
[16] *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, at para. 17; *Bou Malhab v. Diffusion Métromédia CMR Inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, at paras. 50-55
[17] *Pro-Sys Consultants Ltd. v. Microsoft*, 2013 SCC 57, [2013] 3 S.C.R. 477, at paras. 131-132

nor can they be awarded where the assessment of damages requires proof of the harm suffered by the individual class members.[18]

Issue 1: Should this Court recognize a new cause of action for disgorgement of benefits or profits based upon the commission of a "wrong" (the mere breach of a duty), without the requirement for proof of causation of any resulting loss or damage?

30. This Court should reject the creation of this new cause of action for disgorgement for wrongdoing. Our civil justice system is founded upon the compensatory principle. That principle is well established both in negligence and in contract. The elements necessary to establish a claim in negligence or a claim in breach of contract are well defined. Restitution or disgorgement remedies are limited to specific types of claims. The new cause of action proposed by the majority of the Court of Appeal should be rejected on both jurisprudential and policy grounds.

The Compensatory Principle

31. Traditionally, damages in Canada have been compensatory, awarded only upon proof of a legal wrong causing damage to the plaintiff. In negligence, damages are meant to put the plaintiff in the position he or she would have been in had the tort not occurred. The plaintiff must establish a duty, a breach of that duty, "but for" causation, and resulting loss or damage. In contract, damages are awarded to put the plaintiff in the position he or she would have been in if the contract had been performed. Consequently, contract damages are also compensatory; they compensate the plaintiff for the loss or damage resulting from the breach of contract. Disgorgement of profits, on the other hand, has been a remedy limited to specific causes of action, such as proprietary torts and fiduciary claims.

(a) Damages in Negligence

32. The civil justice system has never sought to provide relief simply because the defendant has committed some moral wrongdoing. One of the clearest statements of this principle is found in Lord Atkin's definition of "neighbour" in *Donoghue v. Stevenson*:

> But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief.[19]

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[18] *Healey v. Lakeridge Health Corp.*, 2011 ONCA 55, 103 O.R. (3d) 401, at paras. 70-71
[19] *Donoghue v. Stevenson*, [1932] All E.R. Rep. 562, at pg. 11

33. This Court examined the compensatory purpose of damages for negligence in *Ratych v. Bloomer* and *Cunningham v. Wheeler*. The Court described the function of damages and the trend away from a moralistic view to one based upon fairness to all parties.[20] The focus is on restoration of the plaintiff's loss. McLachlin J. described the compensatory principle as follows:

> In short, the ideal of the law in negligence cases is fully restorative but non-punitive damages. The ideal of compensation which is at the same time full and fair is met by awarding damages for all the plaintiff's actual losses, and no more. The watchword is restoration; what is required to restore the plaintiff to his or her pre-accident position.[21]

34. Consequently, negligence law has evolved a series of requirements to ensure that the compensation is fair to both the plaintiff and the defendant:

- a duty of care, to avoid acts or omissions, that are reasonably foreseeable to cause harm, to a person in proximity,[22]
- a breach of that duty of care to the person in proximity,
- harm (injury, loss or damage) to the person in proximity, and
- a "but for" causal connection between the breach and the harm.

35. A causal connection between the breach of duty and the damages claimed by the plaintiff is an essential component of the compensatory principle. This Court has repeatedly affirmed that causation on the "but for" test is essential to the existence of a cause of action in negligence.[23] In *Clements v. Clements*, this Court stated that a defendant is not a "wrongdoer at large" but only a wrongdoer in respect of damage which he or she actually causes to the plaintiff.[24]

36. The constituent elements of the tort of negligence are interrelated. One cannot divorce the elements into separate disconnected components. One does not owe a duty of care to the whole world; one owes a duty of care to those with whom there is a relationship of proximity. The duty

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[20] *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, at pgs. 963-964
[21] *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359, at pg. 369
[22] *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at paras. 21-30; *R. v. Imperial Tobacco Canada*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 41
[23] *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352; *Ediger v. Johnston*, 2013 SCC 18, [2013] 2 S.C.R. 98; *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181; *Resurface Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333
[24] *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 16

to take care is not an obligation to avoid any and all acts or omissions which have a risk to cause harm; it is to avoid acts and omissions which are reasonably foreseeable to cause harm. No wrongful conduct has occurred if the act or omission does not cause harm, or harm that was reasonably foreseeable, to a person in a relationship of proximity.

> A person who acts without reasonable care does no wrong in law; he commits no tort. He only does wrong, he only commits a tort, if his lack of care causes damage to the plaintiff.[25]

37. The law of negligence requires all of the constituent elements to be present before a tort — a legal wrong — exists. The corollary is that a person is at liberty to pursue activities, either for economic advantage or personal fulfillment, that do not amount to tortious activity. In that way, the private law promotes both individual freedom and economic activity, while ensuring that compensation is fair and reasonable. To put it somewhat differently, economic activity is not limited by restrictions or burdens that are unnecessary to provide fair compensation.

38. The public law may impose criminal penalties and create regulatory offences. But the public law does not generally create compensatory obligations. Breach of statute *per se* does not constitute a cause of action. There is no nominate tort of statutory breach giving a right to damages. The civil consequences of breach of statute are subsumed in the law of negligence. Proof of all of the constituent elements of the tort of negligence is required.[26]

39. Compensatory damages are also the norm in the United Kingdom. With the exception of the proprietary torts, damages are only available on a compensatory basis in tort law.[27] A claimant does not have a choice to seek compensatory damages or a restitutionary award.[28]

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[25] *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, at pg. 964, quoting Lord Diplock in *Browning v. War Office*, [1962] 3 All E.R. 1089, at pgs. 1094-95

[26] *Queen v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205

[27] *Devenish Nutrition Limited v. Sanofi-Aventis SA (France)*, [2008] EWCA Civ 1086, [2009] 3 All E.R. 27 (Eng. C.A.), at paras. 76 & 156

[28] *Devenish Nutrition Limited v. Sanofi-Aventis SA (France)*, [2008] EWCA Civ 1086, [2009] 3 All E.R. 27 (Eng. C.A.), at para. 104

(b) Contract Damages

40. The compensatory principle also applies to damages for breach of contract, though its application is somewhat different than in negligence. In the 2018 decision of *Morris-Garner & Or. v. One Step (Support) Ltd.*, the Supreme Court of the United Kingdom reviewed and analyzed the principles applicable to damages for breach of contract. The law of contract gives effect to consensual agreements. Damages in contract are therefore intended to place the claimant in the same position as he or she would have been in if the contract had been performed. Damages for breach of contract are a substitute for performance. The courts will not prevent breaches of contract where the innocent party can be adequately protected by an award of damages. Nor will courts deprive the contract breaker of any profit he or she may have made as a consequence of his or her failure in performance. Only in exceptional circumstances, and where other remedies are inadequate, will a court, in its discretion, order an account of profits as in *Attorney General v. Blake*.[29] The claimant must prove that a loss has been incurred as a result of the breach of contract. Consequently, damages are compensatory; they compensate the injured party for loss caused by non-performance of the contract.[30]

41. There is no right in a claimant to elect to claim disgorgement of profits instead of orthodox compensatory damages. The decision in *Attorney General v. Blake* does not constitute a "new start" in the area of contract damages permitting the court to make an award of profits to punish wrongdoing. *Blake* only permits an award of profits for a loss caused by breach of contract in exceptional circumstances, in the discretion of the court, where other remedies are inadequate.[31] The court's discretion is subject to strict limitations. The U.K. Supreme Court said that it would be a mistake to conclude:

> … that the fact that loss or damage may be difficult to measure renders it unnecessary to identify such loss or damage, or that it is relevant to an award of damages that the breach of contract was deliberate or the party in breach benefited from his conduct, or that it is relevant to an award of damages that the claimant has a "legitimate interest" in preventing an activity carried out in breach of contract, or

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[29] *Attorney General v. Blake*, [2000] UKHL 45, [2001] 1 A.C. 268

[30] *Morris-Garner & Or. v. One Step (Support) Ltd*., [2018] UKSC 20, [2018] 3 All E.R. 659, at paras. 21, 35, 64,71, 95, 96

[31] *Morris-Garner & Or. v. One Step (Support) Ltd*., [2018] UKSC 20, [2018] 3 All E.R. 659, at paras. 35, 81, 82, 95

> that damages for breach of contract and an account of profits are similar remedies at different points along a continuum,….[32]

42. In the present case, both the Applications Judge and the majority of the Court of Appeal relied upon the decision of the Ontario Court of Appeal in *Cassano v. Toronto Dominion Bank* as authority for the availability of restitutionary damages or disgorgement of profits.[33] *Cassano* does not stand for that proposition. In *Cassano*, the plaintiffs' counsel conceded that "…this was not a case where compensatory damages would be inadequate, which is a prerequisite for an award of restitutionary damages."[34] *Cassano* proceeded on the basis that the remedies sought in the action could not include restitutionary damages. *Cassano* is consistent with the principles enunciated in *Morris-Garner*.

43. This Court's decision in *Bank of America Canada v. Mutual Trust Co*. makes it clear that expectation or compensatory damages are the usual measure of damages for breach of contract. Restitutionary damages are infrequently employed.[35]

44. Disgorgement as a remedy for breach of contract is also limited in American law, as demonstrated by the decision of the U.S. Supreme Court in *Kansas v. Nebraska*. Nebraska had wrongly diverted and used water which belonged to Kansas. The Court awarded a partial disgorgement remedy in addition to compensatory relief. As in Anglo-Canadian jurisprudence, it is an example of disgorgement where one party has taken, and used for profit, an asset or property right (water) belonging to another. Even then, there were strong dissents from Justices Thomas, Scalia and Alito who would have limited the relief to compensation in accordance with ordinary contract principles. The dissenting justices criticized the disgorgement section of the *Restatement (Third) of Restitution and Unjust Enrichment (2010)* as "…a 'novel extension' of the law that finds little if any support in case law."[36]

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[32] *Morris-Garner & Or. v. One Step (Support) Ltd.*, [2018] UKSC 20, [2018] 3 All E.R. 659, at para. 90
[33] Applications Decision, para. 119; **Joint Appellants' Record, Vol. I, Tab 1, pg. 33**; Court of Appeal Decision, para. 115; **Joint Appellants' Record, Vol. II, Tab 5, pg. 38**
[34] *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, at para. 28
[35] *Bank of America Canada v. Mutual Trust Company*, 2002 SCC 43, [2002] 2 S.C.R. 601, at paras. 25, 30 and 31
[36] *Kansas v. Nebraska* (2015), 135 S. Ct. 1042 (USSC), at paras. 1064 and 1068

Disgorgement for Wrongdoing Should Be Rejected

45. The issue of waiver of tort as a remedial device or cause of action has permeated class action certification case law since *Serhan Estate v Johnson & Johnson.*[37] However, the origin of the issue stems from academic commentary.

46. John McCamus is the principal Canadian proponent of waiver of tort as a cause of action. He argues that disgorgement of profits should be available in any case where "tortious conduct" produces a profit. His proposed organizing principle is deterrence — that ill-gotten gains ought to be disgorged. He dispenses with the need to prove an underlying cause of action or proof of loss; disgorgement could be ordered simply where it is appropriate to give effect to the deterrence/disincentive principle.[38] The McCamus proposal does not provide a principled basis for disgorgement of benefits or profits. A preponderance of academics oppose his views.

47. J.M. Martin establishes that waiver of tort was historically only a means to vindicate existing proprietary rights. It did not permit the creation of remedies. He maintains that if waiver of tort is to be recognized, it should be done on the basis of policy "rather than asserted as fact on the grounds of a patchwork and stuttering history."[39]

48. Sandra Barton et al. argue that recognizing waiver of tort as an independent cause of action would not be an incremental development but a "tremendous leap into unchartered territory."[40] They assert that the focus should be on when disgorgement may be awarded, considering areas of law where disgorgement has already been recognized.

49. Greg Weber advocates abandoning waiver of tort altogether, in favour of a principled approach to the availability of a disgorgement remedy. He argues that waiver of tort as an independent cause of action is legally incoherent and cautions that "granting disgorgement without

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[37] *Serhan Estate v Johnson & Johnson* (2004), 72 O.R. (3d) 296 (S.C.J.)
[38] J. McCamus, "Waiver of Tort: Is There a Limiting Principle?" (2014) 55 CBLJ 333 (HeinOnline); **Appellants' Book of Authorities, Tab 8**
[39] J. M. Martin, "Waiver of Tort: An Historical and Practical Survey" (2012) 52 Can Bus L.J. 474, at pg. 551
[40] S. Barton, M. Hines & S. Therien, "Neither Cause of Action nor Remedy: Doing Away with Waiver of Tort" (2015) Ann Rev Civil Lit 131 (Westlaw), at pg. 8; **Appellants' Book of Authorities, Tab 3**

proof of loss (when it would otherwise be required) results in disgorgement arising out of legal nothingness." [41]

50. Despite the strength of the opposing views, the majority of the Court of Appeal adopted an approach — more extreme than the McCamus proposal — and created "disgorgement for wrongdoing" grounded upon the deterrence rationale.[42] It concluded that disgorgement should be permitted to deter misconduct. However, the circumstances which justify disgorgement remain largely undefined.

51. Disgorgement for wrongdoing should be rejected as a new cause of action for reasons of principle and policy. Disgorgement of profits should also be rejected as a remedy for negligence. As in the United Kingdom, a plaintiff should not have the right to elect disgorgement of profits instead of compensatory damages in a negligence claim.

52. Compensation, not disgorgement, is the appropriate and fair measure of damages for breach of a duty of care. Allowing disgorgement of profits blurs the functions of negligence with regulatory and criminal law; it would encourage plaintiffs to take on roles as private prosecutors. Punitive damages are available in egregious cases. To permit disgorgement for breach of duty would deter socially useful behaviour by imposing economic costs of over-deterrence. In the case of manufacturers, it would create a type of strict liability for defective products. The majority of the Court of Appeal overlooked these sound policy reasons.

(a) Disgorgement Should be Limited to Specific Causes of Action

53. The availability of a disgorgement remedy is in direct response to the rationale that underlies certain causes of action. Disgorgement of profits from a fiduciary is in direct response to a breach of the duty of loyalty and the requirement to act in the best interests of the beneficiary.[43] Disgorgement for breach of proprietary rights and intellectual property rights is intended to compensate the owner for the loss of the value of exercising his property or intellectual property

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[41] G. Weber, "Waiver of Tort: Disgorgement Ex Nihilo" (2014) 40:1 Queen's LJ 389, at pgs. 399 – 424

[42] Court of Appeal Decision at paras. 154-157, 160-170, 177, 180; **Joint Appellants' Record, Vol. II, Tab 5, pgs. 51-52, 53-57, 59, 60**

[43] S. Barton, M. Hines & S. Therien, "Neither Cause of Action nor Remedy: Doing Away with Waiver of Tort" (2015) Ann Rev Civil Lit 131 (Westlaw), at page 12 citing to *3464920 Canada Inc. v. Strother*, 2007 SCC 24, [2007] 2 S.C.R. 177; **Appellants' Book of Authorities, Tab 3**

rights and the ability to control its use.[44] Similarly, in breach of confidence cases, an accounting may be available to restore the plaintiff to the position he would have been in had no wrong been committed.[45] In those cases, disgorgement is the appropriate means of remedying the injustice to the plaintiff. By comparison, disgorgement as a remedy for breach of a duty of care would not correct the injustice to the plaintiff. There is no inherent duty of loyalty in a duty of care. There is no proprietary value appropriated by a breach of a duty of care. A duty of care is to avoid foreseeable harm. The means to correct a breach of that duty – the injustice to the plaintiff – is to rectify the harm. That is accomplished through restoration, not disgorgement.

54. In this respect, the majority of the Court of Appeal erred when it relied on the *Blake* and *Reid-Newfoundland Co. v. Anglo-American Telegram Co. Ltd* cases.[46] *Blake* has been confined to limited exceptional circumstances, where other remedies are inadequate. Cases like *Blake* and *Reid* are analogous to other circumstances where disgorgement has been recognized as an appropriate remedy, such as proprietary claims and fiduciary claims.

(b) The Decision Undermines the Compensatory Principle

55. The compensatory principle is based on fairness to the parties. This Court has rejected a punitive approach that would focus on punishment and has instead emphasized restoration.[47] Disgorgement for wrongdoing undermines this principle.

56. It is not possible to conceptually separate the issue of loss or damage from all of the other constituent elements of the tort of negligence. The recognition of disgorgement for wrongdoing would create liability for "negligence in the air".[48] It would create a "remedy" without first establishing a cause of action, and without first establishing a legal basis for the taking of benefits from one person and transferring them to another. It would be a focus upon *punishment* rather than *restoration*.

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[44] *Morris-Garner & Or. v. One Step (Support) Ltd.*, [2018] UKSC 20, [2018] 3 All E.R. 659, at para. 95
[45] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pg. 583 (in dissent)
[46] *Reid-Newfoundland Co. v. Anglo-American Telegram Co. Ltd.*, [1912] AC 555
[47] *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, at pgs. 963-964
[48] *Overseas Tankship (UK) Ltd v. Morts Dock & Engineering Co. Ltd*, [1961] UKPC 2, [1961] 1 All ER 404 (P.C.), at pg. 425 cit'd w. app'l in *Moran v. Pyle*, [1975] 1 S.C.R. 393, at pg. 405

57. Even proponents of a disgorgement cause of action acknowledge that a careful application of causation may be required to limit recovery to profits attributable to a breach of duty.[49] However, disgorgement for wrongdoing, as recognized by the majority, would not appear to require causation.[50] As a result, the "remedy" would be an award which is not made upon the firm legal foundation of what constitutes a tort. Rather, it would be subject to the judicial whim of what a particular judge believes would justify disgorgement in a particular factual situation. Neither the common law nor equity has previously proceeded upon such an unsecure foundation.

58. By removing the requirements for reasonable foreseeability of harm, proximity of relationship and damages, the plaintiff becomes "superfluous" to the action.[51] This is particularly evident in the majority's acknowledgement that the new cause of action may lead to a "first-past-the-post" scenario, thereby permitting one plaintiff to collect disgorged profits at the expense of other potential plaintiffs.[52] This runs the risk that injuries that come to fruition after an award of disgorgement is made may go uncompensated.

59. Adding to the confusion is the majority's proposed focus on whether conduct "falls very substantially below a reasonable standard of care", or on the "degree and seriousness of the breach."[53] Both formulations lack precision and would create tremendous uncertainty in the law, especially where no loss is alleged and the remedy is the taking away of economic benefits otherwise lawfully held by the defendant.

60. The new cause of action signals a new responsibility to society *writ large* to guard against an *ambit of risk*, rather than *harm*. But it does not explain *why* profiting from breach of a duty of care without loss *should be* deterred. Typically, "a benefit unaccompanied by a loss is …thought

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[49] Maddaugh & McCamus, *The Law of Restitution*, looseleaf (consulted on June 7, 2019) (Toronto: Thomson Reuters Canada, 2004), at 25:400; **Appellants' Book of Authorities, Tab 7**

[50] See conflicting statements from the majority on causation. Court of Appeal Decision, at paras. 170, 173, 174; **Joint Appellants' Record, Vol. II, Tab 5, pgs. 57, 58**

[51] The Hon. Mr. Justice T. L. Archibald & C. Vernon, "No Harm, No Foul? The Existence of Waiver of Tort as an Independent Cause of Action in Canadian Law" (2008) Ann Rev Civil Lit 409 (Westlaw), at pg. 19; **Appellants' Book of Authorities, Tab 2**

[52] Court of Appeal Decision, at para 175; **Joint Appellants' Record, Vol. II, Tab 5, pgs. 58-59**

[53] Court of Appeal Decision, paras 164-166; **Joint Appellants' Record, Vol. II, Tab 5, pgs. 55-56**

to be a good thing – a basis for celebration, or at worst, indifference, but not a call for redress." Disgorgement for wrongdoing does not explain *why* the law should be moved beyond indifference where there is no harm, or *why* a "chronically over-burdened legal system" should incur the cost of redistributing wealth.[54]

61. The entire argument in favour of disgorgement for wrongdoing rests upon an unproven and ill-founded proposition: that the law requires a further and better remedy for deterrence for "wrongful" conduct. Compensatory damages and punitive damages, where appropriate, already provide deterrence. The suggested rationale of additional deterrence does not merit subversion of the compensatory principle.

(c) Compensation Provides Optimal Deterrence: Disgorgement Does Not

62. Compensatory damages fulfill a deterrent function by requiring the wrongdoer to pay full compensation for the harm he or she has caused. Deterrence through the compensatory principle is carefully calibrated to ensure that it is capped by the principle of *restitutio in integrum*. The compensatory regime "achieves compensation for the victim and forces the defendant to internalize the cost of harm, thus providing the economically-optimal level of deterrence, or regulation, of the risky activity."[55] There is no need to create a super-compensatory regime. To do so would actually disrupt the current balance with very real implications ─ particularly in the product liability context.

63. This is supported by economic analysis. In *An Economic Analysis of Waiver of Tort in Negligence Actions,* Edward Iaccobucci and Michael Trebilcock conclude:

> …decoupling remedies from actual damages in negligence cases generally, or in products liability cases in particular, is not well founded from an economic perspective. Theory and evidence suggests that the deterrence and insurance aspects of negligence are best achieved by linking remedies to losses actually suffered. In many contexts, disgorgement of gains from activities entailing negligent conduct

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[54] M. McInnes, "Gains-Based Relief for Breach of Contract: Attorney General v. Blake" (2001) Can. Bus. L. J. 72 (HeinOnline), at pgs. 91-92; **Appellants' Book of Authorities, Tab 9**

[55] C. Jones, "Panacea or Pandemic: Comparing 'Equitable Waiver of Tort' to 'Aggregate Liability' in Cases of Mass Torts with Indeterminate Causation" (2016) 2:1 Can. J. Compar. & Contempt. L. 301 (CanLII), at pg. 319

> may induce socially wasteful forms of over-deterrence. Economic analysis does not support the waiver of tort doctrine [disgorgement for wrongdoing].[56]

64. The authors explain that the equilibrium between restoration and deterrence inherent in the compensatory model encourages actors to make socially optimal choices. Manufacturers will make socially optimal choices over potentially riskier options. Furthermore, the price of products with riskier, less socially-optimal components will increase relative to non-negligently designed products. In turn, people are encouraged to purchase the cheaper ─ more socially optimal ─ product. This in turn, encourages manufacturers to internalize the risk of harm and make optimal choices to increase sales.[57]

65. In contrast, when the remedy is "decoupled" from the losses suffered – or the equilibrium interrupted as with disgorgement for wrongdoing ─ the market will see suboptimal deterrence that hurts everyone. Manufacturers would over-deter to account for disgorgement of profit, the increased cost of which would be passed on to buyers ─ even when the risk of harm is actually very low.[58] Manufacturers would then either stop selling a product, including socially useful products,[59] or they would continue to sell the product while "taking enormous care to avoid all possible tortious and non-tortious wrongs while raising prices to compensate for the additional costs of precaution and the possibility of nevertheless owing all the revenue to the plaintiffs…"[60] In the end:

> The consequence of this doctrine would predictably be fewer products being sold at higher prices. This clearly hurts sellers, but also hurts buyers, who must pay

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[56] E. Iacobucci & M. Trebilock, "An Economic Analysis of Waiver of Tort in Negligence Actions" (Spring, 2016) 66 U Toronto L.J. 173 (Westlaw), at pg. 174; **Appellants' Book of Authorities, Tab 6**

[57] E. Iacobucci & M. Trebilock, "An Economic Analysis of Waiver of Tort in Negligence Actions" (Spring, 2016) 66 U Toronto L.J. 173 (Westlaw), at pg. 183; **Appellants' Book of Authorities, Tab 6**

[58] E. Iacobucci & M. Trebilock, "An Economic Analysis of Waiver of Tort in Negligence Actions" (Spring, 2016) 66 U Toronto L.J. 173 (Westlaw), at pgs. 189, 192; **Appellants' Book of Authorities, Tab 6**

[59] J. Chapman & P. Shedden, "Class Proceedings, Gains-Based Claims, and Deterrence" (2007) 4:1 Can. Class Act. Rev. 47, at pg. 76; **Appellants' Book of Authorities, Tab 4**

[60] E. Iacobucci & M. Trebilock, "An Economic Analysis of Waiver of Tort in Negligence Actions" (Spring, 2016) 66 U Toronto L.J. 173 (Westlaw), at pg. 194; **Appellants' Book of Authorities, Tab 6**

> higher prices for precautions they do not want and for a lottery ticket that they do not want…[61]

66. Permitting disgorgement without loss or damage has serious implications. As Justice Chapnik points out in her dissenting judgment in *Serhan*, waiver of tort or disgorgement for wrongdoing basically introduces a type of strict liability for a defective product into our law.[62]

67. Manufacturers and suppliers would be liable for disgorgement of benefits or profits even though no injury, loss or damage has occurred. The injury, loss or damage may be limited, either in the number of persons affected, or the severity of the injury, loss or damage. Consider a manufacturer who discovers that a component may fail due to a faulty design. The failure may or may not have resulted in an accident, with or without any injury, loss or damage. Under disgorgement for wrongdoing, manufacturers may be exposed to unlimited claims for disgorgement of benefits or profits resulting from the sale of the product, regardless of the extent of any injury, loss or damage. Waiver of tort was appropriately rejected for a product liability claim for similar principled reasons in *Reid v. Ford Motor Company et al*.[63]

68. To the extent that greater deterrence may be called for in certain circumstances, the Court already has punitive damages at its disposal. Punitive damages can be carefully calibrated to the specific circumstances of the case. The majority of the Court of Appeal has not demonstrated any need or rationale for expanding the deterrence power of private civil law.

(d) Disgorgement for Wrongdoing Blurs the Roles of Negligence & Regulatory Law

69. By emphasizing *punishment* rather than *compensation*, disgorgement for wrongdoing blurs the roles of negligence law and regulatory law. In negligence, plaintiffs seek redress for *harms* sustained at the hands of others. In contrast, disgorgement for wrongdoing, detached from corresponding harm, encourages individuals to prosecute claims, not to restore their loss, but in the hope of obtaining a windfall. It would turn individuals into private attorneys in the pursuit of

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[61] E. Iacobucci & M. Trebilock, "An Economic Analysis of Waiver of Tort in Negligence Actions" (Spring, 2016) 66 U Toronto L.J. 173 (Westlaw), at pg. 194; **Appellants' Book of Authorities, Tab 6**

[62] *Serhan Estate v. Johnson & Johnson* (2006), 85 O.R. (3d) 665 (S.C.(D.C.)), at para. 253

[63] *Reid v. Ford Motor Company et al*, 2006 BCSC 712, at para. 23

what is effectively a civil fine,[64] but without the procedural and evidentiary protections that inhere in our system of criminal or regulatory law. [65]

70. In this respect, disgorgement for wrongdoing intrudes upon the legislative competency principle. Conduct deserving of punishment is clearly delineated and established by government through criminal and regulatory enactments. Such enactments reflect the important policy objectives of Parliament, Legislatures and regulators.

71. In fact, many activities are permitted and regulated by governments, notwithstanding that they will cause harm to some members of society. Governments have legalized and regulated alcohol consumption despite the fact that some people will become alcoholics. Government decided as a matter of public policy that legalization and regulation was preferable to the evils of prohibition. Parliament has recently legalized marijuana use despite evidence of negative effects, including effects on the mental development of young adults. Parliament has determined that legalization is preferable to the harmful effects of criminalization.

72. Similarly, Parliament and the Legislatures legalized and regulated video lottery gaming to prevent illegal gambling and to control gaming. The control and management of lottery schemes, including VLTs, was set up for two important public purposes: (i) to control gaming and eliminate illegal gambling and (ii) to provide revenue for provincial governments for important social services for the residents of their respective provinces. ALC reported net video lottery receipts (revenue less prize winnings[66]) for 2018 of $140,039,000 for Newfoundland and Labrador and $439,136,000 for Atlantic Canada.[67] Similar lottery schemes operate in other provinces. The majority decision has the potential to seriously affect the legislative scheme, compromising its purpose and the revenue derived by provincial governments.

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[64] J. Chapman & P. Shedden, "Class Proceedings, Gains-Based Claims, and Deterrence" (2007) 4:1 Can. Class Act. Rev. 47, at pg. 75; **Appellants' Book of Authorities, Tab 4**; M. Rosenberg, "Waiving Goodbye: The Rise and Imminent Fall of Waiver of Tort in Class Proceedings" (2010) 6:1 Can. Class Act. Rev. 37, at pgs. 85-86; **Appellants' Book of Authorities, Tab 10**

[65] *Whiten v. Pilot Insurance Co,* [2002] 1 S.C.R. 595, at para. 158

[66] 93% or 95% of video lottery receipts are returned to players as prize winnings in NL depending on the game.

[67] Atlantic Lottery Annual Report 2017-2018, at pgs. 27-28

73. Requiring the disgorgement of profits flowing from such activities has the potential to undermine such legislative policies and regulatory schemes. Disgorgement for wrongdoing fails to explain *why* courts should be moved to indirectly impose civil fines in matters of public importance or public policy. The most reasonable response is that they should not. The imposition of civil fines is a role for Parliament or the Legislatures, and the realm of regulatory and criminal law.

(e) Conclusion

74. There are sound reasons of principle and policy for rejecting disgorgement for wrongdoing as a remedial device or a cause of action. The private law has already developed a variety of causes of action that permit disgorgement in accordance with the principles and policies underlying those causes of action. Disgorgement for wrongdoing unnecessarily and unjustifiably undermines the compensatory principle, and distorts the public ─ private law divide, all with serious implications for manufacturers. As a result, the Appellants look to this Court to preserve "private law's doctrinal coherence, to ensure that one area of private law …is not distorted by the court's employment of another."[68]

Issue 2: Does the Statement of Claim disclose any reasonable cause of action in negligence, breach of the *Criminal Code*, breach of contract or unjust enrichment?

The Statement of Claim does Not Disclose a Reasonable Cause of Action

75. We next examine the regulation of VLT gaming and consider whether the Statement of Claim discloses any reasonable cause of action on the bases left open by the Court of Appeal decision. Is there any recognized wrong? The examination demonstrates that the Statement of Claim discloses no reasonable cause of action, either in negligence, breach of the *Criminal Code*, breach of contract, or unjust enrichment. Justice Welsh, in dissent, reached similar conclusions.

76. The *Lotteries Act* and the *Video Lottery Regulations* are constitutional.[69] The provincial regulatory regimes across Canada were set up to regulate and control what would otherwise have

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[68] R. Brown & M. Yaha, "Serhan v Johnson & Johnson: A Case Comment" (2005) 43:2 Alta. L. Rev. 469, at pg. 476

[69] *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6, at paras. 32-36; *R. v. Furtney*, [1991] 3 S.C.R. 89, at pgs. 102-103; *R. v. Warwaruk*, 2002 MBCA 100, 166 Man. R. (2d) 135, at paras. 32-41

been illegal gambling activities.[70] Section 207 of the *Criminal Code*,[71] headed Permitted Lotteries, permits lottery schemes which are regulated under provincial legislation. Section 207(1)(a), when read together with section 207(4), expressly permits the government of a province, either alone or in conjunction with another province, to operate games on or through a computer, video device or slot machine (usually referred to as video lottery terminals or VLTs) in accordance with any law enacted by the province. The *Act* and the *Regulations* provide a comprehensive scheme for the regulation of video lottery games by ALC. ALC is a Crown agency responsible for the implementation and administration of the *Act* and the *Regulations*. The Statement of Claim pleads that ALC is the "regulator and licensor of VLTs".[72]

77. The *Video Lottery Regulations*[73] define a "video lottery" as "a video lottery scheme or enterprise using one or more video lottery terminals". ALC's powers under the *Video Lottery Regulations* include: the approval of the operation of a video lottery (s.3(1)); the assessment of the suitability of siteholders (s.3(2)); the approval of the site of a video lottery (s.5(1)); the approval of the supply of VLTs and their installation (ss.6, 7); agreements with manufacturers and siteholders (s.7); and the approval of advertising or promotion (s.10). The *Regulations* provide that VLTs must comply with certain requirements regarding wagers, total exposure of players per play, limits on prizes per wager, programming so that prizes are not less than 80% and not more than 96% of money accepted by the VLTs (s.8). There is also a prohibition against manipulating VLTs to influence the payout (s.13). Section 6 of the *Lotteries Act*[74] creates an offence for breach of the *Act* or the *Video Lottery Regulations.*

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[70] In Newfoundland and Labrador, the legislative purpose was explained by Winston Baker, Minister of Finance and Deputy Premier, in the House of Assembly debate leading to passage of the *Lotteries Act*. Hansard, December 11, 1991, House of Assembly Proceedings, Vol. XLI No. 89, pgs. 29-30; **Appellants' Book of Authorities, Tab 5**

[71] *Criminal Code*, ss. 206(1), 206(2) and 207(1)(a), 207(4); *Code Criminel*, ss. 206(1), 206(2) and 207(1)(a), 207(4)

[72] Statement of Claim, paras. 8 and 55; **Joint Appellants' Record, Vol. II, Tab 8, pgs. 93, 102**

[73] *Video Lottery Regulations*, CNLR 760/96

[74] *Lotteries Act*, SNL 1991, c. 53

(a) There is No Cause of Action in Negligence

(i) Public Law Duties, not Private Law Duties

78. The *Lotteries Act* and the *Video Lottery Regulations* create duties to the public at large. The public nature of such duties is demonstrated by the purpose of the statute, the duties created by the *Act* and *Regulations*, and the offence created for non-compliance. The public nature of the duties is incompatible with imposing a private law duty of care on ALC owed to members of the public in general. Imposing a generalized private law duty of care on ALC is inconsistent with its public law duties – which public law duties are expressly pleaded by the Plaintiffs[75] – and must be rejected for lack of proximity and policy considerations, including indeterminate liability concerns.[76]

79. Both the Applications Judge[77] and the majority of the Court of Appeal[78] attempt to sidestep the general principle that entities with a public regulatory role do not owe claimants a duty of care by pointing to ALC's commercial activity and by suggesting that ALC's approval of the specific games authorized for play may not be considered a regulatory decision. The majority of the Court of Appeal stated:

> [193] Unlike the foregoing cases, there was in the current case a direct relationship between the appellant and the claimants in the form of alleged direct commercial transactions. That relationship is arguably not of a regulatory nature. What is at issue in this case is not the policy decision to introduce VLTs into the province and to allow persons to use them. Rather, it is the specific actions of the appellant, allegedly with the knowledge of specific games' deceptiveness and inherent addictiveness, in putting those games into currency. In choosing *particular* games to offer to the public and in engaging in individual transactions with the claimants, the appellant is arguably not performing regulatory functions but engaging in commercial activity designed to make a profit.
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> [Emphasis in the decision]

80. However, the Statement of Claim pleads that ALC is the regulator charged with a duty to act in the public interest.[79] The Statement of Claim pleads that no person may supply a VLT in

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[75] Statement of Claim, para. 55; **Joint Appellants' Record, Vol. II, Tab 8, pg. 102**
[76] *Ernst v. Alberta Regulator*, 2017 SCC 1, [2017] 1 S.C.R. 3, at para. 44
[77] Applications Decision, paras. 147-149; **Joint Appellants' Record, Vol. I, Tab 1, pg. 42**
[78] Court of Appeal Decision, para. 193-194; **Joint Appellants' Record, Vol II, Tab 5, pg. 65**
[79] Statement of Claim, para. 55; **Joint Appellants' Record, Vol. II, Tab 8, pg. 102**

the province unless approval has been given by ALC.[80] It also pleads that all VLT games are, by their very nature, deceptive, addictive and dangerous; that is "inherent" in VLTs.[81] The essence of the allegation is that VLTs should not be authorized for play by residents of Newfoundland and Labrador. That allegation goes to the heart of the regulatory regime and its purpose: to permit VLT gaming in the province, to regulate and license VLT gaming, and to preclude illegal gambling.

81. The issue of what VLT games are to be approved for play in the Province of Newfoundland and Labrador is the very thing that ALC is expressly empowered to determine. It is for ALC to balance the various factors relating to whether a VLT game should be approved for use in Newfoundland and Labrador. It is for ALC to determine whether the characteristics of a VLT game are such that it is appropriate for play in Newfoundland and Labrador. That is the very public policy decision which ALC is required to make.[82]

82. The majority of the Court of Appeal simply disregarded the underlying purpose of the legislation, concluding that VLT operation may not be socially useful: "…such findings could lead to the conclusion that the manner of operation of VLTs was not socially useful, even though the appellant was performing a regulatory function, and that to vindicate the deterrence/disincentive principle disgorgement was appropriate."[83] It is not for the courts to determine what is socially useful. The Legislature has determined that a regulated gaming industry is better than unregulated, illegal gambling with all its resulting social evils. It is not for the courts to make the public policy decision and to balance the social benefits and risks of VLT gaming. If ALC is precluded from authorizing any VLT games or any VLT line games (the predominant category of VLT games), the regulatory purpose would be frustrated.

83. The first question in determining whether a private law duty of care exists is whether the facts disclose a relationship of proximity between the plaintiff and the public entity. Where the

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[80] Statement of Claim, para. 6; **Joint Appellants' Record, Vol. II, Tab 8, pg. 92**
[81] Statement of Claim, paras. 12 and 30; **Joint Appellants' Record, Vol. II, Tab 8, pgs. 94, 97**
[82] In contrast, other matters would not constitute a core public policy decision, such as the supply of a machine with a risk of electrocution.
[83] Court of Appeal Decision, para. 185; **Joint Appellants' Record, Vol. II, Tab 5, pg. 62**

alleged duty of care conflicts with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity. Such a conflict exists where the imposition of the proposed duty of care would prevent the defendant from effectively discharging its statutory duties. There is no proximity where there would be potential conflict with the public duty (*Cooper*) or where the decisions require the exercise of legislatively delegated discretion and involve pursuing a myriad of objectives consistent with public rather than private law duties (*Edwards*).[84]

84. If a *prima facie* duty of care is found to exist, it may be negated by residual policy concerns. Decisions based on public policy considerations, like economic, social and political considerations, will not ground a private law duty of care.[85] Indeterminate liability considerations may also negate a *prima facie* duty of care at the second stage.[86]

85. The "alleged direct commercial transactions" referred to by the majority of the Court of Appeal are merely the payment of the small amount to play the game. That "relationship" is the same general relationship that ALC has with all players of VLT games. The *Video Lottery Regulations* explicitly prescribe the fees that may be charged, the amounts that may be paid out as prizes, and the amounts that may be retained by ALC. A relationship which is statutorily mandated and is general to all players is insufficient to constitute a special relationship of proximity.

86. The majority's assertion that the relationship is "arguably not of a regulatory nature" is misguided. The question is whether the relationship is proximate, not whether it is regulatory. As in *Edwards,* ALC's decision-making is the exercise of legislatively delegated discretion and involves pursuing a myriad of objectives consistent with public rather than private law duties. ALC must balance competing objectives in regulating and controlling VLTs, including avoiding illegal gambling and satisfying public demand for such games. The balancing of the competing issues is a core or true public policy decision based upon economic, social and political

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[84] *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83 at paras. 26-28; *R. v. Imperial Tobacco Canada*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 44; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at para. 44; *Edwards v. L.S.U.C.*, 2001 SCC 80; [2001] 3 S.C.R. 562, at para. 14

[85] *R. v. Imperial Tobacco Canada*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 63, 71-90

[86] *R. v. Imperial Tobacco Canada*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 96-100

considerations. ALC's public duties conflict with the alleged duty of care said to be owed to the claimants.

87. As in *Cooper*, the *Lotteries Act* and the *Video Lottery Regulations* are provisions aimed at the public good: the regulation of the gaming industry in order to eliminate illegal gambling and control legal gaming. Such public policy purposes, objectives and duties preclude the finding of proximity necessary to establish a private duty of care. Finally, the prospect of indeterminate liability would preclude the finding of a duty of care on residual policy grounds.

88. The case of *R. v. Imperial Tobacco*[87] is particularly instructive. This Court had to consider whether causes of action could be owed by government to consumers for, *inter alia*, negligent misrepresentation and duty to warn. The Court concluded that Canada did not owe a duty of care on either of those bases. There was no direct relationship of proximity, the decisions were matters of public policy, and indeterminate liability considerations precluded a cause of action.

89. In this case, the misrepresentation claim has been struck out.[88] In any event, misrepresentation requires reliance, which has been disavowed by the Plaintiffs and eliminated by the certification order. Both misrepresentation and duty to warn require a special relationship of proximity between a VLT player and ALC. A general relationship is insufficient to create a *prima facie* duty of care. No duty of care arises because of lack of proximity, public policy considerations, and indeterminate liability concerns.

90. The same factual allegations in this case were made in *Walsh v. Atlantic Lottery Corp.*[89] The Nova Scotia Court of Appeal accepted the trial judge's application of the *Anns* test to Mr. Walsh's claims. There was no potential duty of care owed to Mr. Walsh due to a lack of necessary proximity. Even if there was a potential duty of care, it would be negated at the second stage of the *Anns* test for overriding policy reasons, such as preventing indeterminate liability. The reasoning of the Nova Scotia Court of Appeal applies in this case. It is consistent with this Court's decisions applying the *Anns* test to regulators.

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[87] *R. v. Imperial Tobacco Canada*, 2011 SCC 42, [2011] 3 S.C.R. 45
[88] Order of the Court of Appeal, para. 2(a); **Joint Appellants' Record, Vol. II, Tab 6, pg. 87**
[89] *Walsh v. Atlantic Lottery Corp.*, 2015 NSCA 16, 355 N.S.R. (2d) 384, at para. 4

91. It is now reasonably well established in Canada that there is no generalized duty of care owed by regulators or casino operators to problem gamblers.[90] In *Paton Estate v. Ontario Lottery and Gaming Corp.*, the Ontario Court of Appeal recognized that, in certain circumstances, it might be possible for a casino owner to owe a duty of care to victims of an "obviously addicted", "out of control" "problem gambler" where a reasonable person would have realized that the person "could be using stolen funds to feed his or her addiction."[91] *Paton Estate* illustrated that specific facts would have to be pleaded and proven to establish such a special relationship of proximity between an individual player and ALC.

92. This is a class action on behalf of all VLT players, even VLT prize winners. It is not an individual action. The Statement of Claim does not plead specific facts to establish a special relationship of proximity to ground a possible cause of action on behalf of an individual. In order to fit the case within the parameters of the *Class Actions Act* and to avoid having it break down into individual factual inquiries for each class member, the Plaintiffs plead a generalized private law duty of care owed to all users of VLTs, regardless of whether they were "problem gamblers" or "out of control" gamblers who could demonstrate some special relationship of proximity with ALC. This is exactly the type of generalized duty of care that the courts have consistently rejected.

93. In summary, no private law duty of care arises in relation to the facts pleaded by the Plaintiffs in this case. There can be no cause of action without a duty of care.

(ii) International Perspective

94. Courts in the United Kingdom, Australia, New Zealand and the United States have also consistently held that there is no general duty of care to protect persons from gambling losses. Attempts by gamblers to sue for their losses have consistently failed since "common law tort principles do not require casinos to rescue compulsive gamblers from themselves."[92]

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[90] *Moreira v. Ontario Lottery and Gaming Corporation*, 2013 ONCA 121, 302 O.A.C. 244; *Burrell v. Metropolitan Entertainment Group*, 2011 NSCA 108, 309 N.S.R. (2d) 375; *Walsh v. Atlantic Lottery Corp.*, 2015 NSCA 16, 355 N.S.R. (2d) 384

[91] *Paton Estate v. Ontario Lottery and Gaming Corp.*, 2016 ONCA 458, 131 O.R. (3d) 273 at paras. 31-32 and 34-36

[92] *Taveras v. Resorts International Hotel Inc., et al.*, (2008) Civil No. 07-4555 (N.J. Dist. Court), at pg. 10

95. In the United Kingdom, the English Courts have rejected the existence of such a general duty of care. In *Calvert v. William Hill Credit Ltd.*, Justice Briggs said "the recognition of a common law duty to protect a problem gambler from self-inflicted gambling losses involves a journey to the outermost reaches of the tort of negligence, to the realm of the truly exceptional." Justice Briggs rejected such a duty of care since there is no general duty upon a person to prevent his neighbour from harming himself; it would be an invasion of his autonomy; and it would be unfair since it would enable the problem gambler to freely take home profits but permit him or her to look to the bookmaker to cover losses without even seeking the bookmaker's assistance to help control his or her gambling.[93]

96. In *Calvert*, Justice Briggs left open the question whether a narrower duty of care could arise in respect of a customer "whose behaviour has become so extreme as to demonstrate to a bookmaker that his gambling is wholly outside his control." A duty of care to a specific person based on a voluntary assumption of responsibility might arise where a bookmaker undertook expressly to prevent the gambler from gambling with the bookmaker. [94]

97. Justice Briggs expressly rejected the notion that the Court should attempt to fashion some remedy for disgorgement of profits. He first pointed out that the bookmaker's profit is not the obverse of the problem gambler's loss. He then concluded:

> 215. The second objection is that the common law of negligence seeks only to award compensation for loss, and does so by enquiring what the victim's position would be if the relevant breach of duty had not occurred. The equitable remedy of an account of profits operates in accordance with different principles, and there is in my judgment no simple crossover, in the absence of any proprietary equity or relevant fiduciary duty, by which the two can be run together. For the purposes of the common law remedy, once it is ascertained that the claimant would have been no worse off if the relevant duty had been performed, that is an end of the matter.[95]

98. In *Ehrentreu v. IG Index Ltd. (Rev 1)*, the English Court of Appeal affirmed Justice Brigg's conclusions, both in relation to tort law and in relation to contractual terms:

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[93] *Calvert v. William Hill Credit Ltd.*, [2008] EWHC 454 (Eng. Ch. Div.), at paras. 2, 146, 172-173; affirmed *Calvert v. William Hill Credit Ltd.*, [2008] EWCA Civ 1427 (Eng. C.A.)
[94] *Calvert v. William Hill Credit Ltd.*, [2008] EWHC 454 (Eng. Ch. Div.), at paras. 170, 176-187; *The Ritz Hotel Casino Ltd v. Geabury*, [2015] EWHC 2294 (QB), at para. 142
[95] *Calvert v. William Hill Credit Ltd.*, [2008] EWHC 454 (Eng. Ch. Div.), at paras. 2, 213-215; affirmed *Calvert v. William Hill Credit Ltd.*, [2008] EWCA Civ 1427 (Eng. C.A.)

> 46. …a duty of care to protect the other party from deliberately inflicting economic harm on himself is, in the words of Briggs J, "truly exceptional".
>
> 47. …it would require very clear express words in the contract, spelling out such a duty, before the Court could conclude that such an exceptional duty arose.[96]
>
> [Emphasis added]

99. The conclusion in *Calvert* and *Ehrentreu* that there is no generalized duty of care owed to all gamblers has been applied in other English cases, including *Ritz Hotel Casino Ltd. v. Al Geabury*[97] and *Quinn v. IG Index Ltd.*[98] *Calvert*, *Ehrentreu*, *Ritz Hotel* and *Quinn* also discuss the very individualistic causation issues which arise in relation to economic loss in gambling cases.

100. In *Kakavas v. Crown Melbourne Limited,* the High Court of Australia expressly affirmed that there is no general duty upon a casino to protect gamblers from themselves. The plaintiff's claim was based upon alleged unconscionable conduct under the *Trade Practices Act*. The Court pointed out that: "The decisions of this Court, in which claims for relief from unconscionable conduct have been litigated, illustrate the necessity for close consideration of the facts of each case in order to determine whether a claim to relief has been established."[99] The High Court added:

> … And the courts of equity have never taken it upon themselves to stigmatise the ordinary conduct of a lawful activity as a form of victimisation in relation to which the proceeds of that activity must be disgorged.[100]

101. The Federal Court of Australia in *Foroughi v. Star City Pty Limited*, found that a casino or "registered club" could not owe a duty of care to protect a club member from financial loss from gambling. The court should be slow to recognize a duty to prevent self-inflicted economic loss. This is especially so where the loss is suffered in gambling because such a loss is an inherent risk of the activity and cannot be avoided.[101]

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[96] *Ehrentreu v. IG Index Ltd. (Rev 1)* [2018], EWCA Civ 79, at paras. 46 and 47
[97] *The Ritz Hotel Casino Ltd v. Geabury,* [2015] EWHC 2294 (QB)
[98] *Quinn v. IG Index Ltd*, [2018] EWHC 2478 (Ch.)
[99] *Kakavas v. Crown Melbourne Limited*, [2013] HCA 25, at para. 14
[100] *Kakavas v. Crown Melbourne Limited*, [2013] HCA 25, at para. 26
[101] *Foroughi v. Star City Pty Ltd*, [2007] FCA 1503, at paras. 121, 124; See also *Politarhis v. Westpac Banking Corp.*, [2009] SASC 96

102. In *Guy v. Crown Melbourne Limited*,[102] the Federal Court of Australia dismissed a statutory unconscionable conduct claim brought on behalf of a purported class of "habituated" or "addicted" gamblers in relation to one particular electronic gaming machine at one particular casino. The case has some factual similarity to the allegations in this case. The case illustrates the highly individualistic reasons surrounding why people gamble, the nature of problem gambling, and the degree of personal control over gambling activities.

103. The New Zealand High Court has also rejected the existence of a generalized duty of care. The Court further concluded that there was not sufficient proximity between the plaintiff and the defendant to establish a duty of care on a specific individual basis. Policy considerations also favoured finding that no duty of care existed.[103]

104. The United States has similarly rejected the existence of such general duties of care.[104] In *Taveras v. Resorts International Hotel Inc., et al.*, the New Jersey District Court found that casinos did not have a duty to identify and exclude gamblers exhibiting compulsive tendencies. The creation of such a duty would lead to indeterminate liability. The Court was unwilling to "sacrifice common sense and stretch the common-law duty of care" by imposing such a duty.[105]

105. The West Virginia Supreme Court of Appeals in *Stevens v. MTR Gaming Group* found that no duty of care exists on the part of manufacturers of video lottery terminals, or the casinos in which the terminals are located, to protect users from compulsively gambling. Consequently, an action in negligence against the manufacturer or the casino may not be maintained for damages sustained by a user of the terminals as a result of his or her gambling.[106]

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[102] *Guy v. Crown Melbourne Ltd (No 2)*, [2018] FCA 36

[103] *Sinclair v. New Zealand Racing Board*, [2015] NZHC 2067, [2016] 2 NZLR 186, at paras. 91, 96-98

[104] *Harrah's Atlantic City Operating co. v. Massimo Dangelico* (2019), No. A-2158-17T3 (NJCA), pg. 3, contains a useful summary of US cases rejecting a duty of care on casinos to restrain the activities of compulsive gamblers. **Appellants' Book of Authorities, Tab 1**

[105] *Taveras v. Resorts International Hotel Inc., et al.*, (2008) Civil No. 07-4555 (N.J. Dist. Court), at pgs. 9-12

[106] *Stevens v. MTR Gaming Group*, 2016 No. 15-0821 (West Virginia C.A.)

106. One consistent factor in the foregoing decisions negating a duty of care is that legislatures have legalized gaming and have set up regulatory agencies to control gaming.[107] As the Indiana Court of Appeal stated in *Caesars Riverboat Casino, LLC v. Kephart*:

> Most importantly, public policy does not support the imposition of a unilateral duty on casinos to protect compulsive gamblers from the casinos' marketing activities and hosting. The General Assembly has made the public policy decision to legalize gambling and has set up a statutory and regulatory framework to govern how casinos do business in Indiana.[108]

107. These cases illustrate the international common law consensus that there is no private law duty of care owed generally to all players engaged in regulated gambling as this would be inconsistent with the regulator's public law duties.

(b) There is No Cause of Action for Breach of the Criminal Code

108. VLT gaming is constitutionally permissible and authorized under section 207(1) of the *Criminal Code*.[109] The Province has validly enacted a regulatory regime to conduct and manage VLT gaming. VLT gaming does not constitute "three-card-monte" for the reasons explained in ALC's factum. The provincial regulatory scheme cannot constitute a system of common gaming houses in contravention of the *Criminal Code*.

109. The "three-card-monte" exception in the *Criminal Code* should be narrowly interpreted in keeping with the basic principle that a person should not be exposed to the risk of criminal prosecution unless the language is clear. Any ambiguity is to be interpreted against a conclusion of criminality. Consistency is required; the *Criminal Code* must mean the same thing for everyone and in all circumstances, whether it is an accused on trial or the defendant ALC on a pleadings motion.

110. As already discussed, breach of the *Criminal Code* does not *per se* create a civil cause of action. Material facts must be pleaded to ground all of the constituent elements of the tort of

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[107] *Caesars Riverboat Casino, LLC v. Kephart*, (2009) 903 N.E. 2d 117 (Ind. C.A.), at pg. 126; *Taveras v. Resorts International Hotel Inc., et al.*, (2008) Civil No. 07-4555 (N.J. Dist. Court), at pg. 11; *Stevens v. MTR Gaming Group*, 2016 No. 15-0821 (West Virginia C.A.), at pg. 15

[108] *Caesars Riverboat Casino, LLC v. Kephart*, (2009) 903 N.E. 2d 117 (Ind. C.A.), at pg. 126

[109] *Criminal Code*, ss. 206(1), 206(2) and 207(1)(a), 207(4); *Code Criminel*, ss. 206(1), 206(2) and 207(1)(a), 207(4)

negligence, including duty of care, breach of duty of care, causation, loss and damage. No cause of action in tort for breach of the *Criminal Code* can exist for the same reasons that there can be no liability for negligence.

111. Breach of the *Criminal Code* cannot give rise to a civil disgorgement remedy. To do so would fundamentally distort the purpose of the criminal law. It would effectively amount to creating a new punishment for breach of the *Criminal Code* which has not been sanctioned by Parliament. The creation of such a remedy must be a matter for Parliament, not for the courts.

(c) There is No Cause of Action for Breach of Contract

(i) There are No Implied Contractual Terms

112. The *Lotteries Act* and the *Video Lottery Regulations* establish the context for the terms of a player's contract for the playing of video lottery games. A player's contractual rights simply reflect a payment by the player for the opportunity to play a video game approved by ALC. The regulatory regime, and the public policy considerations which relate to it, preclude a finding that the terms of the contract are as alleged. Rather, the contract is simply to play a VLT game approved by ALC as regulator.

113. Just as there cannot be a private law duty of care which is inconsistent with ALC's regulatory powers and responsibilities, so too there cannot be implied contractual terms which limit ALC's regulatory powers and responsibilities to determine the characteristics of the VLT games approved for play. The New Brunswick Court of Queen's Bench has recognized that VLT gaming takes place within a tightly controlled regulatory framework. ALC controls the hours of operation, the premises, the nature of the games and other matters, including anything that could have a negative social impact. There cannot be implied terms to the contract of play which would restrict ALC's ability to regulate VLT gaming, whether in relation to the games or otherwise, since that would be considered an illegal or inappropriate fetter on its powers and authority.[110]

[110] *055455 NB Inc. v. Atlantic Lottery Corp.*, 2015 NBQB 231, 443 N.B.R. (2d) 46, at paras. 103-109

114. Canadian courts have rejected alleged implied terms that are inconsistent with the regulatory framework governing the relationship between the parties.[111] In *Allarco Entertainment 2008 Inc. v. Rogers Communications Inc.*,[112] the Court found that alleged implied terms of the contract between the parties could not be imposed as this would be inconsistent with the policy that the CRTC should determine the matter as the regulator. Given the regulatory framework, a court cannot imply additional terms into the contract of play. A court cannot second guess ALC's decision through contractual implied terms, just as it cannot do so through private duties of care in tort law.

115. And as we have already seen, the English Court of Appeal has rejected the notion that a contractual duty might be implied to require the operator to protect a customer from incurring economic losses through gambling; "… it would require very clear express words in the contract ….[113]

(ii) A Disgorgement Remedy is Not Available

116. A breach of an implied term might give rise to a compensatory remedy, if causation and loss were pleaded and proven. But it does not entitle the claimant to a disgorgement remedy. A plaintiff does not have the right to choose disgorgement of benefits or profits instead of compensatory damages.[114] Further, breach of a contractual term would only entitle the claimant to be put in the position he or she would have been in if the contract had been performed. There is no pleading that either the Plaintiffs themselves or each and every VLT player would not have played "but for" the breach of the implied term. Instead, the Plaintiffs have specifically disclaimed causation of loss, and have, in effect, disclaimed causation of benefits or profit to ALC.

117. Whether a person would have played or continued to play VLTs, resulting in benefits or profits to ALC, requires a consideration of causation in the specific circumstances of each player; it is inherently individualistic. Only 8.6% of VLT players are alleged to be problem gamblers who

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[111] *Fairview Donut Inc. v. TDL Group Corp.*, 2012 ONSC 1252, 112 O.R. (3d) 190; affirmed *Fairview Donut Inc. v. TDL Group Corp.*, 2012 ONCA 867

[112] *Allarco Entertainment 2008 Inc. v. Rogers Communications Inc.*, 2011 ONSC 5623, 94 B.L.R. (4th) 110, at paras. 131-140, 220, 229

[113] *Ehrentreu v. IG Index Ltd. (Rev 1)*, [2018] EWCA Civ 79 (Eng. C.A.), at para. 47

[114] *Morris-Garner & Or. v. One Step (Support) Ltd.*, [2018] UKSC 20, [2018] 3 All E.R. 659, at paras. 81, 95

may have impaired control of their gambling activity. The vast majority of VLT players remain in control. They play for entertainment, for social reasons (an evening out), or for other personal reasons. Some players will win a jackpot. For the vast majority of VLT players, there can be no breach of contract. They received exactly what they expected to get: the opportunity to play a game and a chance to win.

118. Even for problem gamblers, there must be a causal connection between the alleged breach of contract and the loss to that person which resulted in a profit to ALC that it would not otherwise have received. That requires a pleading of causation; that the person would not have played the game but for the breach of contract. There is no such pleading in this case. The Plaintiffs do not plead that they became problem gamblers or that they lost control of their gaming behaviour. They do not plead that they played or continued to play because of the alleged characteristics of the games. There is no causal connection pleaded between the alleged breach of contract and either any loss or damage to the Plaintiffs or any profit derived by ALC.

119. The Statement of Claim does not disclose a reasonable cause of action for breach of contract.

(d) There is No Cause of Action for Unjust Enrichment

120. A cause of action for unjust enrichment requires three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) the absence of any juristic reason for the defendant's enrichment.

121. The first two elements are "straightforward" economic matters. Here, it is difficult to conceive of any "deprivation". VLT players received what they bargained for… the opportunity to play a game and potentially win a prize.

122. In any event, the third element is key. The plaintiff must show that there is no juristic reason for the plaintiff's loss and the defendant's enrichment. The established categories that can constitute juristic reasons include a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations.[115]

[115] *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 44

123. In the case of VLTs, the regulatory framework[116] and the contract of play provide the juristic reason for any loss or gain that arises when the person plays a VLT game approved by ALC. "The law, in fact, permits a person to pay money to play a game on a VLT with the result that the player may lose that money."[117] In the event of a breach of contract, the appropriate remedy is determined by the law of contract, not by the principles of unjust enrichment. Because there is a juristic reason for any loss or gain, no cause of action can exist based upon principles of unjust enrichment.

Issue 3: Does the Statement of Claim disclose any reasonable cause of action for disgorgement for wrongdoing if this Court recognizes in principle a cause of action for disgorgement requiring a causal connection between the alleged breach and the benefit or profit to the defendant?

There is No Reasonable Cause of Action for Disgorgement

124. As previously discussed, this Court should reject the creation of a new cause of action for disgorgement for wrongdoing based merely upon the breach of a duty of care, without proof of resulting loss or damage. However, if this Court accepts that such a cause of action may exist in principle, then two requirements are essential. First, the "wrong" must be more than merely an act or omission that triggers some sentiment of moral wrongdoing; there must be a breach of a private law duty of care. The duty of care must have the usual indicia of foreseeability of harm, proximity of relationship and reliance where necessary (e.g. misrepresentation). Second, there must be a "but for" causal connection between the wrong done to the plaintiff and the benefit or profit derived by the defendant. The simple assertion that the plaintiff is "within the ambit of risk" is insufficient.

125. These two essential requirements do not exist in this case. A claim for disgorgement for wrongdoing fails for substantially the same reasons that the traditional causes of action fail.

126. There is no proximity or reliance to give rise to a private law duty of care. Even if a *prima facie* duty of care could be found to exist, it would be negated for residual policy reasons, including public policy considerations and indeterminate liability concerns. Without a private law duty of care, there can be no cause of action. The alleged breach of the *Criminal Code* cannot constitute

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[116] *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 77
[117] Court of Appeal Decision, para. 37; **Joint Appellants' Record, Vol. II, Tab 5, pg. 15**

the wrong since a statutory breach also triggers the requirements for a private law duty of care. There is no breach of contract and no unjust enrichment. There is nothing to ground a cause of action for a disgorgement remedy.

127. The causal connection between the wrong and the benefit derived by ALC is also absent. The necessary causal connection would require the answer to the following question: *Did ALC breach a duty of care owed to the plaintiff, that caused the plaintiff to play VLT games, that resulted in benefits or profits derived by ALC from that plaintiff?*

128. A cause of action must exist at the individual level. As previously discussed, the *Class Actions Act* is merely procedural. It does not create substantive rights. It does not eliminate the requirements for an individual cause of action. The individual nature of the required causation analysis is illustrated by the various gambling and gaming cases referred to earlier.[118]

129. The causal connection in this case would essentially be the same as the causal connection required in a traditional negligence claim. The plaintiff must establish that "but for" the breach of duty, the plaintiff would not have played or continued to play VLT games, which resulted in either a loss to the plaintiff (a compensatory negligence claim) or a profit to ALC (a disgorgement claim). Neither the compensatory claim nor the disgorgement claim would be appropriate for certification since both require proof of individual causation.

130. In this case, the class is defined as those persons who paid to play VLT games. The Plaintiffs have disclaimed loss or damage. ALC's profit from an individual player is a function of what that individual has paid to play. Loss and profit in this case are inextricably linked. If the wrong caused no loss, then the wrong caused no profit. The Plaintiffs have disclaimed causation of loss or damage; by doing so, they have also effectively disclaimed causation of profit to ALC.

131. The majority of the Court of Appeal apparently rejects or ignores the need for proof of individual causation. However, the need for such a requirement is obvious. In the absence of such a causal connection, there is a disconnect between the plaintiff, the wrong, and the benefit. Anyone

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[118] See for example the discussion of why individuals play electronic gaming machines (EGMs) in *Guy v. Crown Melbourne Ltd (No 2),* [2018] FCA 36, at paras. 308-310.

could sue for any benefit as long as they could show some wrong "at large", whether or not the wrong was done to the plaintiff and whether or not the benefit received by the defendant was derived from that particular wrong. A wrong "in the air" or "at large" is insufficient to sustain the required causal connection. That would be a completely untenable position in the Canadian civil justice system.

132. There is no reasonable cause of action for disgorgement for wrongdoing, even if this Court concludes that such a cause of action may exist in principle.

Issue 4: Should certification of the class action have been denied pursuant to sub-sections 5(1)(b)-(e) of the *Class Actions Act*?

The Remaining Certification Requirements Are Not Satisfied

133. Pursuant to sub-sections 5(1)(b)-(e) of the *Class Actions Act*, the Plaintiffs also had to show that there is an identifiable class, common issues and an appropriate class representative to allow class action certification. A class action must also be the preferable procedure. In considering whether a class action is the preferable procedure the court may consider whether common issues predominate over individual issues and whether the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other means.[119] The Plaintiffs must satisfy the Court that there is "some basis in fact" which establishes each of the individual certification requirements.[120]

134. In asking whether there is an identifiable class, courts ask whether the class can be defined by objective criteria. The class must be "bounded (that is, not unlimited)."[121] The class in this case, as defined in the certification order, is what has been termed an "indeterminate class."[122] There is no conceivable way to verify who the class members are. Each game is played by inserting cash into machines and is therefore necessarily anonymous. There is no possible way to identify players other than with subjective, unverifiable evidence. There is also no possible way to determine amounts particular players spent, won or lost, or particular games they played. A member of the

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[119] *Class Actions Act*, SNL 2001, c. C-18.1, s. 5(2)
[120] *Pro-Sys Consultants Ltd. v. Microsoft*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 99
[121] *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 17
[122] *R. v. Imperial Tobacco Canada*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 61

class could literally be any resident of the Province who is not under a legal incapacity as anyone can play a VLT. It does not get any more indeterminate than that.

135. Not all members of the class are the same. They played for their own personal reasons; most played for fun and entertainment. The vast majority of the class members maintained complete control of their gaming behaviour. They suffered no loss nor did they contribute to any wrongful benefit or gain to ALC. In this case, success for one member cannot mean success for all.[123] The common issues must be looked at in their context considering the claim as a whole. This also relates to whether the class action is the preferable procedure. This was recognized in *Hollick*:

> 28 …In my view, it would be impossible to determine whether the class action is preferable in the sense of being a "fair, efficient and manageable method of advancing the claim" without looking at the common issues in their context.
>
> …
>
> 30 The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole.[124]

136. Looking at the context of the entire claim, the Court in *Hollick* concluded that the common issues were negligible in relation to the individual issues:

> 32 I am not persuaded that the class action would be the preferable means of resolving the class members' claims. Turning first to the issue of judicial economy, I note that any common issue here is negligible in relation to the individual issues.[125]

137. Similarly in this case, any common issues are negligible in relation to the individual issues. The claims must inevitably break down into an individualistic determination, both with respect to liability and quantum. Only a small percentage of players become problem gamblers. Whether any person became a problem gambler, whether that person lost control of his or her gaming behaviour and, if so, whether the cause of that loss of control was because of the characteristics of the machines or some other reason requires individual determination. And the amount of any loss to such person or the amount of any benefit derived by ALC would also require individual assessment and determination.

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[123] *Pro-Sys Consultants Ltd. v. Microsoft*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 108
[124] *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at paras. 28-30
[125] *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 32

138. The Plaintiffs' litigation plan requiring only a common issues trial to resolve all issues of liability and damages is unworkable. One cannot order disgorgement "at large"; one must consider each player on a case by case basis. In the final analysis, there is no identifiable class. Each class member is different. Individual issues predominate over common issues. The claims inevitably break down into individualistic determinations both with respect to liability and quantum. Success for one does not mean success for all. This action should not have been certified as a class action.

Conclusion

139. This Court should not recognize a new cause of action for disgorgement for wrongdoing. The Plaintiffs have not pleaded any reasonable cause of action. The Statement of Claim should be struck out, without leave to amend.

PART IV - SUBMISSIONS CONCERNING COSTS

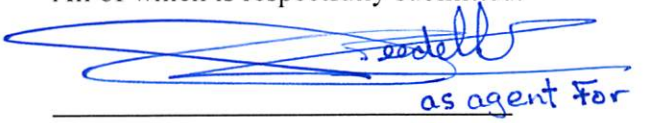
140. Section 37 of the *Class Actions Act* generally precludes costs being awarded to a party in respect of an application for certification of a class action. The Appellants submit that each party should bear its own costs in respect of this appeal.

PART V - ORDERS SOUGHT

141. It is respectfully requested that the appeal be allowed and the Statement of Claim be struck out in its entirety, without leave to amend, each party to bear its own costs.

Dated at St. John's, Newfoundland and Labrador, this 19th day of August, 2019.

All of which is respectfully submitted.



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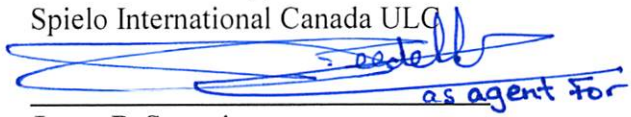

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PART VI – SUBMISSIONS ON CONFIDENTIALITY

The Appellants advise that there is no sealing or confidentiality order, nor is there any publication ban on any information in the file or any classification of information in the file as confidential under legislation or restriction on public access to information in the file that could impact on the Court's reasons in the appeal.

PART VII – TABLE OF AUTHORITIES

STATUTORY AND REGULATORY AUTHORITY **PARAGRAPHS**

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