

**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 GAMING  
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)

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**FACTUM OF THE INTERVENERS  
BALLY GAMING CANADA LTD. and BALLY GAMING INC.**  
(Pursuant to Rule 42 of the Rules of the Supreme Court of Canada)

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**DICKINSON WRIGHT LLP**

Barristers & Solicitors  
199 Bay Street  
Suite 2200, Box 447  
Commerce Court Postal Station  
Toronto, Ontario, M5L 1G4  
Tel: (416) 866-2929  
Fax: (416) 865-1398

**Michael D. Lipton, Q.C.**

mdliptonqc@dickinsonwright.com

**Kevin J. Weber**

kweber@dickinsonwright.com

and

**BENSON BUFFETT**

P. O. Box 1538  
9th Floor, Atlantic Place  
215 Water Street  
St. John's, NL A1C 5N8  
Tel: (709) 579-2081  
Fax: (709) 579-2647

**Paul D. Dicks, Q.C.**

pdicks@bensonbuffett.com

Counsel for the Interveners,  
Bally Gaming Canada Ltd. and Bally Gaming Inc.

**ORIGINAL TO:**           **Supreme Court of Canada**  
301 Wellington Street  
Ottawa, ON  
K1A 0J1

**COPIES TO:**

**GOODMANS LLP**

333 Bay Street, Suite 3400  
Toronto, Ontario M5H 2S7  
Tel: (416) 979-2211  
Fax: (416) 979-1234

**Julie Rosenthal**

jrosenthal@goodmans.ca

**Sarah Stothart**

sstothart@goodmans.ca

**GOLDBLATT PARTNERS LLP**

30 Metcalfe Street, Suite 500  
Ottawa, ON K1P 5L4  
Tel: (613) 482-2463  
Fax: (613) 235-3041

**Colleen Bauman**

cbauman@goldblattpartners.com

Agent for Counsel for the Appellant,  
Atlantic Lottery Corporation Inc. -  
Société des lotteries de l'Atlantique

and

**McINNES COOPER LLP**

10 Fort William Pl., 5<sup>th</sup> Floor  
Baine Johnson Centre  
St. John, NL A1C 1K4  
Tel: (709) 722-8735  
Fax: (709) 722-1763

**Daniel Simmons**

daniel.simmons@mcinnescooper.com

**Doug Skinner**

doug.skinner@mcinnescooper.com

and

**BENNETT JONES LLP**

3400 One First Canadian Place, P.O. Box 130  
Toronto, ON M5X 1A9  
Tel: (416) 863-1200  
Fax: (416) 863-1716

**Mike Eizenga**

eizengam@bennettjones.com

**Jonathan G. Bell**

bellj@bennettjones.com

**Counsel for the Appellant,  
Atlantic Lottery Corporation Inc. –  
Société des lotteries de l'Atlantique**

**CURTIS, DAWE**

11<sup>th</sup> Floor, 139 Water Street  
P.O. Box 337, Stn. C  
St. John's, NL A1C 5J9  
Tel: (709) 722-5181  
Fax: (709) 722-7541

**Ian F. Kelly, Q.C.**

ifkelly@curtisdawe.com

**Daniel M. Glover**

dgllover@curtisdawe.com

Counsel for the Appellants, VLC, Inc.,  
IGT-Canada Inc. and International  
Game Technology

**STEWART, McKELVEY**

P. O. Box 5038  
11th Floor, Cabot Place  
100 New Gower Street  
St. John's, NL A1C 5V3  
Tel: (709) 722-4270  
Fax: (709) 722-4565

**Colm St. R. Seviour, Q.C.**

**Koren A. Thomson**

cseviour@stewartmckelvey.com

Counsel for the Appellant,  
Spielo International Canada ULC

**COX & PALMER**

Scotia Centre  
Suite 1100, 235 Water Street  
St. John's, NL A1C 1B6  
Phone: (709) 738-7800  
Fax: (709) 738-7999

**Jorge P. Segovia**

jsegovia@coxandpalmer.com

Counsel for the Appellant, Tech  
Link International Entertainment Limited

**GOWLING WLG (CANADA) LLP**

2600-160 Elgin Street  
Ottawa, ON K1P 1C3  
Tel: (613) 786-0171  
Fax: (613) 786-3500

**Jeffrey W. Beedell**

jeff.beedell@gowlingwlg.com

Ottawa Agent for counsel for the  
Appellants, VLC, Inc., IGT-Canada  
Inc., International Game Technology,  
Spielo International Canada ULC,  
Tech Link International Entertainment  
Limited

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## **PART I - OVERVIEW AND FACTS**

1. For the purposes of this appeal, the Interveners, Bally Gaming Canada Limited and Bally Gaming Inc., adopt the statement of overview and facts set out in Part I of the facts of the Appellants, Atlantic Lottery Corporation Inc. – Société des lotteries de l'Atlantique, VLC, Inc., IGT-Canada Inc., International Game Technology, Spielo International Canada ULC and Tech Link International Entertainment Limited. On December 3, 2014, a Third Party Notice was issued out of the Supreme Court of Newfoundland and Labrador by the Appellant, Atlantic Lottery Corporation Inc. – Société des lotteries de l'Atlantique against Bally Gaming Canada Limited and Bally Gaming Inc. claiming, inter alia, reimbursement and indemnification of any amount that the said Appellant is ordered to pay to the Respondents. On January 18, 2017, the Newfoundland and Labrador Court of Appeal ordered that Bally Gaming Canada Limited and Bally Gaming Inc. be joined as an intervener to the appeal in the issue regarding the dismissal of the application to strike the statement of claim with the right to participate fully as a party and to take all actions necessary to protect their interests.

## **PART II - QUESTIONS IN ISSUE**

2. In addition to the questions raised in the facts of the Appellants, this appeal raises the question of whether the Court will countenance the creation of a new cause of action completely divorced from the compensatory principle, purportedly requiring the disgorgement of benefits without proof of loss on the part of a plaintiff, where the Respondents' desire for this new cause of action stems entirely from their need to evade well-established principles that would render the certification of their class action impossible.

### PART III - ARGUMENT

3. The Respondents issued this class action on April 26, 2012, two years after Justice Cullity of the Ontario Superior Court of Justice<sup>1</sup> and a majority of the Divisional Court<sup>2</sup> had dismissed the motion of the plaintiffs in *Dennis v. Ontario Lottery and Gaming Corporation* to certify their action as a class proceeding.

4. The plaintiff in *Dennis* claimed to have gambled at Ontario Lottery and Gaming Corporation (OLG) facilities on numerous occasions after entering into OLG's "self-exclusion" program. "Self-exclusion" is a voluntary program by which individuals sign a form consenting to their being denied entry to OLG facilities. The self-exclusion form provided by the OLG at the relevant time directed OLG to use "best efforts" to deny the individual access to OLG facilities, while also providing that the individual accepted that OLG was not liable for any losses if the individual continued to gamble, and released and discharged the OLG from any such losses.<sup>3</sup>

5. Section 5(1) of the Ontario *Class Proceedings Act*<sup>4</sup> requires that plaintiffs certify a class proceeding if:

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
  - (i) would fairly and adequately represent the interests of the class;

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<sup>1</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, 2010 ONSC 1332, 101 O.R. (3d) 23

<sup>2</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, 2011 ONSC 7024 (Div. Ct.)

<sup>3</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, supra note 1, paras. 27-31, 41-43.

<sup>4</sup> S.O. 1992, c. 6.

- (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
- (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Section 5(1) of the *Class Actions Act*<sup>5</sup> of Newfoundland and Labrador provides for substantially similar requirements.

6. Justice Cullity and a majority of the Divisional Court held that the plaintiff in *Dennis* had not satisfied the identifiable class, common issues and preferable procedure requirements. In refusing certification, Justice Cullity relied heavily on the ground that all significant issues of liability turned on proof that individual class members were vulnerable, pathological problem gamblers who returned to OLG facilities despite signing the self-exclusion form.<sup>6</sup> On appeal to the Divisional Court, the majority agreed with the motion judge and dismissed the appeal.<sup>7</sup>

7. Justice Cullity found that the proposed class definition failed to meet the “identifiable class” requirement because it was over-inclusive, and that there was an absence of a rational connection between the class definition and the proposed common issues.<sup>8</sup>

8. Justice Cullity further found that the proposed class definition failed to meet the “common issues” requirement because while many class members might be categorized as vulnerable, the degree of their addiction, if any, and the significance to be attributed to the concept of personal autonomy could only be determined on an individual basis.<sup>9</sup> Liability could only be established by an inquiry into the personal circumstances of each class member at particular times, their gambling history, the extent of their addiction or compulsion to gamble, and their likely behaviour if OLG

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<sup>5</sup> S.N.L. 2001, c. C-18.1.

<sup>6</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, supra note 1, paras. 190-192, 221-231.

<sup>7</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, supra note 2, paras. 26-41, 73.

<sup>8</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, supra note 1, para. 191.

<sup>9</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, supra note 1, para. 191.

had exercised its best efforts or reasonable care.<sup>10</sup> As well, the issue of causation would require an individual inquiry into whether there was a causal link between losses incurred by class members and the alleged breaches by OLG.<sup>11</sup> He concluded that if any class member had sought to advance their claims in an individual action, OLG:

“...would have been entitled to raise issues relating to personal autonomy and degrees of vulnerability in connection with elements of liability such as reasonable foresight of harm; proximity; unconscionability; a willing assumption of risk for the purposes of section 4(1) of the [*Occupiers’ Liability Act*]; causation of proven losses; contributory negligence; and punitive damages. The right of [OLG] to pursue such issues on an individual basis is not, in my opinion, excluded by pursuing the claims under the procedure of the CPA and defining the class, and the common issues, without reference to the vulnerability of the class members...”<sup>12</sup>

“For the reasons given, I am of the opinion that the attempt to define the common issues in a manner that would avoid an inquiry into the status of each class member as a ‘problem gambler’ has not been successful. I am satisfied that a proceeding that requires a consideration of the nature, degree and consequences of each class member’s gambling propensities is individualistic to an extent that it is not amenable to resolution under the procedure of the CPA.”<sup>13</sup>

9. Justice Cullity further found that the proposed class definition failed to meet the “preferable procedure” requirement because none of the three goals of class proceedings – judicial economy, access to justice and behaviour modification – would be served. From the perspective of judicial

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<sup>10</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, supra note 1, para. 221.

<sup>11</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, supra note 1, para. 230.

<sup>12</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, supra note 1, para. 192.

<sup>13</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, supra note 1, para. 231.

economy, the preponderance of individual issues relating to the circumstances of each of the class members for the purpose of determining whether actionable breaches of duty occurred would mean that a class proceeding would offer no gain in judicial economy.<sup>14</sup>

10. In 2011, the majority of the Divisional Court upheld the decision of Justice Cullity, finding that, *inter alia*, damages for breach of contract cannot be assessed in the aggregate and must be the subject of individual assessment;<sup>15</sup> the duty of care allegedly owed by OLG was rooted in OLG's knowledge of the vulnerability of individual class members, which also goes to foreseeability of loss or harm to each individual class member;<sup>16</sup> and on the issue of liability for breach of any such duty of care there will be significant individual issues involving contributory negligence and causation.<sup>17</sup>

11. At the time the Respondents herein initiated their class action, the decisions and reasons of Justice Cullity and the majority of the Divisional Court in *Dennis* were available to counsel for the Respondents. The class action of the Respondents has been carefully crafted to try to overcome the ruling in *Dennis*. The Respondents seek to create a new cause of action that would not require them to allege that any class member has suffered harm, losses or damages, because per *Dennis* any such allegations of harm, losses or damages will require a court to inquire into the personal circumstances of each class member, and therefore result in the matter failing to satisfy the identifiable class, common issues and preferable procedure requirements necessary to have the matter certified as a class action.

12. The creation of a new cause of action, which would make the remedy of disgorgement notionally available to plaintiffs who have not suffered harm, would be plainly inconsistent with

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<sup>14</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, supra note 1, para. 238.

<sup>15</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, supra note 2, paras. 35, 60.

<sup>16</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, supra note 2, para. 40.

<sup>17</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, supra note 2, para. 58.

all previous theories of civil liability. For their particular purposes, the Respondents seek to bring about a change in the law that would increase costs and introduce uncertainty for Canadian business and put it at a competitive disadvantage vis-à-vis other jurisdictions whose laws do not contemplate the uncertain risks of liability brought about by such a proposed cause of action.

13. In 2013, the Ontario Court of Appeal unanimously upheld the decisions of Justice Cullity and the majority of the Divisional Court in *Dennis*.<sup>18</sup> The Court of Appeal held that in order to properly assess liability for self-inflicted harms of the kind involved in litigation over gambling losses, it is necessary to engage in a protracted individualized inquiry into the particular circumstances of each gambler.<sup>19</sup>

14. The plaintiffs in *Dennis* argued before the Court of Appeal that the certification process should not focus on the individual circumstances of the class member, but rather on the alleged wrongdoings of the OLG, and characterized their claim as being an allegation of a “systemic wrong” by the OLG. Justice Sharpe disagreed. The causal chain between the losses allegedly suffered by class members was subject to the impact of many intervening factors. *Dennis* and the other class members had attended at OLG premises and lost money, but so had thousands of other individuals who had not signed self-exclusion forms. The plaintiffs’ own actions and circumstances were factors in the losses they suffered, and accordingly it could not be said that liability arose solely from the fact that OLG had failed to exclude them from its gaming facilities. To properly assess liabilities for self-inflicted harms, it would be necessary to carry out a protracted individualized inquiry into the particular circumstances of each gambler.<sup>20</sup>

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<sup>18</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, 2013 ONCA 501, 116 O.R. (3d) 321.

<sup>19</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, supra note 18, paras. 57, 71.

<sup>20</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, supra note 18, paras. 32, 55-56, 71.

15. The Respondents have brought an action with core allegations that sound in negligence, all based upon a single central allegation, namely, that the Appellant, Atlantic Lottery Corporation (“ALC”), negligently offered certain deceptive and harmful products – games played on video lottery terminals (“VLT gambling” or “VLTs”) which the Respondents allege are inherently addictive and inherently dangerous. Although in the courts below the Respondents disclaimed any allegation of harm, the first paragraph of their Statement of Claim states, quite inconsistently, that they have brought their putative class action “on behalf of persons and estates harmed by VLT gambling” in Newfoundland and Labrador.<sup>21</sup>

16. In *Dennis*, Justice Sharpe stated: “the alleged fault of OLG...is inextricably bound up with the vulnerability of the individual class members. The complaint against OLG is that it failed to prevent them from harming themselves.” In order to assess whether OLG was at fault and liable to the individual class members for the self-inflicted harm they suffered, the court would have to “engage in a detailed inquiry into the particular circumstances of individual gamblers including: their gambling history; the nature and severity of their addiction and vulnerability to gambling; whether and to what extent they experienced moments of clarity; whether they returned to OLG facilities to gamble despite signing the self-exclusion form; if they did return, the nature and extent of their gambling and whether they returned because of their addiction; whether they could have been prevented from gambling or suffering losses; whether and to what extent their failure to self-exclude contributed to the loss; and whether the exclusion of liability clause is enforceable against the particular individual.”<sup>22</sup>

17. As in *Dennis*, the Respondents herein have made a number of allegations that pertain to “problem” gambling, “pathological” gambling and gambling addiction, alleging that certain

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<sup>21</sup> Statement of Claim, para. 1.

<sup>22</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, supra note 18, paras. 55-56.

features of VLTs cause a greater potential for these phenomena.<sup>23</sup> The Respondents are clearly alleging the existence of self-inflicted harms of the kind referred to by Sharpe J.A. in *Dennis*. The Respondents have tried to avoid alleging that any of the members of the proposed class of plaintiffs in fact suffer from problem gambling, pathological gambling or gambling addiction, as doing so would require the court to engage in the kind of detailed inquiry discussed by Sharpe J.A. into the individual circumstances relevant to a claim of a defendant's liability for the self-inflicted harm of a plaintiff. This is the reason the Respondents ask the court to recognize an entirely new proposed cause of action; one in which disgorgement could be available to plaintiffs who have not alleged that they have suffered harm due to the actions of the defendant.

18. As Justice Sharpe concluded, in a case such as this the issue of the alleged fault of the defendant "cannot usefully or fairly be considered in the abstract and without reference to the circumstances of each individual class member." In the result, the Court of Appeal held that certification of the claim as a class action was not appropriate. To evade this conclusion, the Respondents have purported to create a new cause of action that would not require evidence of harm or loss for any member of the class, with the goal of compelling the certification of a class action in which the alleged fault of the defendant must be considered in the abstract and without reference to the circumstances of the individual class members.<sup>24</sup>

19. Justice Sharpe further concluded that in the circumstances of *Dennis*, a class proceeding would not provide an effective procedural tool to advance the resolution of the claims of the proposed class members. Rather, such a class proceeding "would amount to little more than a general commission of inquiry into the prevention of problem gambling."<sup>25</sup> By purportedly

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<sup>23</sup> Statement of Claim, paras. 10-33.

<sup>24</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, supra note 18, para. 57.

<sup>25</sup> *Dennis v. Ontario Lottery and Gaming Corporation*, supra note 18, para. 59.

eliminating the requirement that individual class members must allege that they suffered harm or losses due to the alleged wrong of ALC, the new and unprecedented cause of action which the Respondents ask the Court to recognize would in fact obligate the courts to carry out such general commissions of inquiry using the forum provided by class proceedings legislation.

20. The Respondents have since the outset of this matter sought to evade the proper application of these class proceeding principles to their allegations by trying not to allege any claim of harm, loss or damages, while at the same time obliquely alleging that ALC is liable for the self-inflicted harms suffered by unnamed pathological gamblers, problem gamblers and gambling-addicted persons who are not necessarily the Respondents and who may or may not be members of the proposed class of plaintiffs. To that end, they seek to divorce the principles of causation from the monetary order sought, in order to avoid the need to embark on an individualized inquiry into the circumstances of each person who played on a VLT.

21. In summary, we respectfully submit that the determination of Welsh J.A. of the Court of Appeal of Newfoundland and Labrador was correct. None of the causes of action put forward by the Respondents as a basis for a claim of entitlement to disgorgement is tenable, whether on the basis of negligence, breach of contract or otherwise. Accordingly, we respectfully submit that it is important for this Honourable Court to provide a clear path forward as to whether it will countenance the creation of a new cause of action completely divorced from the compensatory principle, requiring the disgorgement of benefits without proof of loss by a plaintiff, where the Respondents' desire for this new cause of action stems entirely from their need to evade well-established principles that would render the certification of their class action impossible.

#### **PART IV - COSTS**

22. Bally submits that each party should bear its own costs in respect of this appeal.

**PART V - REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT**

23. Counsel for the Interveners respectfully requests ten (10) minutes for oral argument.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 26<sup>th</sup> day of September, 2019.

For:

  
\_\_\_\_\_  
Michael D. Lipton, Q.C.  
Kevin J. Weber  
Dickinson Wright LLP

For:

  
\_\_\_\_\_  
Paul D. Dicks, Q.C.  
Benson Buffett PLC Inc.

**PART VI – SUBMISSIONS ON CONFIDENTIALITY**

24. The Interveners 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**

<b><u>Case Authority</u></b>	<b><u>Paragraphs</u></b>
<a href="#"><u><i>Dennis v. Ontario Lottery and Gaming Corporation, 2010 ONSC 1332, 101 O.R. (3d) 23 (Ont. S.C.J.)</i></u></a>	3, 6, 7, 8, 9
<a href="#"><u><i>Dennis v. Ontario Lottery and Gaming Corporation, 2011 ONSC 7024 (Ont. Div. Ct.)</i></u></a>	3, 4, 10
<a href="#"><u><i>Dennis v. Ontario Lottery and Gaming Corporation, 2013 ONCA 501, 116 O.R. (3d) 321 (Ont. C.A.)</i></u></a>	13,14,16,18,19