S.C.C. 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., ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL FOR SASKATCHEWAN, THE WESTERN LOTTERY CORPORATION, THE ALBERTA GAMING, LIQUOR, AND CANNABIS COMMISSION, THE CANADIAN GAMING ASSOCIATION, THE CANADIAN CHAMGER OF COMMERCE, and THE BRITISH COLUMBIA LOTTERY CORPORATION

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

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Interveners
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INTERVENER'S FACTUM

PART I – OVERVIEW AND FACTS

1. Lottery operators such as Western Canada Lottery Corporation ("**WCLC**") require certainty in order to determine whether the games offered on behalf of the provincial and territorial governments are legal, before they are offered. The same rationale that makes it desirable for a citizen to be able to know what actions are criminally prohibited makes it equally desirable for lottery operators to be able to know what lottery schemes are permitted.

2. In this case, it is alleged that a particular lottery scheme - video lottery terminals ("**VLTs**") - are inherently so deceptive as to fall within the prohibition against three card monte and any game similar to it in s.206 of the *Criminal Code*,[1] and therefore that VLTs are not a permitted lottery scheme under s.207 and that the operation of them by Atlantic Lottery Corporation Inc. constitutes a crime.[2]

3. The majority of the Court of Appeal reasoned: (a) that the "essence" of three card monte could be the fact that it is played in a deceptive way,[3] and therefore that the definition of three card monte or games similar to it in s.206(2) could properly be interpreted to include games the essence of which is a certain type of fraud or deception to which the crime is directed;[4] (b) this interpretation should only be done against a backdrop of evidence as to what is commonly known as three card monte and what the essential characteristics of the game can be considered to be;[5] and (c) as such, it is not plain and obvious that such a claim is certain to fail, and it should therefore be permitted to proceed to trial.[6]

4. The majority held that what is unclear is whether the similarity must be in relation to the ***methodology*** of the game, including the ostensible rules of play and implements used, or in relation

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1 RSC 1985, c C-46.
2 Reasons for Judgment of the Court of Appeal of Newfoundland and Labrador dated December 10, 2018 [**Court of Appeal Reasons**], at para 202, Joint Appellant's Record [**JAR**], Vol. II, Tab 5, p 67.
3 Court of Appeal Reasons at para 208, JAR, Vol. II, Tab 5, p 69.
4 Court of Appeal Reasons at para 211, JAR, Vol. II, Tab 5, p 70.
5 Court of Appeal Reasons at para 211, JAR, Vol. II, Tab 5, p 70.
6 Court of Appeal Reasons at para 217, JAR, Vol. II, Tab 5, p 72.

only to the "essence" of the game, i.e. the ***mischief*** (a certain type of fraud or deception) to which the crime is directed.[7]

5. In dissent, Welsh, J.A. reasoned that similarity must be determined in relation to the methodology of the game, citing the manipulation of cards or objects and sleight of hand as characteristics that are the essence of three card monte:[8]

> *26 Assuming these pleadings could be proven, it is clear, from the above definitions of three-card monte and the relevant provisions of the Criminal Code, that the pleadings do not provide a basis for determining that games played on VLTs are precluded by virtue of section 207(4), which authorizes the Province to conduct or manage a lottery scheme, other than three-card monte. The pleadings do not state that VLT games involve manipulations of cards or objects or sleight-of-hand that invite the player to identify and bet on the location of a particular item. That is the essence of three-card monte.*

6. By reasoning that similarity could also be determined by comparing VLTs to the mischief underlying the criminalization of three card monte without regard to methodology of play, the majority opened the door to a very broad interpretation of the definition of three card monte in ss. 206(2) and 207(4) of the *Criminal Code*.[9] Any lottery scheme that is "inherently deceptive" or "played in a deceptive way" could possibly be considered to be a game "similar" to three card monte, and therefore outside the authority of the lottery to operate under s.207(1)(a).

7. This expansive possible interpretation applies to all lottery schemes – not just VLTs – and creates a significant practical business problem for lottery operators.

8. If the question of whether a game is similar to three card monte turns on similarity of play methodology (i.e. the manipulation of cards or objects) or sleight of hand as found by Welsh J.A. in dissent, the lottery faces a known zone of risk. It cannot run sleight of hand games, or games where the outcome of the game is manipulated after the bet is made. It cannot lawfully conduct

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[7] Court of Appeal Reasons at para 211, JAR, Vol. II, Tab 5, p 70; see also Court of Appeal Reasons at para 207, JAR, Vol. II, Tab 5, p 69, where Welsh J.A. stated that three card monte has been criminalized "*because of the easy opportunity for persons operating the game… to act fraudulently by palming or secreting cards (or the other objects in use) or otherwise manipulating them in an improper and surreptitious manner that effectively cheats the participant out of his or her money*."

[8] Court of Appeal Reasons at para 26, JAR, Vol. II, Tab 5, p 12. See also *R v Andrews* (1975), [1976] 1 WWR 376, 28 CCC (2d) 450 (Sask CA), where the Saskatchewan Court of Appeal similarly focused on play methodology in determining whether certain games could be described as a wheel of fortune.

[9] Court of Appeal Reasons at paras 215-216, JAR, Vol. II, Tab 5, p 71, where the majority found that the definition of three card monte in s.206(2), which expressly includes games similar to three card monte, also applies to s.207(4)(a), where those words do not appear.

and manage lottery schemes that are similar to three card monte in that way. However, the expansive possible interpretation of "similar" to include games which are "inherently deceptive" or "played in a deceptive way" – without regard to play methodology or sleight of hand - creates uncertainty in knowing whether a particular game is criminal.

9. For the reasons discussed below, allowing similarity to be determined in relation not to the methodology of three card monte, but to the mischief underlying it, makes it impossible for WCLC to know in advance whether a particular lottery scheme is or is not within its authority to operate under the *Criminal Code*. This aspect of the decision raises important policy concerns about uncertainty in the criminal law that weigh against permitting such an interpretation or allowing the issue to proceed to trial.

PART II – QUESTION IN ISSUE

10. From WCLC's perspective, the question in issue is whether the Court of Appeal's expansive interpretative approach to determining whether a given lottery scheme is similar to three card monte renders the criminal law impermissibly uncertain.

PART III – ARGUMENT

A. The business problem for lottery operators

11. Authorized lotteries such as WCLC cannot offer three card monte, punch board, and coin table, which are the games listed in s. 207(4)(a) of the *Criminal Code*. Following the Court of Appeal's decision, WCLC now cannot determine whether a lottery scheme is or is not authorized by referring to this list of prohibited lottery schemes. WCLC now does not know whether an existing or future lottery scheme has underlying characteristics that could be found by a court to be deceptive, and therefore similar to the essence of three card monte, and consequently criminal.

12. This uncertainty makes it impossible for WCLC to know whether a game is or is not capable of being authorized as a lawful lottery scheme under s.207(1)(a) at the time that it is launched. This is so, because the determination of whether a game is similar to three card monte would only be made after the game is offered for sale in the market, and would depend on a court in the future finding: (1) that the essence of three card monte is deceptive play; and (2) that the

lottery scheme under consideration is inherently deceptive or played in a deceptive way, such that it is similar to three card monte, and therefore criminal and beyond the authority of the lottery to offer.

13. Lottery schemes will continue to be offered by WCLC across Western Canada. If WCLC has to discern whether a particular game is "inherently deceptive" or "played in a deceptive way" in order to know whether it is similar to the mischief that is the "essence" of three card monte, then it is left without any meaningful guideposts in making that determination. A brighter line is required.

14. This is of particular concern if the remedy of disgorgement for wrongdoing[10] is available. WCLC risks running games that might at some point in the future be found to be unlawful if it guesses incorrectly, and risks losing all of the profits generated from those games that are used for public purposes by WCLC's members, the governments of Alberta, Saskatchewan and Manitoba, and its associate members, the governments of the Northwest Territories, Yukon, and Nunavut.

15. WCLC also risks becoming the target of other class actions alleging that other lottery schemes operated by WCLC are deceptive, and therefore criminal. Since the Newfoundland Court of Appeal has held that it is not plain and obvious that such a claim with respect to VLTs is destined to fail, the decision would be persuasive authority supporting the conclusion that a similar claim involving lottery schemes other than VLTs should also be allowed to proceed to trial. This could result in the same landscape that followed this Court's ruling in *Pro-Sys Consultants Ltd. v Microsoft Corp*.,[11] where lower courts subsequently allowed waiver of tort claims to be certified and to proceed to trial on the basis that it was not plain and obvious that they would fail.[12] Class action claims against lottery operators alleging deceptive games would also likely be permitted to proceed.

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[10] Court of Appeal Reasons at para 170, JAR, Vol. II, Tab 5, p 57.
[11] 2013 SCC 57 at para 97, [2013] 3 SCR 477.
[12] See for example *G.C. v Merck Canada Inc*., 2019 SKQB 42, 2019 CarswellSask 87; *Watson v Bank of America Corporation*, 2014 BCSC 532, 2014 CarswellBC 807; *Tocco v Bell Mobility Inc*., 2019 ONSC 2916, 2019 CarswellOnt 7321; and *Walter v Western Hockey League*, 2017 ABQB 382, 62 Alta LR (6th) 85.

16. Allowing the interpretation permitted by the Court of Appeal creates an intractable legal and business problem for lottery operators. The judgment below runs afoul of the imperatives of certainty and predictability established by criminal jurisprudence. Consequently, the prospect of criminality now hovers over WCLC and other authorized lottery operators. Determining similarity by comparing a particular game to the mischief that is the "essence" of three card monte permits: (a) a judicial finding of criminality in hindsight; (b) a judicial finding of criminality by analogy; and (c) judicial creation of a crime not listed in the *Criminal Code*. Each of these points are discussed in turn below.

B. Point 1: Determining similarity by comparison to the mischief underlying three card monte permits a judicial finding of criminality in hindsight

17. Following the Court of Appeal's decision, an existing lottery scheme ostensibly authorized could suddenly become criminal. In addition, any player who purchased a ticket in such a lottery scheme could also be committing a crime under s.206(4), because the exception in s. 207(1)(g) allowing participation in legal lotteries would no longer apply.

18. This type of situation where otherwise lawful conduct could be held in hindsight to be criminal was criticized by McLachlin, J. (as she then was) in *R v Kelly*.[13] In *Kelly*, this Court considered the elements of the offence of corruptly offering or accepting secret commissions under s.426(1)(a) of the *Criminal Code*. At issue was the meaning of the word "corruptly." The majority held that a transaction is corrupt when the agent fails to disclose the benefit to his or her principal,[14] and that the required disclosure must be both timely and adequately detailed: "[t]he agent must disclose the nature of the benefit which is being received, the amount of that benefit calculated to the best of the agent's ability and the source of the benefit"; and "[t]he disclosure must be timely in the sense that the principal must be made aware of the benefit as soon as possible."[15]

19. Although concurring in the result, McLachlin J. expressed reservations about the requirement for timely and adequate disclosure. An agent taking a secret commission commits part of the offence, but the crime will not be complete until the later failure to make timely

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[13] [1992] 2 SCR 170, 92 DLR (4th) 643 [***Kelly*** cited to SCR].
[14] *Kelly* at 188-189.
[15] *Kelly* at 190-191.

disclosure, and the length of the intervening period will be unpredictable:

> *Under Cory J.'s analysis the commission of part of this offence can be deferred in accordance with the prevailing circumstances. If at that point in time which a trial judge with the benefit of hindsight determines to have been "timely" the agent has not made full disclosure and is aware of the lack of disclosure, the actus reus and mens rea appear,* ***transforming non-criminal conduct into criminal conduct. It is as if the offence lies dormant, waiting to be brought to germination by the bright light of judicial contemplation****.*[16] [Emphasis added]

20. From a policy perspective, this concern is equally applicable here. The operation of a lottery scheme that is legally authorized under s.207(1)(a) could be transformed into criminal conduct where a court determines in the future that the lottery scheme is "inherently deceptive" or "played in a deceptive way" and therefore similar to the essence of three card monte and beyond the power of WCLC to operate. In *Kelly*, McLachlin, J. described this as a "hovering possibility of criminality" that offends the requirement of certainty in the criminal law:

> *A hovering possibility of criminality, which may come into being when in the circumstances it is deemed (after the fact) to have been timely to disclose, offends the fundamental requirement that the criminal law be certain. Simply put, agents will not thereby be given fair notice in advance whether a proposed course of conduct is criminal...*[17]

21. This is echoed in academic commentary by Manning and Sankoff:[18]

> *Charges premised on vague and uncertain statutory provisions are unfair and* ***it is equally unfair for an accused to be forced to wait until a trial judge declares what the parameters and content of the offence are.*** *The principle that the creation of types and ingredients of offences is for Parliament, rather than the courts, it a long-standing one. Since Frey v. Fedoruk, Canada has adopted the principle that both crimes and punishments must be imposed by a fixed or determined law. If an accused cannot tell in advance whether an offence is one of strict or absolute liability, or whether the Crown or defence must prove some or all the element, or whether the offence is to be judged by objective or subjective standards, both procedural and substantive unfairness arises. In summary, if the legislation is not clear* ***and if an accused cannot tell until a court decides what the contours and parameters of the offence are then the accused is being treated in a manner that is contrary to the principles of fundamental justice.*** [Emphasis added]

22. If the criminal law is uncertain, it becomes unfair. People who believe they are acting within the law may find themselves prosecuted, convicted, imprisoned and branded as criminals.[19] The possibility that WCLC could be found to not be acting within the law by offering a particular game and that its conduct could be branded in hindsight as criminal is obviously a material concern, particularly because it offers lottery schemes as a permitted exception to the criminal law.

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[16] *Kelly* at 203 [emphasis added].
[17] *Kelly* at 204.
[18] Morris Manning & Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 5th ed (Toronto: LexisNexis, 2015) at para 2.80.
[19] See *R v Cuerrier*, [1998] 2 SCR 371 at para 48, 162 DLR (4th) 513 **[*Cuerrier*]**.

C. Point 2: Determining similarity by comparison to the mischief underlying three card monte permits a judicial finding of criminality by analogy

23. A second concern with the Court of Appeal's decision is that it expressly invites courts to determine whether a lottery scheme is similar to three card monte (and therefore illegal), by drawing an improper analogy not to the ***methodology*** of the game of three card monte, but to the type of ***mischief*** which underlies the criminalization of it.

24. In *Front Commun des Personnes Assistées Sociales du Québec c. Réseau de Télévision Quatre-Saisons Inc.*,[20] the Federal Court of Appeal held that interpretation of criminal provisions by analogy in this way is not permissible:

> *20 Finally, the principle of legality does not permit interpretation by analogy in criminal law, as Profs. Fortin and Viau explained in their Traité de droit pénal général, Montréal, Éditions Thémis, 1992, at page 28:*
>
> > [TRANSLATION]
> > The principle of legality excludes analogous interpretation from our law**.** Essentially this method of interpretation consists of comparing two phenomena or situations which have a resemblance in what is regarded as their essentials, and which differ in incidental respects, and considering only what is common between the phenomena so as to treat them on an analogous basis. For example, the law prohibits situation A and the evidence against the accused discloses situation B, not prohibited by law. The judge holds that situation B, although different from situation A, is so close to it that he has decided to apply the prohibition existing against situation A. This method is inconsistent with the principle of legality, because situation B becomes the subject of a judicial, not a legislative, prohibition. In fact, the judge is legislating.

25. In this case, the law prohibits three card monte (Situation A), but does not prohibit VLTs (Situation B). The Court of Appeal reasoned that a trial judge could hold that VLTs, although functionally different from three card monte, are in "essence" so close to type of mischief which underlies the criminalization of three card monte that the court could apply the prohibition against three card monte to VLTs.

26. It is readily acknowledged that a comparison must take place. VLTs must be compared to three card monte in order to determine whether a VLT is a game that is similar to three card monte

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[20] 2003 FCA 394, 318 NR 229 [***Front Commun***].

within the definition in s.206(2). However, if in doing so an analogy is drawn not between the play methodology of the two games, but between VLTs and the type of mischief which a court considers to underlie the criminalization of three card monte, then the risk identified in the passage quoted above arises. VLTs could become the subject of a judicial, not a legislative, prohibition. Cartwright J. (as he then was) rejected such an approach in the following terms in *Frey v. Fedoruk*:[21]

> *I think that if any course of conduct is now to be declared criminal, which has not up to the present time been so regarded, such declaration should be made by Parliament and not by the Courts*.

D. Point 3: Determining similarity by comparison to the mischief underlying three card monte permits the judicial creation of a crime not contained in the Criminal Code

27. Finally, the Court of Appeal's decision permitting the possible criminalization of a game that is similar not to the play methodology of three card monte, but to the mischief that is the "essence" of three card monte, broadens the criminal prohibition in a way that would allow courts to effectively create a new crime.

28. Determining which lottery schemes are not authorized under s. 207(4) is a matter for Parliament, not the courts. In *R v Cuerrier*,[22] McLachlin, J. (as she then was) stated that:

> *34 ... Clear language is required to create crimes. Crimes can be created by defining a new crime, or by redefining elements of an old crime.* ***When courts approach the definition of elements of old crimes, they must be cautious not to broaden them in a way that in effect creates a new crime. Only Parliament can create new crimes and turn lawful conduct into criminal conduct****...* [Emphasis added]

29. The Court of Appeal's decision runs contrary to this principle. If similarity is determined by comparing the characteristics of a lottery scheme to the certain type of fraud or deception underlying the criminalization of three card monte, then every judicial decision which finds certain characteristics of game design, game play, or odds disclosure to be deceptive broadens the scope of the prohibited conduct to include games with those characteristics, regardless of play methodology and regardless of whether they are listed in s.207(4) of the *Criminal Code*.

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[21] [1950] SCR 517 at 530, [1950] 3 DLR 513. See also the opening paragraph on page 530.
[22] *Cuerrier* at para. 34.

30. Authorized lotteries would then not only be unable to offer the listed games of three card monte, punch board, and coin table, but also VLTs and other games that are not listed s. 207(4) that are found in the future to be similar to three card monte. New games would effectively be added to the list of prohibited games by judicial decree. One should not have to search the books to discover the common law in order to determine if something is an offence.[23]

31. In *R v W (DL)*,[24] the Crown sought to have the court expand the scope of criminal liability for bestiality, changing the offence from one relating to sexual intercourse between a human and an animal to one proscribing any sexual touching between a human and an animal. In rejecting the Crown's argument, this Court stated that:

> *66 The Crown's position in this case directly implicates the principle that it is for Parliament and not the courts to expand the scope of criminal liability. The Crown invites the Court to develop the common law definition of bestiality so as to expand the scope of criminal liability for that offence. If we accept the Crown's position, the offence will fundamentally change from one relating to sexual intercourse between a human and an animal to one proscribing and punishing any touching of a sexual nature between a human and an animal. As I will explain, there is no clear statutory mandate to do so. And, to accept that invitation would be to exceed the proper role of the courts in defining criminal liability.*

32. This principle is also engaged here. If the Court of Appeal's decision is upheld, the list of lottery schemes prohibited by the language of the *Criminal Code* could fundamentally change by judicial decree, thereby exposing WCLC and lottery players to criminal liability. The readily understood prohibition against running games that are functionally similar to three card monte in terms of play methodology or sleight of hand or manipulation of the outcome after the bet is made could change to a more opaque prohibition against running any games the "essence" of which is the type of fraud or deception to which the crime is directed. Such an expansion of the potential scope of criminal liability for authorized lotteries would be for Parliament, not the courts, to decide.

E. Conclusion

33. At its core, the policy concern is one of certainty and predictability. Lottery operators need a bright line - a practical standard for assessing similarity - to be able to determine whether the games offered on behalf of the provincial and territorial governments are legal, before they are offered. The Court of Appeal's expansive interpretation of possible similarity to three card monte

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[23] *R v Jobidon*, [1991] 2 SCR 714 at 774-775, 66 CCC (3d) 454, Sopinka J, concurring in the result.
[24] 2016 SCC 22 at para 66, [2016] 1 SCR 402.

detracts from this and makes it impossible for lottery operators to predict whether offering a particular lottery scheme is lawful at the time it is offered.

34. As this Court stated in *R v Mabior*,[25] this type of lack of predictability is contrary to the rule of law:

> *14 ... It is a fundamental requirement of the rule of law that a person should be able to predict whether a particular act constitutes a crime at the time he commits the act. The rule of law requires that laws provide in advance what can and cannot be done: Lord Bingham, The Rule of Law (2010). Condemning people for conduct that they could not have reasonably known was criminal is Kafkaesque and anathema to our notions of justice. After-the-fact condemnation violates the concept of liberty in s.7 of the Canadian Charter of Rights and Freedoms and has no place in the Canadian legal system.*

35. WCLC submits that a brighter line would exist if similarity is determined with regard to play methodology or sleight of hand as found by Welsh J.A. in dissent, instead of with regard to an ethereal conception of the mischief that is the "essence" of three card monte that is not spelled out in the *Criminal Code.*

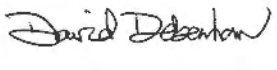
PART IV – COSTS

36. WCLC does not seek costs and respectfully asks that costs not be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Regina, Saskatchewan this 8th day of November, 2019.

SIGNED BY:



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[25] 2012 SCC 47, [2012] 2 SCR 584.

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chapters, we shall examine how this principle is interpreted in relation to other common law defences.[158]

¶2.78 While a reasonable addition to section 7, the principle of moral involuntariness — as described — could have considerable ramifications at some point. The passage above suggests that only conduct that is the product of "a free will ... unhindered by external constraints" should be the subject of criminal liability. This is problematic in one sense, as there are undoubtedly numerous criminal acts that would not meet the strict standards of duress yet could still be regarded as having been hindered by external constraints. But the goal should not be to exculpate any actions suffering from the whiff of coercion. Only conduct that is without "any realistic choice", as the Court describes the principle in a later excerpt, should be regarded as morally involuntary.[159]

¶2.79 There has also been criticism of the viability of moral voluntariness as a principle of fundamental justice, including assertions that the principle is too broad, too vague or simply does not accurately identify the true principle at play in defences such as necessity or duress.[160] There is some validity to these concerns. While the concept of free choice seems reasonable as a starting point, the law does not permit persons to act as they wish solely because they lack a real decision in how to proceed. The defences of duress and necessity both have strong proportionality elements that raise questions about the idea that choice is at the heart of the equation. As Professor Yeo suggests,[161] a stronger approach would have focused on the weaknesses inherent in the statutory defence of duress and invalidate limitations that were inconsistent and arbitrary with the defence's own basic premise. The moral voluntariness principle certainly solved one problem, but in doing so it may have created the potential for future confrontations that will need to be addressed at a later date. That said, not much has been made of the constitutional aspect of moral voluntariness since *Ruzic* was released. Though the principle seems to possess considerable potential for disruption, it has remained dormant for the past 15 years.

(e) Vagueness

¶2.80 An accused person must be able to tell in advance what type of offence is being charged as the whole approach to a defence depends on it. Charges

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[158] See Chapter 8: Defences – General Observations, and Chapter 13: Defences of General Application.

[159] There are other concerns regarding this idea of "choice" as well, including the notion that it is not truly the focus of the duress test. Rather, the focus is on "the quality of legitimacy of the emotions one feels, not their magnitude": Benjamin Berger, "Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Defences" (2006) 51 McGill L.J. 99 at 109.

[160] See, for example, Stanley Yeo, "Challenging Moral Involuntariness As a Principle of Fundamental Justice" (2002) 28 Queen's L.J. 335; Stephen Coughlan, "Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change?" (2002) 7 Can. Crim. L. Rev. 147.

[161] *Ibid.*

premised on vague and uncertain statutory provisions are unfair and it is equally unfair for an accused to be forced to wait until a trial judge declares what the parameters and content of the offence are. The principle that the creation of types and ingredients of offences is for Parliament, rather than the courts, is a long-standing one. Since *Frey v. Fedoruk*,[162] Canada has adopted the principle that both crimes and punishments must be imposed by a fixed or determined law. If an accused cannot tell in advance whether an offence is one of strict or absolute liability, or whether the Crown or defence must prove some or all the elements, or whether the offence is to be judged by objective or subjective standards, both procedural and substantive unfairness arises. In summary, if the legislation is not clear and if an accused cannot tell until a court decides what the contours and parameters of the offence are then the accused is being treated in a manner that is contrary to the principles of fundamental justice.

¶2.81 The general distaste for vague and uncertain laws was a staple of the common law long before the Charter was enacted. In *Shaw v. D.P.P.*,[163] Lord Reid famously stated that "[i]t has always been thought to be of primary importance that our law and particularly our criminal law should be certain; that a man should be able to know what conduct is and what is not criminal." In *Marcotte v. Canada (Deputy Attorney General)*, Dickson J. reiterated this point, holding:

> It is unnecessary to emphasize the importance of clarity and certainty when freedom is at stake. No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced.[164]

When the Charter was enacted, it was not immediately clear whether these general principles would rise to a constitutional status, but it is worth noting that the doctrine requiring that statutes not be vague or uncertain has deep roots in American constitutional law. In *Grayned v. Rockford (City)*,[165] Justice Marshall described the underlying principles of the doctrine in the following terms:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis with the attendant

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[162] [1950] S.C.J. No. 21, [1950] S.C.R. 517 (S.C.C.).
[163] [1962] A.C. 220 at 281.
[164] [1974] S.C.J. No. 142, [1976] 1 S.C.R. 108 at 115 (S.C.C.). See also *Cotroni v. Québec (Police Commission)*, [1977] S.C.J. No. 101, [1978] 1 S.C.R. 1048 at 1058 (S.C.C.).
[165] 408 U.S. 104 (1972).