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 BETWEEN:

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

Appellants
(Respondents)

-AND-

DOUGLAS BABSTOCK AND FRED SMALL

Respondents
(Respondents)

-AND-

BALLY GAMING CANADA LTD. AND BALLY GAMING INC.; THE ATTORNEY GENERAL OF ONTARIO; THE ATTORNEY GENERAL OF MANITOBA; THE ATTORNEY GENERAL FOR SASKATCHEWAN; WESTERN CANADA LOTTERY CORPORATION; ALBERTA GAMING, LIQUOR, AND CANNABIS COMMISSION; CANADIAN GAMING ASSOCIATION; CANADIAN CHAMBER OF COMMERCE and BRITISH COLUMBIA LOTTERY CORPORATION

Interveners

FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF SASKATCHEWAN

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

Counsel for the Intervener, Attorney General of Saskatchewan

Jared G. Biden
Saskatchewan Ministry of Justice
and Attorney General
900 – 1874 Scarth Street
Regina, SK S4P 4B3

Tel: (306) 787-8383
Fax: (306) 787-0581
Email: jared.biden@gov.sk.ca

Ottawa Agent for Counsel for the Proposed Intervener, Attorney General of Saskatchewan

D. Lynne Watt
Gowling WLG (Canada) LLP
Barristers and Solicitors
160 Elgin Street Suite 2600
Ottawa, ON K1P 1C3

Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Counsel for the Appellant, Atlantic Lottery Corporation Inc.

Julie Rosenthal
Sarah Stothart
Daniel Simmons
Doug Skinner
Mike Eizenga
Goodmans LLP
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Ontario
M5H 2S7

Tel: (416) 979-2211
Fax: (416) 979-1234
Email: jrosenthal@goodmans.ca

Ottawa Agent for Counsel for the Appellant, Atlantic Lottery Corporation Inc.

Colleen Bauman
Goldblatt Partners LLP
500-30 Metcalfe St.
Ottawa, Ontario
K1P 5L4

Tel: (613) 482-2463
Fax: (613) 235-3041
Email: cbauman@goldblattpartners.com

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

Ian F. Kelly, Q.C.
Daniel M. Glover
Curtis, Dawe
11th Floor, 139 Water Street
P.O. Box 337, Stn. C
St. John's, Newfoundland and Labrador
A1C 5J9

Tel: (709) 722-5181
Fax: (709) 722-7541
Email: ifkelly@curtisdawe.com

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

Jeffrey W. Beedell
Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario
K1P 1C3

Tel: (613) 786-0171
Fax: (613) 788-3587
Email: jeff.beedell@gowlingwlg.com

Counsel for the Appellant, Spielo International Canada ULC

Colm St.R. Seviour, Q.C.
Koren A. Thomson
Stewart McKelvey
100 New Gower Street, Suite 110
P.O. Box 5038
St. John's, Newfoundland & Labrador
A1C 5V3

Tel: (709) 722-4270
Fax: (709) 722-4565
Email: cseviour@stewartmckelvey.com

Ottawa Agent for Counsel for the Appellant, Spielo International Canada ULC

Jeffrey W. Beedell
Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario
K1P 1C3

Tel: (613) 786-0171
Fax: (613) 788-3587
Email: jeff.beedell@gowlingwlg.com

Counsel for the Appellant, Tech Link International Entertainment Limited

Jorge P. Segovia
Cox & Palmer
Scotia Centre, Suite 110
235 Water Street
St. John's, Newfoundland & Labrador
A1C 1B6

Tel: (709) 570-5331
Fax: (709) 726-4864
Email: jsegovia@coxandpalmer.com

Ottawa Agent for Counsel for the Appellant, Tech Link International Entertainment Limited

Jeffrey W. Beedell
Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario
K1P 1C3

Tel: (613) 786-0171
Fax: (613) 788-3587
Email: jeff.beedell@gowlingwlg.com

Counsel for the Respondents, Douglas Babstock and Fred Small

Kirk M. Baert
Celeste Poltak
Chelsey F. Crosby, Q.C.
Koskie Minsky LLP
900 – 20 Queen St. W.
Toronto, Ontario
M5H 3R3

Tel: (416) 595-2092
Fax: (416) 204-2889
Email: kmbaert@kmlaw.ca

Ottawa Agent for Counsel for the Respondents, Douglas Babstock and Fred Small

Eugene Meehan, Q.C.
Supreme Advocacy LLP
100 – 340 Gilmour Street
Ottawa, Ontario
K2P 0R3

Tel: (613) 695-8855 Ext: 101
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca

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

Paul D. Dicks, Q.C.
Michael D. Lipton, Q.c.
Benson Buffett
P.O. Box 1538, 9th Floor, Atlantic Place
215 Water Street
St. John's, Newfoundland & Labrador
A1C 5N8

Tel: (709) 579-2087
Fax: (709) 579-2647
Email: pdicks@bensonbuffett.com

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

David R. Elliot
Dentons Canada LLP
99 Bank Street
Suite 1420
Ottawa, Ontario
K1P 1H4

Tel: (613) 783-9699
Fax: (613) 783-9690
Email: david.elliott@dentons.com

Counsel for the Intervener, Attorney General of Ontario

Brent Kettles
Attorney General of Ontario
720 Bay Street
8th Floor
Toronto, Ontario
M7A 2S9

Tel: (416) 553-6739
Fax: (416) 326-4181
Email: brent.kettles@ontario.ca

Ottawa Agent for Counsel for the Intervener, Attorney General of Ontario

Maxine Vincelette
Juristes Power
130 rue Albert
bureau 1103
Ottawa, Ontario
K1P 5G4

Tel: (613) 702-5573
Fax: (613) 702-5573
Email: mvincelette@juristespower.ca

Counsel for the Intervener, Attorney General of Manitoba

Denis Guénette
Department of Justice Manitoba
7th Floor - 405 Broadway
Legal Services Branch
Winnipeg, Manitoba
R3L 3C6

Tel: (204) 945-5183
Fax: (204) 948-2826
Email: Denis.Guenette@gov.mb.ca

Ottawa Agent for Counsel for the Intervener, Attorney General of Manitoba

D. Lynne Watt
Gowling WLG (Canada) LLP
Barristers and Solicitors
160 Elgin Street Suite 2600
Ottawa, ON
K1P 1C3

Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Counsel for the Intervener, Western Canada Lottery Corporation

James S. Ehmann, Q.C.
Keith Kilback
Kanuka Thuringer
1400 - 2500 Victoria Ave
Regina, Saskatchewan
S4P 3X2

Tel: (306) 525-7222
Fax: (306) 359-0590
Email: jehmann@ktllp.ca

Ottawa Agent for Counsel for the Intervener, Western Canada Lottery Corporation

David Debenham
McMillan LLP
2000-45 O'Connor Street
Ottawa, Ontario
K1P 1A4

Tel: (613) 691-6109
Fax: (613) 231-3191
Email: david.debenham@mcmillan.ca

Counsel for the Intervener, Alberta Gaming, Liquor, and Cannabis Commission

G. Alan Meikle, Q.C.
Sean McDonough
Mandy England
Attorney General of Alberta
9th Flr., Peace Hill Trust Twr.
10011 109 St. N.W.
Edmonton, Alberta
T5J 3S8

Tel: (780) 422-9479
Fax: (780) 427-1230
Email: alan.meikle@gov.ab.ca

Ottawa Agent for Counsel for the Intervener, Alberta Gaming, Liquor, and Cannabis Commission

Michael J. Sobkin
331 Somerset Street West
Ottawa, Ontario
K2P 0J8

Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

Counsel for the Intervener, Canadian Gaming Association

Brandon Kain
Gillian P. Kerr
Adam Goldenberg
McCarthy Tétrault LLP
Suite 5300
Toronto Dominion Bank Tower
Toronto, Ontario
M5K 1E6

Tel: (416) 601-8200
Fax: (416) 868-0673
Email: bkain@mccarthy.ca

Ottawa Agent for Counsel for the Intervener, Canadian Gaming Association

Darius Bossé
Juristes Power
130, rue Albert
bureau 1103
Ottawa, Ontario
K1P 5G4

Tel: (613) 702-5566
Fax: (613) 702-5566
Email: DBosse@juristespower.ca

Counsel for the Intervener, Canadian Chamber of Commerce

Matthew Milne-Smith
Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
37th Floor
Toronto, Ontario
M5V 3J7

Tel: (416) 863-0900
Fax: (416) 863-0871
Email: mmilne-smith@dwpv.com

Ottawa Agent for Counsel for the Intervener, Canadian Chamber of Commerce

Matthew Estabrooks
Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
P.O. Box 466, Stn. A
Ottawa, Ontario
K1P 1C3

Tel: (613) 786-0211
Fax: (613) 788-3573
Email: matthew.estabrooks@gowlingwlg.com

Counsel for the Intervener, British Columbia Lottery Corporation

K. Michael Stephens
Shannon Ramsay
Hunter Litigation Chambers Law Corporation
2100 - 1040 West Georgia Street
Suite 2100
Vancouver, British Columbia
V6E 4H1

Tel: (604) 891-2404
Fax: (604) 647-4554
Email: mstephens@litigationchambers.com

Ottawa Agent for Counsel for the Intervener, British Columbia Lottery Corporation

Colin S. Baxter
Conway Baxter Wilson LLP
400 - 411 Roosevelt Avenue
Ottawa, Ontario
K2A 3X9

Tel: (613) 288-0149
Fax: (613) 688-0271
Email: cbaxter@conway.pro

PART I: OVERVIEW OF POSITION

1. The federal and provincial governments share jurisdiction over lotteries and gaming. Certain provinces, including Saskatchewan, authorize the use of video lottery terminals [VLTs] and similar electronic games within their borders. The provincial use of VLTs has never been regarded as criminal. If the federal government sought to criminalize this type of gaming, it would do so explicitly.

2. The Attorney General for Saskatchewan [Saskatchewan] submits that the operation of VLTs pursuant to a provincial lottery scheme does not fall within the definition of "three-card monte" in the *Criminal Code*.[1]

3. The law of tort has traditionally focused on providing compensatory relief to those who have suffered loss due to the fault of another. The majority decision under appeal has the potential to upend this status quo. Recognition of an independent cause of action awarding disgorgement upon breach of a duty of care or criminal statute— but without proof of loss— will shift tort's focus to penalizing objectionable behavior. From a practical perspective, the new tort will supersede an action in negligence in many circumstances.

4. Saskatchewan submits that this Court should not recognize the nascent cause of action described in the majority decision below as "disgorgement for [tortious] wrongdoing"[2] and/or "unjust enrichment gained through tortious wrongdoing".[3] This is so for two principal reasons.

5. First, the proposed cause of action is a solution in search of a problem. The courts already deter and denounce objectionable behavior through the imposition of punitive damages. Second, the proposed cause of action blurs the lines between public and private law. The legislatures have jurisdiction to establish regulatory schemes to deal with objectionable and/or risky conduct. The proposed cause of action will interfere with the operation of at least some of those schemes.

---

[1] RSC 1985, c C-46 [*Code*].
[2] *Atlantic Lottery Corporation Inc.-Société des loteries de l'Atlantique v Babstock*, 2018 NLCA 71 at paras 83, 89, 170, 185 [Court of Appeal Reasons].
[3] See e.g.: Court of Appeal Reasons at paras 171, 173, 181.

PART II: POSITION OF THE ATTORNEY GENERAL OF SASKATCHEWAN

6. The operation of VLTs pursuant to a provincial lottery scheme is not prohibited by the *Code*. More particularly, the principle of cooperative federalism supports the position that the provincial use of VLTs is not captured by the prohibition against "three-card monte" in the *Code*.

7. Furthermore, this Court should not recognize the cause of action referred to by the majority below as disgorgement for tortious wrongdoing. To do so would encroach on legislative jurisdiction over regulatory and other matters.

8. For clarity, Saskatchewan takes no position on the availability of disgorgement as a remedy in contract. Nor does Saskatchewan take a position as to the availability of disgorgement as a remedy for established causes of action in tort, particularly those related to the wrongful use of another's property. Rather, Saskatchewan's focus is on whether this Court should recognize the tortious cause of action proposed by the majority below.

PART III: STATEMENT OF ARGUMENT

A. The use of VLTs pursuant to a provincial lottery scheme is not prohibited by the *Code*

9. Nothing in the definition of "three-card monte" and "any other game that is similar to it" in s. 206(2) of the *Code* indicates that Parliament intended the provision apply to VLTs operated pursuant to provincial lottery schemes. Indeed, nothing in the definition suggests it should apply to electronic gaming at all.

10. The reason for this is simple. VLTs and other forms of electronic gaming did not exist when the prohibition against "three-card monte" was enacted.[4]

11. This Court takes a narrow approach to defining the scope of criminal offences in cases of ambiguity.[5] If Parliament seeks to include a certain type of conduct within the gravamen of a

---

[4] See e.g.: Factum of the Appellant, Atlantic Lottery Corporation Inc. – Societe Des Loteries De L'Atlantique at paras 66-74.

[5] See e.g.: *United States of America v Dynar*, [1997] 2 SCR 462 at para 58, Cory and Iacobucci JJ.

criminal offence, it should do so expressly, not by implication.[6] Expansive interpretations of criminal offences that evolve over time to account for changing social and technological circumstances will potentially capture behavior previously regarded as legal. Such interpretations could also, in certain situations, run afoul of the general prohibition against common law offences enshrined in s. 9 of the *Code*.

12. If Parliament seeks to criminalize a novel type of conduct based on emerging technology, it should have to do so explicitly. For example, if Parliament wanted to criminalize VLTs, or any other type of electronic gaming, it has had over 20 years to do so by amending the *Code*. Parliament has not chosen to do so. Instead, provincial governments have chosen to regulate VLTs through their jurisdiction over gaming.

13. VLTs and similar electronic gaming devices have operated pursuant to provincial regulatory schemes for years, including in Saskatchewan.[7] Obviously, this will change if VLT gaming is interpreted to run afoul of the *Code's* prohibition against "three-card monte".

14. Jurisdiction over lotteries and gaming is shared between the federal government and the provinces.[8] More to the point, this Court has already determined that the provinces have jurisdiction to regulate VLT gaming.[9] The courts should interpret gaming-related legislation in a manner that recognizes and respects this shared jurisdiction.

15. It is a core tenet of statutory interpretation that legislation should be interpreted in a manner that minimizes conflict with other statutory provisions.[10] This is particularly apposite where one

---

[6] *R v DLW*, 2016 SCC 22 at para 55, [2016] 1 SCR 402, Cromwell J, citing *Marcotte v Deputy Attorney General for Canada*, [1976] 1 SCR 108 at 115, Dickson J (as he then was).

[7] Electronic slot machines are authorized in Saskatchewan pursuant to *The Alcohol and Gaming Regulation Act, 1997*, SS 1997, c A-18.011, ss 12, 15, 185.1; *The Saskatchewan Gaming Corporation Act*, SS 1994, c S-18.2, s 15; and the *Saskatchewan Gaming Corporation Casino Regulations*, 2002 RRS c A-189.011 Reg 3. VLTs are authorized in Saskatchewan pursuant to Orders in Council 583/1992 [**Tab 1**]; 1116/1992 [**Tab 2**] and 1173/1992 [**Tab 3**].

[8] *Siemens v Manitoba (Attorney General)*, 2003 SCC 3 at paras 22, 35, 36, [2003] 1 SCR 6, Major J [Siemens]; *R v Furtney*, [1991] 3 SCR 89 at 103, Stevenson J.

[9] Siemens at paras 35, 36.

[10] See e.g.: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada, 2014) at 353, 356-359 [**Tab 4**].

interpretation of a federal statute creates a conflict with provincial legislation; thereby triggering the doctrine of paramountcy and limiting the provinces' ability to operate in areas of shared jurisdiction. Statutory interpretation should facilitate cooperation between the federal and provincial governments, not undermine it.[11]

16. In other words, the process of statutory interpretation should be animated, in part, by the principle of co-operative federalism. Where possible, statutory interpretation should encourage interlocking federal and provincial schemes, and avoid unnecessary constraints on provincial action. The courts should favour harmonious interpretations of federal and provincial legislation over interpretations that result in incompatibility.[12]

17. More particularly, the courts should avoid overly expansive interpretations of federal legislation which conflict with provincial powers.[13] This is especially so where, as here, the federal government has not taken any position on the interpretation of the federal provision at issue.

B. This Court should not recognize a nascent tort of disgorgement for wrongdoing

18. Neither the Respondents nor the majority decision below identify a pressing need to recognize a tortious cause of action awarding disgorgement as a general remedy for civil wrongdoing. Insofar as the judicial branch has an interest in penalizing objectionable conduct on its own initiative, it already has the tool to do so: the law of punitive damages.[14] There is no need to reinvent the wheel when it comes to the common law of tort.

19. Furthermore, recognition of a cause of action imposing disgorgement as a remedy for civil wrongdoing will impinge upon legislative jurisdiction to regulate wrongful and/or risky behavior.

---

[11] *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras 24, 75, [2007] 2 SCR 3, Binnie and Lebel JJ, citing *Canada (Attorney General) v Law Society (British Columbia)*, [1982] 2 SCR 307 at 356, Estey J.
[12] *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd.*, 2015 SCC 53 at paras 20, 22, [2015] 3 SCR 419, Abella and Gascon JJ [*Lemare*].
[13] *Lemare* at para 23.
[14] See e.g.: *Hill v Church of Scientology*, [1995] 2 SCR 1130 at para 196, Cory J; *Whiten v Pilot Insurance Co.*, 2002 SCC 18 at para 68, [2002] 1 SCR 595, Binnie J [*Whiten*].

The federal and provincial legislatures actively exercise this jurisdiction through the field of public law.

20. For example, Saskatchewan has enacted legislation requiring the civil forfeiture of property connected to or generated from criminal activity.[15] This regime is regularly utilized to disgorge proceeds and seize property related to unlawful activity.[16] The proceeds are paid, in part, to a victim's fund.[17]

21. Recognition of a common law cause of action awarding disgorgement for a breach of the *Code*, as proposed in the majority decision below,[18] will conflict with the operation of this statutory regime.

22. As the majority below admits, proceeds of criminal activity could be awarded to plaintiffs who suffered little or no loss under the proposed cause of action.[19] Such proceeds would not be used to further the public good. Instead, they would be granted as a windfall to those who have no real entitlement to it. This is objectionable on public policy grounds.[20]

23. Saskatchewan and other jurisdictions have determined that monies and other property connected to criminal wrongdoing should be used to further the public interest. The Saskatchewan legislature has created a regulatory regime to do just that. The courts should not establish their own competing regime through the common law.

---

[15] *The Seizure of Criminal Property Act, 2009*, SS 2009, c S-46.002.
[16] See e.g.: *Saskatchewan (Seizure of Criminal Property Act, Director) v Kotyk*, 2013 SKCA 140, [2014] 3 WWR 38, Herauf JA. This Court has upheld the constitutionality of Ontario's similar civil forfeiture regime: *Chatterjee v Ontario (Attorney General*, 2009 SCC 19 at paras 4, 23, [2009] 1 SCR 624, Binnie J.
[17] See: *The Seizure of Criminal Property Act, 2009*, s 34(2)(c).
[18] See: Court of Appeal Reasons at paras 218-229.
[19] Court of Appeal Reasons at para 175.
[20] See e.g.: *Whiten* at para 44.

24. Saskatchewan has also enacted legislation aimed at preventing offenders from financially exploiting the notoriety of their crimes.[21] For example, this legislation has been used to prevent an offender from enjoying financial proceeds from the sale of a book he wrote about the murder for which he was duly convicted.[22]

25. In *Attorney General v Blake*,[23] the Law Lords fashioned a disgorgement remedy in contract to deal with an analogous situation, wherein a former secret service agent, a "notorious, self-confessed traitor", had published a book disclosing confidential information. The Saskatchewan experience illustrates that Canadian legislatures can, and will, penalize similar objectionable conduct through the creation of statutorily imposed penalties where they deem it appropriate to do so.[24]

26. In non-criminal contexts, the provinces employ various public law sanctions to deter behavior that their legislatures have determined, as a matter of public policy, to be objectionable. Such sanctions are employed in various fields, including in the realms of consumer protection;[25] employment law and worker safety;[26] and the environment,[27] among others. Indeed, such regulatory frameworks underpin much of the modern state.

---

[21] *The Profits of Criminal Notoriety Act*, SS 2009, c P-28.1.
[22] See e.g.: *Saskatchewan (Attorney General) v Thatcher*, 2010 SKQB 109, 353 Sask R 45, Zarzeczny J.
[23] [2011] 1 AC 268 (HL).
[24] There is no reason in principle why a legislature cannot stipulate that such legislation has retroactive effect, if it thought it appropriate to do so.
[25] See e.g.: *The Consumer Protection and Business Practices Act*, SS 2013, c C-30.2, ss. 108, 109, 110.
[26] See e.g.: *The Saskatchewan Employment Act*, SS 2013, c S-15.1, s. 2-95, 3-78, 3-79, 5-23, 6-123.
[27] See e.g.: *The Environmental Management and Protection Act, 2010*, SS 2010, c E-10.22.

27. The legislatures also deal with objectionable behavior through the creation of statutory causes of action. As one example, various provincial governments have enacted legislation to recover social costs incurred as a result of tobacco-related wrongdoing.[28]

28. It is the elected legislatures which are best suited to balance the myriad of policy considerations at play in deciding how and when to regulate objectionable behavior. Choosing ***not*** to regulate or sanction a particular type of conduct is a policy decision in and of itself. Such decisions should be respected by the courts.

29. The cause of action proposed in the majority decision below would essentially create a common law regulatory scheme to address judicially perceived social "wrongs". As conceived in the majority decision below, the penalty of disgorgement would be levied by the courts to censure objectionable behavior in service of the principle of deterrence.[29]

30. The courts should not be in the business of creating regulatory regimes and/or civil penalties. Generally speaking, the courts lack the institutional capabilities to establish and oversee such schemes. For example, the cause of action proposed in the majority decision below would impart sweeping power to judges to determine: i) what types of 'wrongs' should be subject to disgorgement; ii) whether a defendant can rely on public policy or other defenses to resist the claim; and iii) what, if any, level of causation is required to establish the claim.[30] Such a regime would create considerable uncertainty for those who live, work, and do business in Canada.

---

[28] See e.g.: *The Tobacco Damages and Health Care Costs Recovery Act*, SS 2007, c T-14.2. This Court has already determined that similar legislation is constitutional: *British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at paras 1-3, [2005] 2 SCR 473, Major J [*Imperial Tobacco*]. For further analysis, see: Mariette Brennan, "Canada's Next Step In Tobacco Control Laws: Is Plain Packaging Legislation a Viable Proposal?" (2013) 51:1 Alta L Rev at 23, 2013 CanLIIDOcs 77.

[29] Court of Appeal Reasons at paras 154, 166, 185.

[30] Court of Appeal Reasons at paras 170, 220, 229.

31. Such an ad hoc and ex post facto approach should be eschewed in favour of a stable and predictable system of public law deterrents to objectionable behavior. This system already exists in Canada— at both the federal and provincial levels— through the operation of the legislative and regulatory regimes described above.

32. The Factum of the Appellant, Atlantic Lottery Corporation, outlines various additional reasons why it is inadvisable to blur the lines between public and private law by recognizing the proposed cause of action.[31] Saskatchewan agrees with those submissions.

33. Changes to the common law should occur incrementally. Although the common law will gradually evolve over time, sudden paradigm shifts in basic legal concepts should be avoided. This is particularly so where a change potentially interferes with matters falling within legislative jurisdiction.[32]

34. If there is a need to change the manner in which courts deal with objectionable behavior through the imposition of civil penalties, such change should be implemented through the law of punitive damages. It should not be done through recognition of a new tort. The law of punitive damages already serves the goal of deterring objectionable behavior, and operates pursuant to established rules that have been refined over time.[33]

35. This point is illustrated by the fact that recognition of the cause of action proposed in the majority decision below will lead to undesirable, absurd, and unfair results.

---

[31] Factum of the Appellant, Atlantic Lottery Corporation Inc. – Societe Des Loteries De L'Atlantique at paras 66-74.
[32] *Imperial Tobacco* at para 51; *R v Salituro*, [1991] 3 SCR 654 at 670, Iacobucci J; *Friedmann Equity Developments Inc. v Final Note Ltd.*, 2000 SCC 34 at paras 42, 46, 48, [2000] 1 SCR 842, Bastarache J.
[33] *Whiten* at para 44.

36. For example, proof of loss is, and has always been, a requisite element of the tort of negligence.[34] Under the cause of action proposed here, proof of loss is not required to establish entitlement to a remedy.[35]

37. If the proposed cause of action is accepted, there is a very real danger that it will lead to a system of "private Attorneys General" (i.e., plaintiffs who issue suit in pursuit of personal gain), as Binnie J cautioned against in *Whiten*.[36]

38. Furthermore, if the proposed cause of action is accepted, it will be easier for an individual who has not suffered harm to obtain a remedy in "disgorgement for wrongdoing" than it will be for a person who has suffered loss to obtain a remedy in negligence. There is a real possibility that plaintiffs who suffer actual loss will lose out on compensation to those who have not been harmed. The majority decision below admits this problem is inherent in the proposed cause of action:

> [175] It is inherent in this area that a claimant may receive a windfall which is regarded as the lesser evil than allowing a defendant to profit from a wrong. In any event, a first-past-the-post approach may not be as unfair as it may at first seem. In reality, it is no different from what now exists in the area of compensation claims. A number of plaintiffs may separately press claims against one defendant in respect of one negligent act. Assuming they are tried separately, one may get judgment and have it satisfied before the others are even out of the gate, reducing the defendant's remaining assets to a point that would not be able to satisfy the remaining claims. To some degree this potential problem can be ameliorated by procedural devices of consolidation of cases and joint case management. This is equally true for restitution claims as for compensation claims.[37]

39. This result seems perverse, and unfair. It could lead to situations where a claimant cannot receive full compensation for their injuries because available monies have been awarded to those who did not experience loss. Invariably, those who suffered harm will need to rely on public social programs to make up their loss, while the successful claimant who suffered no loss receives an underserved windfall.

---

[34] See e.g.: *Moran v Pyle National (Canada) Ltd*., [1975] 1 SCR 393 at 405, Disckson J (as he then was); *Clements v Clements*, 2012 SCC 32 at paras 7, 21, [2012] 2 SCR 181, McLachlin CJ.
[35] Court of Appeal Reasons at paras 173, 177.
[36] Whiten
[37] Court of Appeal Reasons at para 175.

PART IV: COSTS

40. Saskatchewan submits that it should not be liable for costs beyond those in the purview of Rule 59(1)(a) and the October 10, 2019 Order of Justice Moldaver.

PART V: REQUEST FOR ORDER

41. In light of the said Order of Justice Moldaver regarding interveners' oral arguments, Saskatchewan makes no further requests.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED this 8th day of November, 2019.

Jared G. Biden, counsel for the Intervener,
Attorney General for Saskatchewan

PART VII: AUTHORITIES, STATUTES & REGULATIONS

CASES

Tab BOA	Citation	Paragraph(s)
	Atlantic Lottery Corporation Inc.-Société des loteries de l'Atlantique v Babstock, 2018 NLCA 71.	4, 21, 22, 29, 30, 35, 36, 38.
	Attorney General v Blake, [2000] UKHL 45, [2001] 1 AC 268 (HL).	25.
	British Columbia v Imperial Tobacco Canada Ltd., 2005 SCC 49, [2005] 2 SCR 473.	27, 33.
	Canada (Attorney General) v Law Society (British Columbia), [1982] 2 SCR 307.	15.
	Canadian Western Bank v Alberta, 2007 SCC 22, [2007] 2 SCR 3.	15.
	Chatterjee v Ontario (Attorney General, 2009 SCC 19, [2009] 1 SCR 624.	20.
	Clements v Clements, 2012 SCC 32, [2012] 2 SCR 181.	36.
	Friedmann Equity Developments Inc. v Final Note Ltd., 2000 SCC 34, [2000] 1 SCR 842.	33.
	Hill v Church of Scientology, [1995] 2 SCR 1130.	18.
	Marcotte v Deputy Attorney General for Canada, [1976] 1 SCR 108.	11.
	Moran v Pyle National (Canada) Ltd., [1975] 1 SCR 393.	36.
	R v DLW, 2016 SCC 22, [2016] 1 SCR 402.	11.
	R v Furtney, [1991] 3 SCR 89.	14.
	R v Salituro, [1991] 3 SCR 654.	33.
	Saskatchewan (Attorney General) v Lemare Lake Logging Ltd., 2015 SCC 53, [2015] 3 SCR 419.	16, 17.
	Saskatchewan (Attorney General) v Thatcher, 2010 SKQB 109, 353 Sask R 45.	24.
	Saskatchewan (Seizure of Criminal Property Act, Director) v Kotyk, 2013 SKCA 140, [2014] 3 WWR 38.	20.
	Siemens v Manitoba (Attorney General), 2003 SCC 3, [2003] 1 SCR 6.	14.
	United States of America v Dynar, [1997] 2 SCR 462.	11.
	Whiten v Pilot Insurance Co., 2002 SCC 18, [2002] 1 SCR 595.	18, 22, 34, 37.

STATUTES, REGULATIONS, ETC.

Tab BOA	Citation	Paragraph(s)
	Criminal Code, RSC 1985, c C-46.	2, 6, 9, 11, 12, 13, 21.
1	Saskatchewan Order in Council 583/1992.	13.
2	Saskatchewan Order in Council 1116/1992.	13.
3	Saskatchewan Order in Council 1173/1992.	13.
	The Alcohol and Gaming Regulation Act, 1997, SS 1997, c A-18.011.	13.
	The Consumer Protection and Business Practices Act, SS 2013, c C-30.2.	26.
	The Environmental Management and Protection Act, 2010, SS 2010, c E-10.22.	26.
	The Profits of Criminal Notoriety Act, SS 2009, c P-28.1.	24.
	The Saskatchewan Employment Act, SS 2013, c S-15.1.	26.
	The Saskatchewan Gaming Corporation Act, SS 1994, c S-18.2.	13.
	The Saskatchewan Gaming Corporation Casino Regulations, 2002 RRS c A-189.011 Reg 3.	13.
	The Seizure of Criminal Property Act, 2009, SS 2009, c S-46.002.	20.
	The Tobacco Damages and Health Care Costs Recovery Act, SS 2007, c T-14.2.	27.

OTHER AUTHORITIES

Tab BOA	Citation	Paragraph(s)
	Brennan, Mariette. "Canada's Next Step In Tobacco Control Laws: Is Plain Packaging Legislation a Viable Proposal?" (2013) 51:1 Alta L Rev at 23, 2013 CanLIIDOcs 77.	27.
4	Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada, 2014).	15.