S.C.C. File No. 38521

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

B E T W E E N:

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)

A N D B E T W E E N:

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 GALLY GAMING INC.

Interveners
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PART I ~ OVERVIEW

1. Canada's common law tradition has long served it well in the realm of commerce. In the context of tort claims, requiring the plaintiff to show proof of loss is an integral component of that common law tradition. The Canadian Chamber of Commerce (the "**Chamber**") submits that the Newfoundland Court of Appeal gutted this important safeguard by creating "unjust enrichment gained by tortious wrongdoing" as a novel cause of action that does not require proof of loss. This novel doctrine: (i) is an abrupt departure from common law tradition; (ii) constitutes poor policy; and (iii) represents a significant deviation from the common law in other jurisdictions. It will expose defendants to indeterminate liability to the detriment of the Chamber's members, the Canadian economy, and ultimately, all Canadians.

2. The need to prove loss caused by the defendant prevents participants in the Canadian economy – individuals and corporations alike – from being saddled with expensive and unforeseeable litigation expense and risk. The Court of Appeal's decision permitting disgorgement of profits solely upon proof of a defendant's wrongful conduct and corresponding gain (and without proof of loss)[1] is a dangerous expansion of civil liability. The Court of Appeal's novel tort radically shifts the balance of private rights and remedies as between plaintiffs and defendants. By creating the spectre of unpredictable, indeterminate liability, this novel tort encourages wasteful nuisance litigation where *de minimis* or no loss exists, exacerbates the significant risks already inherent in operating a commercial enterprise, and discourages valuable economic activity.

3. Further, the Court of Appeal's novel tort will neutralize class certification as an important safeguard against unmeritorious class proceedings. Plaintiffs who could not otherwise meet the test for class certification have for decades been pleading "waiver of tort" as a panacea, which would make virtually any properly – pleaded claim certifiable by rendering causation and harm irrelevant. As a procedural statute, class proceedings should not be a Trojan horse to justify the creation of a novel tort that would bury Canadian businesses under a wave of lawsuits for ever-increasing amounts of money, without any requirement that the putative plaintiff prove that the defendants

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[1] The Chamber refers to "unjust enrichment as a result of wrongdoing," as described in *Atlantic Lottery Corporation Inc. - Société des loteries de l'Atlantique v. Babstock,* 2018 NLCA 71 at para. 177, 29 C.P.C. (8th) 1 [*Babstock*] as the "**novel tort**".

harmed anyone. Businesses defending class actions would face intense pressures to settle even the most dubious of claims. The resulting inevitable rise in the number and magnitude of class actions would greatly increase the costs of commerce in Canada, and put Canada at a competitive disadvantage in the global economy.

4. For these reasons, the Chamber respectfully asks this Court to confirm that proof of causation and compensable loss remains a necessary element in establishing a tort in Canadian common law. The Chamber takes no position on the outcome of the appeal.

PART II ~ QUESTION IN ISSUE

5. The Chamber's intervention in this appeal is restricted to the issue of whether this Court should recognize a cause of action that provides a disgorgement remedy without requiring any proof of causation or loss. The Chamber submits that the answer should be "no."

PART III ~ STATEMENT OF ARGUMENT

A. The Court of Appeal's Novel Tort is Doctrinally Inconsistent with Established Law

6. At common law, both negligence and unjust enrichment require proof of loss.[2] This Court has long held that negligence "in the air" is not actionable.[3] Similarly, this Court recently confirmed that unjust enrichment requires proof of a plaintiff's deprivation corresponding to the defendant's enrichment.[4]

7. This foundational requirement to prove loss or deprivation in a tort claim serves several important goals: (a) it promotes access to justice for plaintiffs with legitimate interests at stake; (b) it protects defendants from indeterminate liability; (c) it saves the judicial system from being burdened by claims where no loss has actually occurred; and (d) it does not punish activities that create value without causing harm.

8. For these and other reasons, Canadian courts have never recognized the novel tort. Instead,

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2 Philip H. Osborne, *The Law of Torts*, 5th ed. (Toronto: Irwin Law, 2015) at p. 68 [Osborne]; Jeffrey Berryman, *The Law of Equitable Remedies*, 2nd ed (Toronto: Irwin Law, 2013) at p. 7.

3 *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 at p. 405, 43 D.L.R. (3d) 239), quoting *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The "Wagon Mound")*, [1961] A.C. 388 at 425, [1961] 1 All E.R. 404.

4 *Moore v. Sweet*, 2018 SCC 52 at para. 37, [2018] 3 S.C.R. 303 *per* Côté J.

the doctrine of waiver of tort has hitherto only been recognized as a disgorgement remedy for a limited class of torts or breach of contract rather than a freestanding cause of action.[5] Canadian courts have not endorsed the novel tort beyond merely holding that it is not certain to fail at the class certification stage.[6]

9. Tort law is not an arbiter of morality, punishing the wicked.[7] Rather, tort law has traditionally focussed on compensating losses caused by breaches of private rights.[8] Private law claims are founded upon the rights and corresponding duties that exist between people.[9] For example, one has a duty to refrain from stealing from another because a person has a private right to retain possession of property. Equally, one person cannot strike another because it infringes the latter's right to bodily integrity. The invasion of a right by a tortfeasor entitles the injured party to seek legal redress in the form of compensation for the loss suffered. A stranger whose rights are unaffected by an alleged tortfeasor's malfeasance has no tenable claim at common law.[10]

10. To achieve these primary compensatory and restorative aims, the default remedy in private

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5 *United Australia v. Barclays Bank Ltd.*, [1940] All E.R. 20 at 30, [1941] A.C. 1 [U.K. H.L.]; J.M. Martin, "Waiver of Tort: An Historical and Practical Survey" (2012) 52 Can. Bus. L.J. 473 at p. 534.

6 *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 477 at para. 97, [2013] 3 S.C.R.; Kevin P. McGuinness, "Waiver of Tort", *Halsbury's Laws of Canada – Restitution (2017 Reissue)* (Lexis Advance Quicklaw); Sandra Barton, Mark Hines & Shawn Therien, "Neither Cause of Action nor Remedy: Doing away with Waiver of Tort" (2015) Annual Rev. Civ. Litigation 1 (Westlaw) [Barton] at p. 1.

7 *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at p. 634, 129 D.L.R. (3d) 263; *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 at pp. 962-64, 69 D.L.R. (4th) 25 [*Raytch*]; *Hall v. Hebert*, [1993] 2 S.C.R. 159 at pp. 199-201, 101 D.L.R. (4th) 129 *per* Cory J. (concurring) [*Hall*]; *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570 at para. 70, 174 D.L.R. (4th) 71 *per* Binnie J. quoting G.H.L. Fridman, The Law of Torts in Canada, 2nd ed. (Toronto: Carswell, 1990), at pp. 315-316 with approval, *2105582 Ontario Ltd. (Performance Plus Golf Academy) v. 375445 Ontario Limited (Hydeaway Golf Club)*, 2017 ONCA 980 at para. 58, 138 O.R. (3d) 561.

8 *Raytch*, *supra* note 2; *Cooper v. Miller*, [1994] 1 S.C.R. 359 at pp. 396-397, 113 D.L.R. (4th) 1 [*Cooper*]; *Demers v. BR Davidson Mining & Development Ltd.*, 2012 ONCA 384 at para. 11, 111 O.R. (3d) 42; Mark Geistfeld, "Negligence, Compensation, and the Coherence of Tort Law" (2003) 91:3 Geo. L.J. 585 at pp. 587-588.

9 *Hall*, *supra* note 7 at p. 182 *per* McLachlin J. (as she then was).

10 *Wong v. Giannacopoulos*, 2011 ABCA 277 at para. 7, 515 A.R. 58; see also *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 at para. 22, 33 D.L.R. (4th) 321.

law is an award of compensatory damages, which are quantified based on the amount of a plaintiff's loss. Although the common law also recognizes that disgorgement remedies may be awarded in certain circumstances,[11] there still must be a link between a tortfeasor's actions and harm to the plaintiff before such disgorgement remedies will apply.

11. The requirement of harm or injury suffered by a plaintiff is founded in a "clear economic logic underpinning the traditional approach to tort remedies."[12] No private law claim exists absent such a link, in part because the occurrence of a plaintiff's damage or loss "is the vital element that triggers the claim and launches the litigation process."[13] As Edward Iacobucci and Michael Trebilcock explain:

> The linkage between the damages remedy and the plaintiffs' losses creates economically valuable deterrence and insurance by compelling the seller to internalize the plaintiff's losses.[14]

12. The Court of Appeal's decision, however, severs the tie between injury and remedy that underpins private law. It permits an uninjured person to claim windfalls for any benefits gained by the defendant, even if no one was harmed by the conduct. Indeed, it is unclear if the plaintiff need even be within the ambit of risk allegedly created by the defendant. Such a result effectively turns every individual into an officious intermeddler seeking windfall gains, and eliminates any requirement of standing. The decision below therefore represents a significant departure from our legal tradition.

B. The Court of Appeal's Decision is Poor Policy

(i) The Court of Appeal's Decision Dangerously Expands Civil Liability

13. In addition to the doctrinal inconsistencies in the decision below, there are also policy reasons militating against endorsing the Court of Appeal's novel tort. First, the requirement that plaintiffs

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11 See, *e.g.*, Barton, *supra* note 6 at p. 14.

12 Edward M. Iacobucci & Michael J. Trebilcock, "An Economic Analysis of Waiver of Tort in Negligence Actions" (2016) 66 U.T.L.J. 173 at 192 [Iacobucci & Trebilcock].

13 Osborne, *supra* note 2 at 25.

14 Iacobucci & Trebilcock, *supra* note 13 at 192.

prove loss is an objective standard for liability and serves as a guide for reasonable behaviour.[15] The imposition of loss and harm are concrete events that businesses can foresee when assessing the risks of their activities. Attaching liability to these concrete events encourages businesses to take appropriate precautions to avoid them, or at least take steps to mitigate the likelihood that loss or harm will materialize. Liability based on abstract wrongdoing, on the other hand, does not serve any utilitarian purpose and does not advance the goal of deterrence. A defendant who harms no one but commits some technical non-compliance with a statute or inadvertent, harmless breach of a duty, may be liable if it saved some expenses in doing so.[16] It is exceedingly difficult *ex ante* to determine what might be considered a breach once the link to harm is removed. Defendants are unable to adjust their behaviour when liability is indeterminate and unforeseeable, and have no particular incentive to avoid inflicting harm when doing so has no corresponding effect on potential liability.

14. Second, untethering a defendant's liability from a plaintiff's loss dangerously expands civil liability with unpredictable ramifications. Could any user of a public road commence an action against a trucking company whose drivers exceed the speed limit to the company's benefit, even if they never caused an accident? Could a customer visiting a business with trivial shortcomings in its safety practices bring a claim based on occupier's liability even if no one was injured on the defendant's allegedly unsafe premises, on the theory that the defendant benefitted from maintenance cost savings? Courts may be overrun if every citizen becomes a private attorney general empowered to punish wrongdoing in the absence of loss.

15. Furthermore, allowing claims for a defendant's profits where the defendant has not caused damage or loss deters harmless activity and converts the compensatory or remedial function of tort law into a "lottery ticket", or windfall, for plaintiffs[17] – which this Court has repeatedly cautioned

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15 See *M'Alister (or Donoghue) v. Stevenson*, [1932] ALL E.R. Rep. 1, at p. 11, [1932] A.C. 562 (U.K. H.L.) where the House of Lords held that one "must take reasonable care to avoid acts or omissions which [one] can reasonably foresee would be likely to injure [one's] neighbour".

16 *Babstock*, *supra* note 1 at para 170; Iacobucci & Trebilcock, *supra* note 13 at 193.

17 Iacobucci & Trebilcock, *supra* note 13 at 194.

to avoid.[18] Such a consequence is particularly perverse when defendants may not be able to reasonably foresee what legal risks exist because these novel tort claims will be untethered to any damage caused by the defendant. Defendant businesses may be forced to account for higher disgorgement risks by inevitably passing costs down to the end customer,[19] resulting in a transfer of wealth from society at large into the private hands of individual plaintiffs. The decision below imperils productive economic activities and gives considerable incentive to speculative plaintiffs to pursue specious claims in the hopes of extracting a favourable settlement based on the ease of pleading a claim of wrongdoing.

16. This Court should not countenance the creation of novel causes of action that drastically expand civil liability while providing no additional deterrence against harmful conduct.

(ii) The Court of Appeal's Decision Unacceptably Alters Class Actions Procedure

17. The policy concerns arising from the creation of a novel tort in this case are magnified for class proceedings. In class proceedings, plaintiffs must first satisfy enumerated class certification threshold requirements, including most importantly the requirements of common issues and that a class proceeding is the preferable procedure. The most common reason that certification is denied is where the plaintiffs are unable to prove causation and harm on a class-wide basis.[20] These two threshold requirements are often the only protection defendants have against class certification given the procedural nature of a certification motion, which gave rise to a trend of pleading waiver of tort as a kind of "Hail Mary" to evade this obstacle:

> In order to avoid litigating individual issues, class actions have pleaded a radical form of waiver of tort that disregards proof of loss. This extension of the doctrine

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18 *Raytch*, *supra* note 7 at p. 962; *Cooper*, *supra* note 8 at pp. 368-369 and 396-397; *M.B. v. British Columbia*, 2003 SCC 53 at para. 39, [2003] 2 S.C.R. 477; *IBM Canada Limited v. Waterman*, 2013 SCC 70 at paras. 20-21, [2013] 3 S.C.R. 985 [*IBM*].

19 Iacobucci & Trebilcock, *supra* note 13 at 194.

20 See, *e.g.*, *Dennis v. Ontario Lottery and Gaming Corporation*, 2013 ONCA 501 at para. 68, 116 O.R. (3d) 321; *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 32, [2001] 3 S.C.R. 158 [*Hollick*]; *Kirk v. Executive Flight Centre Fuel Services Ltd*., 2019 BCCA 111, at paras. 107-108, 22 B.C.L.R. (6th) 83, leave to appeal to the S.C.C. refused, 2019 CarswellBC 3036; *Chadha v. Bayer Inc.*, 63 O.R. (3d) 22 (C.A.) at para. 52, 223 D.L.R. (4th) 158, leave to appeal to S.C.C. refused, [2003] 2 S.C.R. vi (note).

> is inconsistent with its underlying principles, and it finds little support in Canadian law.[21]

18. The Court of Appeal's decision removes proof of causal loss as an element of the novel tort. As a result, a class action will likely now always be the preferable procedure to litigate such claims, because the individual circumstances of plaintiff class members are rendered irrelevant. Only the defendant's conduct will matter. Plaintiffs will now be able to routinely certify class proceedings that claim millions or even billions of dollars, simply by pleading a defendant's wrongdoing and benefit, in circumstances where no evidence is permissible as to whether the case has any actual merit.

19. Such an outcome would unacceptably alter Canada's class action regimes. As this Court has stated repeatedly, class proceeding statutes are procedural and do not grant substantive rights.[22] Recognizing the novel tort as a cause of action in the way envisioned by the Court of Appeal would allow plaintiffs to claim extraordinary relief on the flimsiest of pleadings. Plaintiffs would no longer need to prove "some basis in fact"[23] that they were injured by the defendants' actions or omissions. Given the pressures on defendants to settle certified class actions to avoid ruinous judgments,[24] as a practical matter, such certifications would pre-empt actual trials, inducing defendants to accept inequitable settlement terms. If such a dramatic expansion of substantive liability is to be effected, it should be done by the legislature, not the courts.

20. Recognizing the novel tort as a cause of action that does not require a plaintiff to prove any loss transforms and displaces the laws of negligence and unjust enrichment. The Court of Appeal's decision compounds the uncertainty, costs, and risks that litigation presents to businesses in Canada. It will spur additional class action litigation based on dubious allegations for ever-larger sums. It will result in the diversion of valuable judicial and commercial time and resources away from productive activities, and towards the adjudication and defence of increasing numbers of

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21 H. Michael Rosenberg, "Waiving Goodbye: The Rise and Imminent Fall of Waiver of Tort in Class Proceedings" (2010) 6:1 Can. Class Action Rev. 37 at 54.

22 See, *e.g.*, *Bisaillon v. Concordia University*, 2006 SCC 19 at para. 17, [2006] 1 S.C.R. 666; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 at para. 226, [2007] 2 S.C.R. 801; *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 116, 437 D.L.R. (4th) 383.

23 *Hollick*, *supra* note 20 at para. 25.

24 Affidavit of Scott Smith, sworn September 12, 2019 at para. 17.

meritless claims.

C. Recognizing the Novel Tort as an Independent Cause of Action at Common Law Would Put Canada at Odds with Other Leading Common Law Jurisdictions

21. This Court should also reject the novel tort because doing so would desynchronize Canadian common law from that of important common law trading partners. Creating a rift between Canadian common law and that of other jurisdictions puts Canada at a competitive disadvantage for attracting trade and investment. Absent the Court of Appeal's novel tort, Canadian private law is largely harmonious with the laws of England, Australia, and the largest U.S. states. None of these jurisdictions recognize disgorgement of profits from wrongdoing as an independent cause of action. The creation of such a novel tort would therefore would make Canada an outlier among its peers and a costlier and less attractive jurisdiction for business and trade.

(i) Waiver of Tort is Not a Cause of Action in England

22. The laws of England do not recognize waiver of tort (the most common, if somewhat misleading, label for the novel tort at issue in this case) as an independent cause of action, nor do they allow unjust enrichment to be claimed absent proof of corresponding deprivation.[25] In England, "waiver of tort" is simply a remedial doctrine. As explained in the leading text of *Clerk & Lindsell on Torts*:

> Used in this sense "waiver of tort" is a misleading and unfortunate term for it has nothing to do with the tort being extinguished. On the contrary, the tort is the foundation of the claim.[26]

23. While English courts permit disgorgement of a defendant's profits in exceptional circumstances,[27] the Court of Appeal erred in suggesting that English authorities support the proposition that a plaintiff can sue based on nothing more than the defendant's alleged wrongful conduct and gain.[28] The principal case relied upon by the majority of Court of Appeal in this regard,

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25 Charles Mitchell, Paul Mitchell, and Stephen Watterson, eds., *Goff & Jones: The Law of Unjust Enrichment*, 9th ed. (London: Sweet & Maxwell, 2016), at para. 1-09.

26 Michael A. Jones *et al*., *Clerk & Lindsell on Torts*, 22nd ed. (London: Sweet & Maxwell, 2018), at para. 31-02 [emphasis added].

27 See, *e.g.*, *Attorney General v. Blake (Jonathan Cape Ltd., third party)*, [2000] UKHL 45, [2000] 4 All E.R. 385 [*Blake*]; *Experience Hendrix LLC v. PPX Enterprises Inc. and another*, [2003] EWCA Civ. 323, [2003] 1 All E.R. (Comm.) 830 [*Hendrix*].

28 *Babstock*, *supra* note 1 at paras. 222, 225-229.

Attorney General v. Blake, does not support the establishment of the novel tort. In *Blake*, the defendant breached his employment contract with the Crown by disclosing state secrets.[29] Rather than awarding expectation damages, the House of Lords ordered the defendant to disgorge his ill-gotten gains. The House of Lords stressed the exceptional nature of disgorgement and discussed its application only with respect to breach of contract.[30] This Court and other Canadian courts have accepted and applied the narrow holding from *Blake* that disgorgement may be exceptionally ordered as a remedy where a breach of contract has been established.[31] *Blake* did not establish a disgorgement remedy in the absence of an otherwise viable cause of action.

(ii) Waiver of Tort is Not a Cause of Action in New York or California

24. Similar to England, U.S. states do not recognize waiver of tort or unjust enrichment as an independent cause of action without proof of corresponding deprivation.[32] Notably, the *Third Restatement of Restitution and Unjust Enrichment* describes waiver of tort or restitution as a remedial mechanism, and not a cause of action:

> The claimant is free to choose restitution when it offers a more favourable recovery, but he may not have both restitution and damages for the same wrong.[33]

25. Indeed, some U.S. states like California do not recognize unjust enrichment as a cause of action at all.[34]

(iii) Waiver of Tort is Not a Cause of Action in Australia

26. In Australia, "unjust enrichment is not the basis of restitutionary relief".[35] Instead, in cases of

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29 *Blake*, *supra* note 27 at p. 492.

30 *Blake*, *supra* note 27 at p. 499-500.

31 See, *e.g.*, *IBM*, *supra* note 18 at para. 36; *Smith v. Landstar Properties Inc.*, 2011 BCCA 44 at paras. 40-44, 14 B.C.L.R. (5th) 48.

32 The elements of unjust enrichment in New York State are the same as those in Canada. See, e.g. *Goldemberg v. Johnson & Johnson Consumer Cos*, 8 F. Supp. 3d 467 at p. 483, 2014 U.S. Dist. LEXIS 47180.

33 *Restatement of the Law 3d, Restitution and Unjust Enrichment*, Introduction.

34 *McVicar v. Goodman Global Inc.*, 1 F. Supp. 3d 1044 at p. 1059, 2014 U.S. Dist. LEXIS 26332.

35 *Australian Financial Services and Leasing Pty Ltd. v. Hills Industries Ltd.*, [2014] HCA 14 at para. 78, (2014) 307 A.L.R. 512 [*Australian Financial*].

mistaken payment, Australian courts focus their inquiry on "whether it is equitable for the plaintiff to demand or for the defendant to retain the money",[36] which includes an analysis into whether the plaintiff suffered a deprivation.

27. Canadian law, therefore, is more generous to plaintiffs than the laws of Australia and some U.S. states, and is largely in line with the laws of England. The Court of Appeal's decision to recognize waiver of tort as an independent cause of action that does not require proof of loss is a radical shift away from the state of the common law in comparable jurisdictions.

28. The creation of such a dichotomy between Canadian common law and that of similar jurisdictions would make Canada a riskier place to do business and a comparatively less attractive place to invest. Scope of liability is an important consideration in determining how, when, and whether to do business in Canada.[37] Increased litigation exposure due to the recognition of the novel tort would raise the operating expenses of Canadian businesses, making their goods and services more expensive, and therefore less competitive, in the global marketplace. Further, prudent investors would be wary of a jurisdiction that allows plaintiffs to force a defendant to disgorge profits where alleged "wrongdoing" causes no harm and would not otherwise meet the traditional requirements for tortious conduct—especially when such a cause of action is foreign to similar common law jurisdictions.

29. These disadvantages concern the Chamber and its members, and are significant factors militating against recognizing the novel tort as an independent cause of action.

PART IV ~ SUBMISSIONS ON COSTS

30. The Chamber undertakes not to seek any costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of November, 2019.

FOR Matthew Milne-Smith
Counsel for the Intervener, Canadian Chamber of Commerce

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36 *Australian Financial*, *supra* note 35 at para. 75, quoting *Campbell v. Kitchen & Sons Ltd. and Brisbane Soap Co. Ltd.*, 1910 HCA 50, BC1000001 at p. 8.

37 Smith Affidavit, *supra* note 24 at para. 14.

PART V ~ TABLE OF AUTHORITIES

Tab	Authority	Paragraph Reference
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