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

Respondent
(Respondents)

-AND-

BALLY GAMING CANADA LTD. AND BALLY GAMING INC.

Interveners
(Interveners)

AND BETWEEN:

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

Appellants
(Respondents)

-AND-

DOUGLAS BABSTOCK AND FRED SMALL

Respondent
(Respondents)

-AND-

BALLY GAMING CANADA LTD. AND BALLY GAMING INC.

Interveners
(Interveners)

-AND-

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Interveners

FACTUM OF THE INTERVENER, ALBERTA GAMING, LIQUOR AND CANNABIS COMMISSION

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

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PART I – OVERVIEW AND FACTS

1. The Appellant Atlantic Lottery Corporation Inc. acts as agent for the governments of the four Atlantic provinces in conducting and managing their provincial lottery schemes.[1] The Alberta Gaming, Liquor and Cannabis Commission ("AGLC") is similarly a Crown agent that conducts and manages gaming as part of Alberta's provincial lottery scheme.[2]

2. AGLC's submissions focus on two issues: the Court of Appeal of Newfoundland and Labrador's recognition of a cause of action for "disgorgement of profits acquired as a result of the commission of a tortious wrong",[3] and the proper interpretation of the *Criminal Code*'s prohibition of "three-card monte".

3. AGLC agrees with the Appellants' position that the Court of Appeal erred in recognizing disgorgement for "tortious wrongdoing" as a cause of action.[4] In the event that this Court is inclined to recognize such a cause of action, AGLC's position is that it should not extend to the Crown, or, at the very least, its application to the Crown should be restricted by considerations that recognize the unique position of the Crown.

4. There are compelling policy reasons not to permit a cause of action for disgorgement for tortious wrongdoing as against the Crown.[5] This Court has recognized the uniqueness of the Crown's position in other areas of public authority liability, including negligence, unjust enrichment, and *Charter* damages. The purpose of extending tort law in the dramatic manner proposed by the Court of Appeal is to ensure that wrongdoers cannot keep the profits of their wrongdoing.[6] However, Crown profits end up in the public purse. Declining to extend this cause

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[1] Factum of the Appellants VLC., Inc. et al. ["VLC Factum"], para 11 and references therein.
[2] *Gaming, Liquor and Cannabis Act*, RSA 2000, c. G-1, ss. 3, 4
[3] *Atlantic Lottery Corporation Inc.-Société des lotteries de l'Atlantique v. Babstock*, 2018 NLCA 71 at para 170 ["Court of Appeal Decision"]
[4] Factum of the Appellant, Atlantic Lottery Corporation Inc. at paras 20, 29-79 ["ALC Factum"]; VLC Factum at paras. 31-39, 45-74
[5] AGLC's position is that disgorgement in tort law, whether as an independent cause of action or an election of remedy, should not be allowed against the Crown for the policy reasons discussed herein. However, the Court of Appeal's recognition of it as an independent cause of action is the focus of these submissions.
[6] Court of Appeal Decision at para 173

of action to the Crown is justified by the need to protect the public purse from "windfalls" that see plaintiffs receive damage awards unconnected to any loss, at the expense of their neighbours.

5. If such a tort is recognized and extended to the Crown, it is necessary to preserve the balance that this Court has established in circumscribing the tortious liability of the Crown. There are existing safeguards that were carefully developed to achieve appropriate limits on Crown liability, and they will be disrupted by elements of this tort as proposed by the Court of Appeal. The broad and discretionary residual considerations proposed for this new tort will not adequately protect the Crown. They give insufficient guidance as to when the tort will be applicable, and would purport to review the "social utility" of Crown actions, which generally is not justiciable. The parameters of such a tort must take these considerations into account.

6. In assessing whether the claim that video lottery terminal (VLT) games offend the provisions of the *Criminal Code* has a reasonable prospect of success, AGLC submits that principles of cooperative federalism must inform the proper interpretation of "three-card monte". This principle supports the Appellants' argument that VLT games are not contrary to the *Criminal Code*.

PART II – POSITION ON QUESTIONS IN ISSUE

7. In its submissions, AGLC will address the following issues stated in this appeal:[7]

   a. "Should this Court recognize a cause of action… that would provide for a disgorgement remedy upon proof of a breach of a duty of care… without any proof of resulting loss or harm?"

   b. "Is there any reasonable prospect of the plaintiffs succeeding in their claim that the VLT games offered by [the Appellant] fall within the *Criminal Code*'s prohibitions regarding 'three-card monte'?"

8. In respect of the first issue, AGLC's position is that this cause of action should not be recognized, or that the Crown should be exempted from its application. If it is recognized against the Crown, there are particular considerations that must be factored into its parameters.

9. On the second issue, AGLC's position is that it is proper and necessary to apply the interpretive principles of cooperative federalism when interpreting "three-card monte".

[7] As stated in ALC Factum, para 28

PART III - ARGUMENT

1. Cause of Action for "Disgorgement for Wrongdoing"

A. Disgorgement for Wrongdoing Should Not Apply to the Crown

(i) Crown Liability is Recognized as Unique

10. The need to account for the unique nature of the Crown as a defendant has been long recognized. The case law reflects careful balancing to ensure that, when all elements of a particular tort are taken together and applied to the Crown, the outcome will yield a fair result—not only for the parties to the litigation, but also to the public served by the Crown. This carefully developed jurisprudence should not be ignored in considering the appropriateness of applying the putative cause of action for disgorgement against the Crown.

11. The unique role of government actors is recognized in negligence,[8] where it has been observed that there is potential for indeterminate liability that may tax public resources and chill government action if doctrinal limits are not imposed.[9] Policy decisions are recognized as deserving differential treatment, as they are within the purview of governments and are not amenable to review by the courts.[10] Such matters cannot give rise to tort liability under the law as it stands. There is no reason to deviate from that principle with the creation of this new tort.

12. In the unjust enrichment context, impact on the public purse was identified as a consideration in *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*.[11] This Court expressly left open the possibility that policy considerations may limit the liability of public bodies in unjust enrichment *simpliciter*,[12] and even that a general immunity for public bodies might apply in that context.[13]

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[8] *R. v. Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 76 ["*Imperial Tobacco*"]
[9] *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para 74 ["*Elder Advocates*"]
[10] *Cooper v. Hobart*, 2001 SCC 79 at para 38 ["*Cooper*"]; *Imperial Tobacco* at paras 87, 90
[11] 2007 SCC 1 ["*Kingstreet*"]
[12] This term is used in the same manner as the Court of Appeal Decision at para 85
[13] *Kingstreet* at paras 19-30, esp. para 30. In *Elder Advocates* at para 91, which also concerned an application to strike, this Court allowed a claim in unjust enrichment *simpliciter* against the Crown to proceed to trial based on the pleadings. However, the Court left open the possibility

13. The public purse was also raised in the discussion of appropriate measures of damage awards for *Charter* breaches.[14] This Court recognized that, while the primary purpose of such awards is usually compensatory, there may be circumstances in which the deterrence rationale will play a role in determining quantum. Even so, the need for rationality and proportionality in arriving at the amount of any such award was emphasized.

14. The quantum of *Charter* damages must be fair not only to the claimant but also to the state, with the recognition that "[l]arge awards and the consequent diversion of public funds may serve little functional purpose in terms of the claimant's needs and may be inappropriate or unjust from the public perspective".[15] In weighing the appropriateness of such an award, one countervailing factor is the "danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests."[16]

15. Plaintiffs will not be unfairly disadvantaged if this new cause of action is unavailable as against the Crown. There is already a myriad of torts by which individuals can seek recourse for government wrongdoing, which have been carefully developed to set parameters so that they achieve fair results for all parties involved.

16. The existence of alternative remedies was recognized as a countervailing factor that could render *Charter* damages for deterrence alone inappropriate.[17] Similarly, the availability of well-established causes of action to address tortious wrongs by the Crown provide sufficient remedies that render disgorgement unnecessary and inappropriate.

(ii) Burden on Public and Windfall to Plaintiff

17. The principle underlying "disgorgement for wrongdoing" is disincentivizing or deterring wrongful conduct leading to improper profit-making.[18] The award to the plaintiff need not bear

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that in the determination of such claims a principle of general immunity for the Crown might be recognized.

[14] *Vancouver (City) v. Ward*, 2010 SCC 27 at paras 47, 51 ["*Ward*"]
[15] *Ward* at para 53
[16] *Ward* at para 53
[17] *Ward* at paras 33-37
[18] Court of Appeal Decision at paras 154, 162-66, 173

any relation to his loss,[19] meaning the plaintiff may get a "windfall"—an award that far exceeds any actual damages or harm.[20] This was not only acknowledged by the Court of Appeal, but characterized as "inherent in this area" and justified as "the lesser evil than allowing a defendant to profit from a wrong".[21]

18. The Crown is a steward for the public, and Crown assets are ultimately public assets. The Court of Appeal's comfort with the notion of plaintiffs receiving a windfall[22] must be re-examined through this lens. Such a windfall to plaintiffs, particularly those who need only show exposure to the risk of harm,[23] cannot be so easily cast as a "lesser evil" when it is funded from the public purse at the expense of the plaintiffs' neighbours.

19. It is no answer to say that this particular case is a proposed class action with a potentially large class, or that this is the likely manner in which such claims would be pursued. As has been recognized and recently reaffirmed by this Court, class actions are a procedural vehicle only; the applicable substantive law is no different than in individual actions.[24] Recognizing this cause of action against the Crown must work from both a principled and policy perspective when applied to the claim of one or to the claim of many, as it will be applicable to both.

20. The substantive law should not be changed in order to optimize class actions as a vehicle for advancing claims. Whether a class action is possible is determined by application of the criteria for certification that have been imposed by the legislature, not by revamping the substantive law. Deterrence can be achieved in a manner that does not unduly punish the rest of the public, who did not think to sue first or who fall outside the definition of a particular class.[25]

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[19] Court of Appeal Decision at paras 170, 172, 173
[20] Court of Appeal Decision at paras 174-76
[21] Court of Appeal Decision at para 175
[22] Court of Appeal Decision at paras 175, 176
[23] Court of Appeal Decision at para 172, 187
[24] *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at paras 116-117
[25] It is questionable whether this cause of action would even operate fairly in the class action context, as the ability to opt-out is an important feature of such actions, yet this model of disgorgement does not account for how opted-out persons' claims would align with this "winner take all" approach. See the discussion in *ALS Society of Essex County v. Corp. of the City of*

B. If Applicable to the Crown, Special Considerations are Warranted

(i) Need to Factor Special Considerations into the Analysis

21. If this cause of action is recognized, and the Crown is not exempted, care must be taken to ensure that the existing parameters of tort liability of the Crown are not ignored. One element of this new cause of action is that there must be a tortious wrong.[26] The elements of the existing torts must therefore mesh with those of this new tort. Eliminating the requirement for the plaintiff to have suffered actual loss (and perhaps even actual harm[27]) disrupts the balance that has been struck in the case law to date.

22. One example specific to Crown actors is misfeasance in public office. The elements of this tort include proof that the conduct at issue was the legal cause of injuries suffered, which are compensable in tort law.[28] All of the elements were developed to work together, and all are necessary to strike the balance required to enable public actors to function in their roles without undue exposure to claims in tort.[29] If the requirement to demonstrate compensable injury is removed, then that balance is upset.

23. There are also limits built into the *Anns/Cooper* test: in determining whether there is sufficient proximity or foreseeability at stage one, and at the second policy considerations stage. As has been noted by the Appellants,[30] removing the requirement to prove causally linked loss or injury will upend the application of these factors.

Windsor, 2016 ONSC 6625 at paras 13, 14, 20, 23-26 (Appendix "A"), aff'd *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2017 ONCA 555 at paras 27, 29, 30.

[26] Court of Appeal Decision at para 170, item 1

[27] Both the majority and dissent of the Court of Appeal were unclear as to whether the plaintiffs were pleading any actual loss or harm, though both recognized that no damages were sought (Court of Appeal Decision at paras 49, 50, 72, 100, 101, 119, 133, 186, 189). Nonetheless, the majority held that this new cause of action would not require actual loss or deprivation (paras 86, 87, 170, 188) and would be available where the plaintiff is "exposed to significant risk of harm" (paras 160, 172-174, 187), which is quite different from requiring proof of actual harm.

[28] *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at paras 29, 32 ["*Odhavji*"]

[29] *Odhavji* at paras 22, 23, 26, 28, 29, 32

[30] ALC Factum at para 42; VLC Factum at paras 56-58

24. Take, for example, the question at the centre of the foreseeability analysis: whether the "risk of the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged", emphasizing the connection between the plaintiff and actual damage suffered.[31] For this new tort, the Court of Appeal indicated that showing oneself to be within the "ambit of risk" would be sufficient to ground a claim.[32]

25. Removing the requirement to demonstrate compensable harm has serious implications for the determination of when, and to whom, the Crown may owe a duty of care. In the first step of *Anns/Cooper*, it would cloud the determination of whether a duty of care is owed. Previous decisions have recognized that general duties to the public do not equate to private law duties to specific individuals.[33] How will that principle be maintained and applied if the plaintiff need not be a specific individual who has suffered harm, but can be any person within the "ambit of risk"?

26. On the second step of *Anns/Cooper*, recognized limitations like indeterminate liability[34] also become unclear. If the class of plaintiffs need not be comprised of individuals who have actually experienced compensable harm, then how would one ever limit the scope of liability? The difficulty is that by the design of the tort itself, which bases liability on an ambit of risk, there is potential to give rise to liability to an indeterminate class, thereby transgressing the policy limits established by this Court in the tort context.

27. It is essential that proportionality and rational connection to a demonstrated loss or harm be maintained as an element. To eliminate it is inconsistent with the cases that have carefully delineated the scope of Crown liability with thorough consideration of policy concerns. The amount of the award to be paid from the public purse cannot be divorced from considerations of fairness to the public.[35]

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[31] *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19 at para 24, citing with approval A.M. Linden and B. Feldthusen, *Canadian Tort Law* (10th ed. 2015) (emphasis in the decision)
[32] Court of Appeal Decision at paras 160, 172-174, 187
[33] *Imperial Tobacco* at para 50
[34] *Imperial Tobacco* at para 100
[35] To be clear, the need to demonstrate compensable harm does not mean double recovery is contemplated. The remedy for this tort as it is proposed is disgorgement, not compensatory damages *and* disgorgement.

28. The need to demonstrate loss also serves as an appropriate constraint on who has standing to bring claims. The Crown is subject to more claims, as a single defendant, than any other entity. Limits have been imposed to control who has standing to bring such claims. The need to show causality and actual harm are important gatekeepers.

(ii) Residual Considerations are Insufficient

29. The Court of Appeal would see the applicability of this new cause of action determined on a case-by-case basis, with residual and discretionary factors considered at the end of a full analysis to weigh "whether it is appropriate to vindicate the deterrence/disincentive principle on the particular facts of the case".[36] There are two problems with this proposed approach.

30. First, it does not allow for unmeritorious claims to be determined at an early stage, nor is it designed to provide clear guidance on what claims may be exempted from disgorgement.

31. The Court of Appeal proposes that appropriateness will be determined on a discretionary and case-by-case basis, as the final step in the analysis after considering a full evidentiary record.[37] This means that there is no clear guidance for those who wish to avoid actions that would attract such liability.

32. There is also no clear guidance for defendants that would allow them to seek dismissal of a claim at a preliminary stage. There should be clear parameters as to when disgorgement is inappropriate that are capable of being applied as a threshold. If it is left as a residual and discretionary consideration, it is likely to permit too many cases that should fail to consume already stretched judicial and governmental resources.[38]

33. Second, a number of the proposed residual factors are problematic if applied to the Crown. One factor identified by the Court of Appeal is whether allowing disgorgement "would inappropriately deter socially useful activity".[39] It is unclear exactly how this would be determined. In the case of the government, the profits earned may be used to fund important public and community-based initiatives. Would the social utility of keeping the profits to

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[36] Court of Appeal Decision at paras 170, 187
[37] Court of Appeal Decision at paras 170, 187. This was also argued in the Factum of the Respondents at para 49.
[38] See e.g. *Henry v. British Columbia (Attorney General)*, 2015 SCC 24 at paras 75, 77, 78
[39] Court of Appeal Decision at para 170, item 6

promote those public activities (and perhaps paying only compensatory damages) be what is weighed? If social utility of the impugned activity itself is examined, is there to be some measure of how many people came within the ambit of harm versus how many people received some more positive social benefit?[40] (And if so, how "positive" must such a benefit be?)

34. This broad, discretionary examination of "social utility" invites exactly the sort of review of the desirability of government action that this Court has said is inappropriate for courts to consider.[41] It is inappropriate to conduct such review in the context of a disgorgement claim for "tortious wrongdoing", and to make a discretionary decision as to whether a particular court believes the social value is sufficiently meritorious as to obviate the need for deterrence by disgorgement.

35. The social utility of the actions of the Crown and its agents should thus be presumed, in the absence of conduct that would meet the established standard to justify punitive damages, which is the other form of retributive justice. That standard is exceptional cases of malicious, oppressive, and high-handed conduct that offends a court's sense of decency.[42] Conduct that falls short of attracting a retributive award in the form of punitive damages cannot support a retributive award of disgorgement. Again, claimants will have traditional compensatory damages to remedy tortious wrongdoing that does not meet this exceptional standard.

2. Interpretation of "Three-Card Monte"

36. The interaction between the *Criminal Code* and provincial gaming legislation has previously been recognized by this Court,[43] which has also held that the area of gaming falls within the "double aspect" doctrine.[44] In *Siemens*, this Court held, "Parliament [through s. 207(1)(a) of the *Criminal Code*] has intentionally designed a structure for gaming offences that affirms the double aspect of gaming and promotes federal-provincial cooperation in this area."[45]

37. Given the recognition of the need for federal-provincial cooperation in gaming, the principle of cooperative federalism is appropriately considered in the interpretation of the

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[40] *Odhavji* at para 28, public officials may validly make decisions adverse to the interests of some.
[41] *Cooper* at para 38; *Imperial Tobacco* at para 87
[42] *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at paras 36, 69
[43] *Siemens v Manitoba (Attorney General)*, 2003 SCC 3 at paras 22, 35, 36 ["*Siemens*"]
[44] *R. v. Furtney*, [1991] 3 S.C.R. 89 at 103; *Siemens* at para 22
[45] *Siemens* at para 35

Criminal Code provisions at issue. This includes what this Court has described as the "fundamental rule of constitutional interpretation" that courts are to prefer an interpretation of a federal statute that does not interfere with a provincial statute where such an interpretation is available.[46] Absent "very clear" statutory language to the contrary, courts should not presume that federal legislation is intended to render provincial legislation inoperative, and courts must take a "restrained approach" in engaging in a paramountcy analysis and instead favour harmonious interpretations over incompatibility.[47]

38. The language in the *Criminal Code* must be clear if it is to prevent the provinces from selecting certain games in accordance with their gaming power. When interpreting "three-card monte" as used in the *Criminal Code*, the principles of cooperative federalism favour a narrow reading of that legislation. Otherwise, it opens the door broadly for paramountcy to come into play and invalidate provincial legislation and undertakings.

39. An interpretation of ss. 206(2) or 207(4) that incorporates the "essence" of three-card monte is not sufficiently clear to comply with these principles. More particularly, an interpretation that would encompass VLTs would have the effect of creating a direct conflict with gaming legislation enacted across the country. This would not accord with the principles reviewed above.

PART IV – SUBMISSIONS ON COSTS

40. AGLC makes no submissions on costs of the appeal and will bear its own costs.

PART V – ORDER SOUGHT

41. AGLC makes no submissions on the order to be issued in this appeal.

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

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G. Alan Meikle, Q.C.
Sean McDonough
Mandy England
Alberta Justice and Solicitor General
Counsel for the Intervener, **Alberta Gaming, Liquor and Cannabis Commission**

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[46] *Saskatchewan (Attorney General) v Lamare Lake Logging Ltd.*, 2015 SCC 53 at paras 20-22 ["*Lamare Lake*"]; *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras 37, 75 ["*Canadian Western*"]

[47] See *Lamare Lake* at paras 21, 27; *Canadian Western* at paras 37, 74, 75

PART VI – TABLE OF AUTHORITIES

APPENDIX "A"

CITATION: ALS Society of Essex County v. Corp. of the City of Windsor, CV-08-12004
Belle River District Minor Hockey Assoc. Inc. v. Corp. of Town of Tecumseh, CV-08-12005
2016 ONSC 6625
DATE: 20161101

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	Court File No. CV-08-12004
Amyotrophic Lateral Sclerosis Society of Essex County Plaintiff	Brian N. Radnoff, for the Plaintiff
– and – The Corporation of the City of Windsor Defendant	Brendan Van Niejenhuis and Fredrick Schumann, for the Defendant
- and -	Court File No. CV-08-12005
Belle River District Minor Hockey Association Inc. and Essex County Dancers Incorporated Plaintiffs	Brian N. Radnoff, for the Plaintiffs
- and – The Corporation of the Town of Tecumseh Defendant	Brendan Van Niejenhuis and Fredrick Schumann, for the Defendant **HEARD:** October 13, 2016

Proceeding under the *Class Proceedings Act, 1992*

REASONS ON MOTION TO STRIKE
AMENDED AMENDED STATEMENT OF CLAIM

PATTERSON J.:

[1] There were two motions before me, one is a motion by the defendants seeking to strike out amendments made to the statement of claim by the plaintiffs attached in Schedule "A" that include the request that the defendants pay not only the refund of allegedly unlawfully collected bingo license and related fees, but which now claim disgorgement of all monies collected by the defendants, including those paid by the opt-outs.

[2] The plaintiffs made these amendments on a without notice basis and initially submitted that they had a right to do so as the defendants have not filed their statement of defence and therefore it was permitted by Rule 26.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.

[3] This latter point became moot as the plaintiffs filed the other motion before me, namely a motion seeking leave to amend the statement of claim *nunc pro tunc*.

[4] The actions were commenced on October 24, 2008 and have resulted in two certification hearings, various attendances before the Divisional Court and the Court of Appeal, with ultimately in 2015 the action being certified.

[5] In all the documentation including the statement of claim, the language of the pleadings, the various certification orders and the final certification order the plaintiffs' claim was that they were seeking the return of or refund of monies paid for bingo licenses and related fees that they claim were illegal and void.

[6] It is the plaintiffs' position that they are not claiming there was unjust enrichment but that their claim was always for restitution of monies illegally paid, and that they always were claiming restitution or disgorgement of all monies paid. Further, they submit that the defendants not be permitted to retain any of the funds paid pursuant to an illegal tax on constitutional/public law grounds.

[7] The amendment claiming the disgorgement of all monies paid and not just a refund of money to class members was made after the opt-out period had ended.

[8] Because of circumstances that arose during the opt-out period I permitted those who had opted out a further time period in which they would have a right to opt back in and which time period is now also over.

[9] The plaintiffs indicate that changes that they are asking for by way of amendment are minor in nature and the issue of disgorgement of all monies paid including those paid who have elected to opt-out can be dealt with by the trial judge on a full factual record which could include some form of apportionment of the money being paid to class

members and/or be included in a separate award subject to the direction of the court including a cy-près award.

[10] The defendants raised the concern that as a result of the plaintiffs now seeking disgorgement of all monies paid and not just a request for a refund to class members, the claim would include funds paid by the opt-outs who have the right to pursue their individual actions.

[11] In answer, the plaintiffs indicate that it would be for the trial judge to deal with this as part of the remedy portion of the trial and that the trial judge could deduct funds in order that there would not be the issue of double payment.

[12] The plaintiffs submit the amendments are merely to clarify the claim but in my opinion it is and was clear. I have been case managing this file since 2008 and have provided three certification orders, the first two of which were appealed and ultimately, after the last decision of the Court of Appeal providing direction, was certified as a class action. In my opinion the language of the statement of claim was clearly an action for refund of monies paid by individual class members.

[13] The plaintiffs are now claiming that not only monies the individual class members paid but payment of all monies paid by everyone including the opt-outs. If this was their position from the beginning it should have been made clear from the beginning and it would have been examined with a full *Class Proceedings Act, 1992*, S.O. 1992, c. 6, ("*CPA*") section 5 analysis. This is especially true for those who have decided to opt-out as they were not provided with a notice of the proposed amendments. The list of opt-outs was readily available because of the circumstances in this action that they had to be notified giving them the right to opt back in if they so desired. The amended statement of claim now could adversely affect their rights because the plaintiffs are now claiming all monies, including those paid by the opt-outs. The plaintiffs submit these funds that could be distributed to the class members who did not opt-out including other remedies as directed by the trial judge. This is important information that could affect the decision by those who have opted out.

[14] The amendments also raise the question as to why would you have to do a detailed examination of the license and related fees paid by each individual member of the class if the claim is for all monies paid to be divided subject to the direction of the court? I understand the argument could be that the individual class members initially would get a refund of monies they paid and that the excess paid by the opt-out could be divided amongst the class members. This is not possible as the *CPA*, p. 27(2) provides that the common issues trial does not bind persons who have opted out. As a result, any claimant who opts-out has a right to proceed on their own and is not bound by the class proceeding.

[15] Although the rules permit the amendment of the statement of claim when the statement of defence has not yet been filed as in our case, our case involves a class proceeding that has been certified and the custom has arisen that in such a case leave of the court should be always sought in order that the court could scrutinize the proposed amendments to

determine whether they fundamentally change the nature of the action that had been certified: Branch, Ward, Class Actions in Canada, (Toronto: Thomson Reuters, 2016) at §15.40 and Eizenga, Michael, Class Actions Law and Practice, (Toronto: LexusNexis, 2009) at §3.303. Amendments were made without notice and I had no opportunity to determine whether the changes were significant or not and whether or not a re-examination of the section 5 certification criteria had been met.

[16] As noted in *Lacroix v. Canada Mortgage & Housing Corp.*, 2007 CarswellOnt 2582, at para. 7, the motion to amend cannot be considered simply as if the proceeding was an individual action. The rules respecting class actions must be considered and applied before any amendment is allowed.

[17] The initial question is, do the amendments disclose a cause of action? As provided in *Alberta v. Elder Advocates of Alberta Society*, [2011] 2 SCR 261, 2011 SCC 24, at para. 4, "The question is whether the pleadings, assuming the facts pleaded to be true, disclose a supportable cause of action. If it is plain and obvious that the claim cannot succeed, it should be struck out."

[18] *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] 1 S.C.R. 3, 2007 S.C.C. 1, provided that the cause of action returns money paid to the taxpayer who paid the money and not otherwise. *Kingstreet* decided that the refund of taxes paid pursuant to an *ultra vires* statute was a claim for restitution as a constitutional /public law remedy.

[19] Further, in *Kingstreet*, it was held that each payment of the tax constituted an independent cause of action which was complete when the government received payment. "The cause of action was complete at the moment the Province illegally received the payment": see *Kingstreet*, at para. 61. This does not support the plaintiffs' argument that any tax paid gives rise to a claim for disgorgement of all monies received by the government for the entire tax paid.

[20] *Elder Advocates*, at para. 61, narrowed the *Kingstreet* constitutional/public law remedy when illegal taxes were paid to cases where the statute was subsequently declared unconstitutional. The plaintiffs in our case do not claim the unconstitutionality of the relevant statutes resulting in my opinion that the *Kingstreet* constitutional/public law remedy is not available. In my opinion each class member's claim is limited to the gain received by the defendants from the individual class member, namely, an amount equal to the fees paid by that class member. Any refund would only allow the individual plaintiffs to recover the defendants' gain attributable to the wrong done to them who are the individual class member who did not opt-out.

[21] The other proposed amendment was paragraph 18.1 "The plaintiff pleads that this is an appropriate case for the court to determine the aggregate of the defendants' liability and to give judgment accordingly."

[22] It is not necessary to certify aggregate damages as a common issue as the failure to do so does not preclude the trial judge from invoking s. 24(1)(c) of the *CPA* once liability is

found and it is considered appropriate: see *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 S.C.R. 477, 2013 S.C.C. 57, at paras. 134.

[23] Therefore, in my opinion, it is not necessary to grant this amendment. I say this especially because it was done in conjunction with amendments requesting that the claim was not for a refund of monies paid but a disgorgement of all monies collected by the defendants. It is noted, also, at *Pro-Sys*, at paras. 131-133, the aggregate damages provision of the *CPA* is procedural only and does not expand liability:

> The *CPA* was not intended to allow a group to prove a claim that no individual could. Rather, an important objective of the *CPA* is to allow individuals who have provable individual claims to band together to make it more feasible to pursue their claims.

The proposed amendment 18.1 is not granted as it is not needed for s. 24(1)(c) to be heard at trial.

[24] Section 9 of the *CPA* allows for opt-outs and s. 27(2) provides that a judgment on common issues does not bind people who have opted out. As noted in *Sauer v. Canada (Attorney General)*, 2010 ONSC 4399, at para. 19, the right to opt out "is the mechanism by which . . . class members become bound by the court's decision". That by opting out a person may "preserve legal rights that would otherwise be determined or compromised in the class proceeding".

[25] The plaintiffs' proposal that the common issues' judge could deduct monies owing to those who have opted out from the assessment of damages in the common issues trial is not supportable as it could not legally bind those who have opted out. Further, it is not supportable that the additional funds paid by those who have opted out could be used to fund a possible cy-près award for the same reason.

[26] The representative plaintiffs may only act on behalf of class members who have not opted out and cannot act on behalf of all of those who have paid the alleged unlawful taxes. Those who remain in the class do not have a claim to payments made by others.

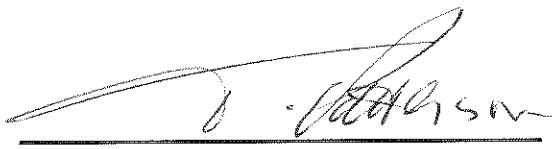
[27] In my opinion, the amendments proposed are not minor, not supportable in law, and contradict the basis on which this action has been litigated over an eight-year period from 2008 by the parties and which resulted in an order of certification of the class action.

[28] One of the factors supporting the certification order was that individual claims would be modest and access to justice by way of the class proceedings legislation was required to permit those individuals to assert a claim they may otherwise not assert. It is now being requested a claim for disgorgement all monies paid even by the opt-outs.

[29] In my opinion the amendments would result in the improperly taking of funds from those who have opted out for the distribution to others. Also, in my opinion, funding a cy-près award using opt-out monies is not permitted by the *CPA*.

[30] Therefore defendants' motion to strike out the paragraphs in the proposed amendments is granted and the plaintiffs' cross-motion seeking leave to make those amendments is denied.

[31] Costs submissions are to be submitted by the defendants within 30 days and by the plaintiffs within 30 days thereafter.



Terrence L. J. Patterson
Justice

Released: November 1, 2016

Schedule "A"

1. The plaintiff[s] claim[s] on its[their] own behalf and on behalf of the other members of the class as described below:

(d) an accounting of all lottery licensing fees and lottery administration fees ~~paid to~~ received by Windsor [Tecumseh] ~~by the plaintiffs and other class members~~ on or after January 1, 1990 found to be levied without authority or *ultra vires*;

(d.1) disgorgement of all lottery licensing fees and lottery administration fees paid to Windsor [Tecumseh] on or after January 1, 1990, found to be levied without authority or *ultra vires*;

(e) further and in the alternative, restitution of all such lottery licensing fees and lottery administration fees charged to the plaintiffs and other members of the class in accordance with the aforesaid accounting;

...

18.1 The plaintiff[s] plead[s] that this is an appropriate case for the court to determine the aggregate of Windsor's [Tecumseh's] liability and to give judgment accordingly.[27]

CITATION: ALS Society of Essex County v. Corp. of the City of Windsor, CV-08-12004
Belle River District Minor Hockey Assoc. Inc. v. Corp. of Town of Tecumseh, CV-08-12005
2016 ONSC 6625
DATE: 20161101

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Amyotrophic Lateral Sclerosis Society of Essex County

Plaintiff

– and –

The Corporation of the City of Windsor

Defendant

Proceeding under the *Class Proceedings Act, 1992*

- and -

Belle River District Minor Hockey Association Inc. and Essex County Dancers Incorporated

Plaintiffs

- and –

The Corporation of the Town of Tecumseh

Defendant

Proceeding under the *Class Proceedings Act, 1992*

REASONS ON MOTION TO STRIKE

AMENDED AMENDED STATEMENT OF CLAIM

Patterson J.

Released: November 1, 2016