SCC File No.: 38521

IN THE SUPREME COURT OF CANADA

(On appeal from the Court of Appeal of Newfoundland and Labrador)

BETWEEN:

ATLANTIC LOTTERY CORPORATION INC.

APPELLANT
(Appellant)

- and -

DOUGLAS BABSTOCK AND FRED SMALL

RESPONDENTS
(Respondents)

- and -

BALLY GAMING CANADA LTD AND BALLY GAMING INC.

INTERVENERS
(Interveners)

AND BETWEEN

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

APPELLANTS
(Respondents)

- and -

DOUGLAS BABSTOCK AND FRED SMALL

RESPONDENTS
(Respondents)

- and -

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 MANITOBA –
LE PROCUREUR GÉNÉRAL DU MANITOBA

PURSUANT TO RULE 37 OF THE *RULES OF THE SUPREME COURT OF CANADA*

Counsel for the Intervener, Attorney General of Manitoba

Denis Guénette
Tom Dobson
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
Tom.Dobson@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 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 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 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

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PART I: OVERVIEW OF POSITION

1. The Province of Manitoba has statutory responsibility for the conduct and management of the VLT lottery scheme within the province that dates back to the early 1990's. Such provincial schemes are within the jurisdictional competence of the provinces and are not ousted by the *Criminal Code* prohibitions on "three card monte" or games similar thereto.

PART II: POSITION OF THE ATTORNEY GENERAL OF MANITOBA

2. The Attorney General of Manitoba addresses only one issue in this Factum:

> Do video lottery games, of the type at issue in the proposed class action that is the subject of this appeal, fall within the *Criminal Code* prohibition against three card monte?

3. The Attorney General of Manitoba submits that they do not.

PART III: STATEMENT OF ARGUMENT

Introduction

4. The plaintiffs in a proposed class action argue that VLTs are beyond the constitutional jurisdiction of provincial Legislatures.

5. The plaintiffs' position rests on a false assumption, inherent to their pleading, that Parliament either has exclusive jurisdiction to legislate gaming or that Parliament can use the *Criminal Code* to restrict the constitutional jurisdiction of provinces to legislate in relation to gaming and VLTs within their provinces. However, provincial legislative competence over gaming is indisputable: it is based on the *Constitution Act, 1867* sections 92(13) and (16),[1] and sections 92(9) and (7).[2] To the extent Parliament also legislates in relation to gaming, it does so within its criminal law powers at section 91(27), but not exclusively.[3]

6. This Court has unquestionably settled that gaming falls within the constitutional "double

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1 *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3 ("*Siemens"*), at para. 22.
2 *R. v. Furtney*, [1991] 3 S.C.R. 89 ("*Furtney"*), at para. 29.
3 *Furtney*, para. 29.

aspect" doctrine. [4] This point of constitutional law has been free from doubt for decades. Provincial and federal legislation over gaming coexists, cooperatively.

7. Any suggestion that (i) provincial gaming legislation somehow owes its existence to the *Criminal Code*, or (ii) sections 206 and 207 of the *Criminal Code* might obviate provincial constitutional competence over gaming, is simply in error. Parliament does not "authorize" provincial gaming legislation. The Constitution does.

Manitoba's concern

8. This is an issue of concern to the Attorney General of Manitoba, given that Manitoba's Legislature has established a legislative régime over gaming and VLTs, as follows:

a. Lottery schemes, including VLTs, are conducted and managed under *The Manitoba Liquor and Lotteries Corporation Act*[5]: see s. 2(b) for the Act's purpose, and ss. 44, 49(1)(g), (h) and (i), and 56(7) as it applies to VLTs. See also the *Video Lottery Regulation*, Man. Reg. 84/2014.

b. Lottery schemes, including VLTs, are regulated under *The Liquor, Gaming and Cannabis Control Act*[6] for the purpose of being conducted and managed with integrity and in the public interest: see s. 2(b) for the Act's purpose; Part 4 regarding gaming generally; the definition of "siteholder" at s. 77(1) and its use throughout Part 4, and s. 81(3) specifically in relation to VLTs; and ss. 87(1) and 113 in relation to the approval of the gaming integrity of lottery schemes.

9. The statement of claim and plaintiffs' factum suggest the only legislation that authorizes the Atlantic Lotteries Corporation Inc. ("ALC") to conduct and manage VLTs as a lottery scheme in Newfoundland and Labrador is exclusively the *Criminal Code*. But any such suggestion is wrong in law. The legislation that actually authorizes ALC to conduct and manage VLTs as a lottery scheme in that province is the relevant provincial legislation. The provincial legislation in Newfoundland and Labrador that pertains to gaming and VLTs will, and must,

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4 *Siemens*, at para. 22, and *Furtney* at para. 29.
5 C.C.S.M. c. L155.
6 C.C.S.M. c. L153.

remain constitutionally-presumed valid.[7]

10. By omission, the core allegations in the plaintiffs' statement of claim imply there is no provincial legislation in Newfoundland and Labrador in relation to gaming and VLTs, or that the legislation that does exist is somehow irrelevant and can be disregarded. However, it is not the *Criminal Code* that actually vests authority in ALC to conduct and manage VLTs. It is provincial legislation.

Gaming is a double aspect subject matter

11. This Court has already held that constitutionally, gaming is a "double aspect" subject matter. Again, it is not Parliament that authorizes provincial gaming legislation, but the *Constitution Act, 1867*. The *Criminal Code* neither displaces nor constrains provincial legislative competence over gaming, and it does not sit alone at the apex of Canadian gaming law from which all other authorities and powers – including provincial laws – are subsequently derived and delegated. When it comes to gaming, provincial legislation and federal legislation sit alongside one another.

12. In fact, the *Criminal Code* and provincial laws are drafted in light of that constitutional legal reality, and must be interpreted accordingly. The concept of "conduct and management" is one of the vital cross-jurisdictional links.

13. The Attorney General of Manitoba has previously appeared in this Court as a party, in a case where it successfully defended against a challenge to the validity of a Manitoba statute that related to VLTs. On January 30, 2003, this Court delivered reasons for decision in *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3. In upholding that legislation, this Court found unanimously as follows [with emphasis added]: [8]

> [22] The pith and substance of the *VLT Act* falls within a provincial head of legislative authority. As Stevenson J. wrote for this Court in *Furtney*, *supra*, at p. 103, gaming is a matter that falls within the "double aspect" doctrine. Accordingly, gaming can be subject to legislation by both the federal and provincial governments:

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7 *Hewson v. Ontario Power Co. of Niagara Falls* (1905) 36 S.C.R. 596, at 603

8 *Siemens*, paras. 22 and 23.

> In my view, the regulation of gaming activities has a clear provincial aspect under s. 92 of the *Constitution Act, 1867* subject to Parliamentary paramountcy in the case of a clash between federal and provincial legislation. . . . Altogether apart from features of gaming which attract criminal prohibition, lottery activities are subject to the legislative authority of the province under various heads of s. 92, including, I suggest, property and civil rights (13), licensing (9), and maintenance of charitable institutions (7) (specifically recognized by the *Code* provisions). Provincial licensing and regulation of gaming activities is not *per se* legislation in relation to criminal law.
>
> Without foreclosing discussion on other potential heads of jurisdiction, it is sufficient for this appeal to find that the *VLT Act* was, *prima facie*, validly enacted under ss. 92(13) and 92(16). Section 16(1) deals specifically with the siteholder agreements, which are contractual in nature and thereby fall under property and civil rights. On a broader level, the municipal plebiscites empower each community to determine whether VLTs will be permitted, thereby invoking matters of a local nature.
>
> [23] The *VLT Act* is not, as the appellants have submitted, a colourable attempt to legislate criminal law.

14. At the time, the "VLT Act" that was discussed in *Siemens* was a discrete stand-alone "local option" statute for municipalities, called *The Gaming Control Local Option (VLT) Act*, which built on the main regulatory statute *The Gaming Control Act.*[9] Still, the principle in *Siemens* applies to provincial gaming and VLT legislation generally, and not just the local option aspect.

15. In fact, *Siemens* did not establish new law about the division of powers as it relates to gaming, but worked from the principle about provincial legislative competence as already established earlier in this court's decision of *Furtney*.[10]

16. In more recent cases, this Court has been using the language of "cooperative federalism" to explain situations where provincial and federal laws co-exist over a subject matter, and approaches to use when interpreting the legislation.[11] It is submitted that gaming is a longstanding pre-eminent example of cooperative federalism. In any event, when it comes to the interpretation of provincial and federal laws where they co-exist or overlap, there are well-

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9 The successor legislation in Manitoba since April 2014, is Part 10 (Community Input) of *The Liquor, Gaming and Cannabis Control Act*, C.C.S.M. c. L153.

10 *R. v. Furtney*, [1991] 3 S.C.R. 89.

11 See, for example, *Reference re Pan Canadian Securities Regulation*, 2018 SCC 48, at paras 16 to 20, and the cases referred to therein.

established constitutional principles that must be applied before reaching the conclusion that one set of provisions is invalid or rendered inoperable. A conflict or inconsistency must first be established. At that point, the doctrines which result in invalidity might be engaged.[12] Crucially, the established governing principle is that restraint is to be used before deciding there is a conflict or inconsistency.[13]

17. However, because the plaintiffs do not acknowledge any overlap, they make no suggestion of conflict or inconsistency. They simply disregard the valid provincial legislation that empowers ALC to conduct and manage VLTs, arguing their case entirely as an interpretive exercise that can be self-contained within the *Criminal Code*. But when the provincial law is actually taken into account – as it should, and as it must – it becomes apparent that any conflict arises only from the plaintiffs' proposed expansive definition of the *Criminal Code* three card monte prohibition. Without that proposed expansive definition, the provincial and federal laws will simply continue to operate in harmony, as they have already for many years.

18. With the plaintiffs being entirely silent about the provincial law and any constitutional principle that they would suggest would be engaged to permit their expansive definition to prevail, it is not known which constitutional theories the plaintiffs would actually invoke in their attempt to invalidate the presumptively valid provincial laws. From a constitutional perspective, this makes it difficult to meaningfully respond. After all, how can one respond to a constitutional theory that has not been raised, in relation to applicable provincial legislation that is simply ignored? The plaintiffs do not, for example, specifically suggest whether they intend to advance the doctrine of paramountcy. Their only analytical theory of the law is that the *Criminal Code* is the lone statute that is to be considered, in isolation from provincial law. But disregard by omission is not an established constitutional doctrine that can lead to an invalidation of provincial legislation.

Procedural Concerns about Raising a Constitutional Issue

19. The Attorney General of Manitoba is concerned that procedurally, an important

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12 See, for example, *Smith v. The Queen*, [1960] S.C.R. 776 at 800.

13 In addition to the principle of interpretation that applies to co-operative federalism provisions, see Hogg, *Constitutional Law of Canada*, Chapter 16 "Paramountcy", at section 16.6 "Effect of Inconsistency".

constitutional question has not been put squarely in issue in this matter. In particular, provincial competence over gaming is at risk of being eroded on the basis of a trial, despite the absence of any notice of constitutional question having put the issue directly in play, and without any mention of the constitutional issue directly in the pleading. While a suggestion is being made that this is a question that can simply be submitted to a trier fact based on expert evidence, without regard to any constitutional issues, the Attorney General of Manitoba submits that a constitutional question that relates to the division of powers is a matter of law, not one of fact.

20. The Attorney General of Manitoba submits that, where a constitutional inadequacy arises from within a pleading, the law should allow for courts to exercise their remedial authority at the early stages of proceedings, and not solely after trial. This can include, if necessary, a properly framed motion to strike, on the basis that a plaintiff will be incapable of proving as true the allegations of law – including constitutional law – that are made either expressly in the pleading, or implicitly.

21. While this Court's decision in *Miazga*[14] was not a constitutional case, that was a decision that highlighted the importance of a properly framed pleading in order to cause an important issue to be brought forward from the start in the courts. At para. 74, this Court wrote:

> [74] …. Nonetheless, in the absence of any express provision to the contrary, the question whether there is a sufficient case to be put to the jury will remain a matter to be determined by the judge as a matter of law, in accordance with the respective roles of the judge and the jury. Therefore, factual inadequacy in a motion to strike a pleading or on a motion for summary judgment can still form a basis for the pre-trial striking of the pleading or the dismissal of the action, even where the ultimate determination of the issue may be expressly reserved by statute to the jury. See, e.g., *Wilson*, per Dambrot J.

22. The motion to strike can therefore be an appropriate tool for trial courts to maintain control over their proceedings.

23. The Attorney General of Manitoba acknowledges that the motion to strike test includes the step of making an initial presumption that a plaintiff will be able to prove their allegations as true. However, that the initial presumption in that test has its exceptions.

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[14] *R. v. Miazga* 2009 SCC 51

24. On a motion to strike a statement of claim for no reasonable cause of action, the pleading is to be taken as true – but only to the extent the plaintiffs are capable of proving their allegations.[15] While this general presumption is a well-established part of the motion to strike test, an exception also is clearly part of the test. Thus, where the plaintiffs make allegations that they will be unable to prove, those allegations do not enjoy the benefit of the general presumption.

25. In *Operation Dismantle*, this Court struck an action that alleged the federal government was increasing the risk of nuclear war by permitting cruise missiles to be tested in Canada. This Court held the allegation of an increased risk was "simply too uncertain, speculative and hypothetical to sustain a cause of action."[16]

26. In *R. v. Imperial Tobacco*, this Court again recognized the exception to the general presumption, and restated the principle: "The facts pleaded are taken as true unless they are manifestly incapable of being proven."[17] The history of the presumption was previously canvassed in *Hunt v. Carey Canada*.[18]

27. The Attorney General of Manitoba submits that an exception to the motion to strike presumption can apply where a party pleads law – including constitutional law – that it will be incapable of proving.

Conclusion

28. The constitutional law in this area is certain and well-established. Gaming is a double aspect subject matter and clear example of cooperative federalism. Provinces are constitutionally empowered to legislate in relation to gaming, including VLTs. The *Criminal Code* does not restrict that constitutional legislative authority, and must be understood by inter-relating to it.

29. Courts should be entitled to intervene, on a motion to strike before trial, if it is plain and obvious, from a constitutional perspective, that the claim cannot succeed because the plaintiffs will be unable to prove the underlying assumption of constitutional invalidity.

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15 *R. v. Imperial Tobacco*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17
16 *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at p. 447.
17 *R. v. Imperial Tobacco*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 22
18 *Hunt v. Carey Canada*, [1990] 2 S.C.R. 959, at p. 975.

PART IV: COSTS

30. The Intervener Manitoba 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: ORDER REQUESTED

31. In light of the said Order of Justice Moldaver regarding the allocation of time to the interveners for oral argument, Manitoba makes no further request.

DATED at the City of Winnipeg, in the Province of Manitoba, this 12th day of November, 2019.

PER:

DENIS GUÉNETTE,
Counsel for the Intervener, Attorney General of Manitoba

AND PER:

TOM DOBSON
Counsel for the Intervener, Attorney General of Manitoba

PART VII – TABLE OF AUTHORITIES & LEGISLATION

Case Law:	**References**
Hewson v. Ontario Power Co. of Niagara Falls (1905) 36 S.C.R. 596	9
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