

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
(Respondent)

- and -

BALLY GAMING CANADA LTD. AND BALLY GAMING INC.

INTERVENORS
(Intervenors)

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
(Respondent)

- and -

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PARTS I - II – OVERVIEW AND ISSUES

1. These Respondents' submissions collectively respond to the eight (8) facts filed on this appeal on behalf of the Intervenor.

PART III – STATEMENT OF ARGUMENT RESPONDING TO INTERVENORS

A. Intervenor's Arguments Generally

2. Five themes collectively emerge from the respective facts of the intervenors:
- (a) federal legislation like the *Criminal Code of Canada* (the "*Code*") must be interpreted in a manner which does not otherwise constrain valid provincial legislative action;
 - (b) terms of contract ought not be implied where a public body is acting under the rubric of a provincial statutory framework;
 - (c) there should be no disgorgement remedy at Canadian law for the commission of a crime *simpliciter*;
 - (d) that the prohibition against three-card monte and all games "similar" thereto expressly codified in section 206(2) of the *Code* does not also apply to games permissible pursuant to section 207(4); and
 - (e) a cause of action for disgorgement based on unjust enrichment gained by the commission of a wrong, ought not be a part of Canadian tort law.

B. *Code* Prohibition of Three-Card Monte & Games Similar Thereto

3. As Issues 1, 3 and 4 all pertain to the interpretation of the *Code*, they will be addressed together below. One overarching principle however applies to each sub-issue which this Honourable Court ought to bear in mind upon reviewing these arguments:

"Parliament does not happily abide gaming activities of any sort in Canada. The little it tolerates, it does so grudgingly. **Section 206 [of the *Code*] is prohibitive in nature, not regulatory. The purpose of Parliament in enacting it was generally to outlaw gaming and lotteries.** ... Thus, even permitted lotteries must strictly adhere to the limits imposed by the terms and conditions of s. 207 [of the *Code*]."¹ [emphasis added]

¹ Reference *Re Earth Future Lottery (P.E.I.)*, 2002 PESCAD 8, at para. 7, upheld by the Supreme Court of Canada, [2003] 1 SCR 123.

4. Therefore, any exceptions to the *Code's* prohibitions must be very narrowly construed in favour of prohibition to properly honour the spirit and intent of Parliament.

5. ***Co-operative Federalism.*** A number of intervenors rely on this principle to assert that the Court of Appeal's interpretation of "three-card monte" in the *Code* was so broad, that it somehow restricts provincial autonomy over gambling regulation. In this regard, the intervenors rely upon the following tenets of law, none of which the Respondents dispute:

- where there is an interlocking federal-provincial scheme like gambling regulation, the reach of the federal legislation at issue ought not be artificially broadened; and
- if Parliament can be taken to have left a matter to the province – narrow prohibitions against certain gambling practices like three-card monte – then it should be taken and accepted to have done so.

6. Fundamentally, the Intervenors object to an alleged expansive interpretation of gambling offences in the *Code* which necessarily leads to a corollary narrow interpretation of provincial gambling exemptions. The Intervenors have attempted to characterize the issue as one of conflicting federal and provincial legislation. This alleged "conflict" was not engaged below and is not engaged on this appeal. Importantly, what the Intervenors have ignored is the unassailable fact that "were it not for the exemptions laid out in the *Criminal Code*, it is clear that provincial legislatures would have no jurisdiction to permit the operation of lottery schemes otherwise prohibited by the *Code*."² As such, provincial exemptions must be **narrowly** construed.

7. None of these principles of cooperative federalism are in dispute. Neither does their application answer the heart of the litigation below which presents as a matter of statutory interpretation at its essence: is it possible for the VLT games operated in Newfoundland to constitute games "similar" to three-card monte, which are prohibited by the *Code*. The Court of Appeal merely determined that they "might", on a full evidentiary record. The Intervenors are simply conflating the notion of complementary legislative jurisdiction with how the game of three-card monte ought to be specifically defined and interpreted.

8. ***Remedy for Crimes Simpliciter.*** Some Intervenors contend that permitting disgorgement as a remedy for breaches of the *Code* impermissibly undermines the *Code's* forfeiture and

² J.A. Osborne & C. S. Campbell, "Recent Amendments to Canadian Lottery and Gaming Laws: The Transfer of Power between Federal and Provincial Governments", *Osgoode Hall Law Journal* 26.1 (1988): 19 at 31 – 32.

restitution provisions which already exist. Their argument is that Parliament deemed it appropriate to divine a statutory scheme for restitution of the proceeds of crime and therefore, it remains beyond the purview of a court to permit other remedies at common law which would operate to erode that statutory forfeiture scheme.

9. Respectfully, this argument ignores the express statutory language of section 11 of the *Code* which provides that "no civil remedy for an act or omission is suspended or affected by reason that the act or omission is a criminal offence".³ This provision specifically contemplates the possibility of 'overlapping' remedies as between the common civil law and criminal law in relation to the same act or omission, whether that act constitutes a crime or a civil tort or possibly both. What is more is that the majority of *Code* provisions referred to with respect to restitution orders or fines, only become operative at sentencing. This confirms that the *Code's* provisions for monetary orders were never intended to be used as a substitute for civil proceedings, civil judgments or enforcement. In any event, this is not a case of allegations concerning the commission of crimes *simpliciter* alone but also turns on causes of action in tort, contract and unjust enrichment.

10. ***Statutory Definitions Must Have the Same Meaning Throughout the Same Statute.*** The Intervenor's argument that the definition of "three-card monte" in section 206(2) of the *Code* does not also apply to the meaning of "three-card monte" in section 207, offends all notions of modern statutory interpretation. In fact, this principle of interpretation – that the same word shall be given the same consistent meaning throughout a statute – is so settled and established in our common law that it has been elevated to a presumption at law:

"It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework. ... **The presumption of coherence is virtually irrebuttable.**"⁴[emphasis added]

11. The Court of Appeal logically applied this presumption below and found that the most likely intention of Parliament was that the definition of three-card monte in section 206(2) also applied to the same phrase in section 207(4)(a). Nevertheless, certain Intervenor's assert that this creates intolerable uncertainty, giving rise to a "hovering possibility of criminality", offensive to

³ *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 11.

⁴ R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) at 176 [RBA, Tab 6]

criminal law itself. One Intervenor in particular, the Western Canada Lottery Corporation expressly states that determining which lottery scheme are authorized pursuant to section 207(4) is a matter for Parliament, not the courts. The Respondents wholeheartedly agree.

12. The only manner by which to honour the intention of Parliament is to presume – and import – an internally harmonious, consistent and coherent statutory meaning of three-card monte, one that includes "games similar thereto". The Intervenors have provided no compelling legal rationale for departing from this principle. Moreover, the approach urged by the Respondents honours the settled proposition that that, "as criminal activity [gaming and gambling], its qualified [provincial] exemptions must be adhered to strictly."⁵ As "without the exemptions, the provincial governments would be acting as nothing more than elected criminal organizations."⁶

13. The ancillary issue that the Intervenors raise regarding interpretation of the *Code* is the ostensible business problem created by the Decision below which they allege constitutes a judicial creation of a crime in hindsight. In support, they argue that courts cannot look to the mischief sought to be prevented in interpreting elements of criminal offences.

14. Criminal offences on their merits are interpreted all the time with regard to the underlying mischief to reveal the intent of Parliament as well as with the assistance of expert evidence. This Court has itself repeatedly found that expert evidence has an essential role in criminal cases and serves to "help the court determine whether the elements are made out".⁷ Acceptance of the Intervenors' arguments in this regard would therefore work to vitiate these holdings.

C. Implied Contractual Terms

15. The Intervenors raise two issues: (a) the propriety of implying a term where one party is a regulator, and (b) if an implied term may be imposed upon a regulator, what is the appropriate substance of such a term.

⁵ T. Patrick, "No Dice: Violations of the Criminal Code's Gaming Exemptions by Provincial Governments", 44 *Crim. L.Q.* 108 (2000) at 113, [Reply B.A., Tab 1].

⁶ T. Patrick, "No Dice: Violations of the Criminal Code's Gaming Exemptions by Provincial Governments", 44 *Crim. L.Q.* 108 (2000) at 111, [Reply B.A., Tab 1].

⁷ *R. v. J.-L. J.*, [2000] 2 S.C.R. 600 at para. 25; *R. v. Levkovic*, [2013] 2 S.C.R. 204 at para. 73.

16. **Regulators Remain Subject to Basic Implied Obvious Terms.** Certain Intervenors argue that public authorities or regulators ought not be burdened with considerations resulting from private duties. In so doing, they argue that the proximity tort analysis applies with equal force to the imposition of obvious contractual terms. However, this very Court has found the opposite: "the regulated actor is taken to be aware of and to have accepted the imposition of a certain objective standard of conduct".⁸ That is all the Respondents seek to imply – a minimum standard of fairness which is a far cry from the Intervenors' authorities holding that implied terms cannot fetter a regulator's discretion nor force it to breach a term of its enabling statutory regime. Neither would be the result here if the merits court imposed a term requiring a fair game.

17. **Obviousness of the Implied Term – A Fair Game.** It has already been judicially determined that Parliament's purpose in enacting sections 206 and 207 of the *Code* was "to ensure they [gaming and lotteries] would be run honestly".⁹ As such, the implication of 'fairness' sought by the Respondents falls squarely within the "degree of obviousness" identified by this Court, required for implication.¹⁰ It is an unassailable proposition as both a matter of law and public policy that statutory public gaming or lottery authorities ought to be required to act fairly in their dealings.

D. Disgorgement For Wrongdoing

18. In response to the Intervenors' arguments asserting that no such remedy ought to be available at common law, the Respondents repeat, rely and adopt their submissions contained in their appeal factum dated October *, 2019, in their entirety.

PART IV – ORDER SOUGHT

19. The Respondents request that this appeal be dismissed, with costs of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 15th day of November 2019

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⁸ *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at 229.

⁹ *Reference Re Earth Future Lottery (P.E.I.)*, 2002 PESCAD 8, at para. 7, upheld by the Supreme Court of Canada, [2003] 1 SCR 123.

¹⁰ *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 at para. 29.

PART V – SUBMISSIONS ON CASE SENSITIVITY

20. Not Applicable

PART VI - TABLE OF AUTHORITIES

CASES

AT PARAGRAPH(S)

<i>M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.</i> , [1999] 1 S.C.R. 619	17
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Other

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LEGISLATION

Criminal Code of Canada, R.S.C. 1985, c. C-46, [s. 11](#)

Code criminel, L.R.C. (1985), ch. C-46, [s. 11](#)