S.C.C. File No.

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

BETWEEN:

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

APPLICANTS
(Second, Third, Fourth, Fifth and Seventh Respondents)

-and-

DOUGLAS BABSTOCK and FRED SMALL

RESPONDENTS
(First Respondents)

-and-

BALLY GAMING CANADA LTD. and
BALLY GAMING INC.

INTERVENERS
(Interveners)

APPLICATION FOR LEAVE TO APPEAL
(VLC, INC., IGT-CANADA INC., INTERNATIONAL GAME TECHNOLOGY, SPIELO INTERNATIONAL CANADA ULC, and TECH LINK INTERNATIONAL ENTERTAINMENT LIMITED, APPLICANTS)
(Pursuant to s. 40 of the *Supreme Court Act,* R.S.C. 1985, c. S-26 as amended 1990 c. 8 and Rule 25 of the *Rules of the Supreme Court of Canada*)

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Documents Relied Upon

The Applicants, VLC, Inc., et al. rely on and refer the panel to the Application for Leave to Appeal of the Applicant, Atlantic Lottery Corporation Inc. – Société des Lotteries de Atlantique ALC, (First Application) which contains the Statement of Claim, dated April 26, 2012 at Tab 9 under Documents Relied Upon.

APPLICANTS' MEMORANDUM OF ARGUMENT

PART I – OVERVIEW AND BACKGROUND FACTS

Overview

1. This proposed appeal raises one of the most important issues to come before the Court in recent years. The majority decision of the Newfoundland and Labrador Court of Appeal recognizes a new, broad and all-encompassing cause of action for disgorgement of benefits or profits based only upon the commission of a "wrong". The cause of action does not require proof of causation of any loss or damage to the plaintiff. The plaintiff may be entitled to the disgorgement remedy where the defendant has committed a "wrong", notwithstanding that the plaintiff has suffered no injury, harm, loss or damage as a result of the "wrong". The "wrong" may arise from an incomplete cause of action in tort, breach of contract, a crime or otherwise.

2. Labelled "disgorgement for wrongdoing", the new cause of action jettisons the language of "waiver of tort". The majority of the Court of Appeal expressly rejects the concept that waiver of tort is simply a remedial option, dependent upon the establishment of an underlying tort. The new cause of action extinguishes the requirements of the existing causes of action. The result is a fundamental shift in our jurisprudence regarding civil remedies for wrongs in Canada. It warrants consideration by this Court.

3. Damages for civil wrongs in Canada have traditionally been awarded only upon proof of wrongdoing causing damage to the plaintiff. In tort, damages are compensatory - designed to put the plaintiff into the position she would have been in had the tort not occurred. In negligence, the plaintiff must establish a duty, a breach of duty, "but for" causation, and resulting loss or damage. In contract, damages are awarded for breach of contract to put the plaintiff in the position she would have been in if the contract had been performed. Disgorgement of profits was a remedy limited to proprietary or fiduciary claims or, in exceptional cases, the acquisition of a benefit from a third party.

4. The majority decision has departed from these fundamental principles. The analysis for disgorgement for wrongdoing shifts the focus to the nature of the "wrong" committed, and whether that "wrong" warrants disgorgement of benefits or profits, with no requirement for any injury or loss. However, the circumstances which ostensibly justify disgorgement are largely undefined. The result is a new cause of action which raises familiar concerns of "liability in an indeterminate amount for an indeterminate time to an indeterminate class."[1]

5. Whether Canadian law should recognize this new cause of action is a matter of significant public importance. It has far reaching implications in at least three areas:

   (i) it is an important issue of law that affects the nature and type of civil remedies for wrongs in Canada;

   (ii) it has important implications for the video lottery gaming industry in Canada, including the various Canadian Lottery Commissions and the provincial governments that rely upon those Lottery Commissions for millions of dollars of revenue to support hospitals, schools, transportation and other public services; and

   (iii) it has potential serious effects upon the Canadian economy, negatively impacting the competitive position of manufacturers and suppliers of a wide range of products and services in Canada.

6. The Applicants adopt the submissions set forth in the Memorandum of Argument of Atlantic Lottery Corporation (ALC), which separately seeks leave to appeal. The submissions contained herein are supplementary to ALC's submissions.

Background Facts

7. The Applicants adopt the statement of facts set forth by ALC and supplement those facts with the following.

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[1] Deloitte & Touche v. Livent Inc. (Receiver of), 2017 SCC 63; [2017] 2 SCR 855 at para. 135 citing to Caparo Industries plc v Dickman, [1990] 1 All ER 568 (HL) at p. 576 and Ultramares Corp v Touche, 174 NE 441 (NY 1931) at p. 444

8. The Applicants are all manufacturers and suppliers of video lottery terminals (VLTs) who have supplied VLTs to ALC during the proposed class period. ALC has commenced third party proceedings against the various manufacturers and suppliers claiming reimbursement and indemnification of any amount that ALC may be ordered to pay to the class.

9. ALC conducts and manages a constitutionally permissible lottery scheme as agent for the governments of Newfoundland and Labrador, Nova Scotia, New Brunswick and Prince Edward Island. The *Lotteries Act*[2] and the *Video Lottery Regulations*[3] establish the powers and authority given to ALC in Newfoundland and Labrador. By virtue of the *Regulations*, ALC is empowered to approve which VLTs may be operated in the Province and the sites for such operation.[4] All VLTs operated in the Province have been approved by ALC for play by residents of Newfoundland and Labrador.

10. The *Lotteries Act* and the *Video Lottery Regulations* create duties to the public at large, not private law duties of care. The Statement of Claim is grounded upon alleged duties of care that are said to be owed to all players of VLTs who are residents of Newfoundland and Labrador. The Statement of Claim alleges that VLTs are inherently deceptive, inherently addictive and inherently dangerous when used as intended.[5] In other words, VLTs have such characteristics by their very nature.

11. No special relationship of proximity between the individual Plaintiffs and ALC has been pleaded. This case is not about whether a private law duty of care may be owed by ALC to an individual person who could demonstrate a special relationship of proximity with ALC. Any such duty of care, if it existed, would be owed only to the specific individual and could not ground a class action on behalf of all players of VLTs.

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[2] Lotteries Act, SNL 1991 c. 53
[3] Video Lottery Regulations, CNLR 760/96
[4] See the discussion by Welsh, JA, dissenting, at paras. 29-33; Reasons of the Court of Appeal, ALC Leave Application, Tab 6
[5] Statement of Claim, paragraph 12; ALC Leave Application at Tab 9

12. The claim on behalf of all persons using VLTs in Newfoundland and Labrador relates to the very activity that ALC is empowered to determine as regulator; that is, what games are to be approved for play in the Province.

PART II – STATEMENT OF QUESTIONS IN ISSUE

13. The overriding issue of public importance in the proposed appeal is whether Canadian law should recognize a broad new cause of action for disgorgement of benefits or profits based upon the commission of a "wrong", without any requirement for proof of causation, loss or damage.

14. The Applicants adopt and support the issues of public importance as set forth by ALC in its Memorandum of Argument, as follows:

    (a) Should a new cause of action be recognized entitling a plaintiff to a disgorgement remedy upon proof of the breach of a duty of care in negligence, absent damage, injury or loss?

    (b) What is the proper analytical framework to apply to the issue of causation when considering disgorgement for breach of contract?

    (c) What is the proper interpretation of the definition of "three-card monte" found in subsection 206(2) of the *Criminal Code*, and is breach of the *Code*'s prohibition on three-card monte sufficient in and of itself to warrant a disgorgement remedy?

PART III – ARGUMENT

The Proposed Appeal Raises Significant Issues of Public Importance

Introduction

15. The Applicants adopt the submissions contained in the Memorandum of Argument of ALC. These submissions are supplementary.

The Majority Decision Circumvents Fundamental Principles

16. There has been an ongoing debate as to whether "waiver of tort" is a separate cause of action or merely an election of remedies dependent upon proof of the constituent elements of an underlying tort. The majority of the Court of Appeal of Newfoundland and Labrador has decided in favour of the former and, in doing so, has restated the doctrine as disgorgement for wrongdoing -- a new, broad and all-encompassing cause of action for disgorgement of benefits or profits based upon the commission of a "wrong".

17. Notwithstanding the majority's assertion,[6] the new cause of action is not an incremental development in the law. It is a complete rejection of longstanding principles at the heart of the compensatory model of justice.

18. Under the new cause of action, the wrong may arise from an incomplete tort, breach of contract, crime or otherwise. Proof of causation of loss or damage to the plaintiff is not required -- the plaintiff need not suffer an injury, harm, loss or damage to be entitled to the disgorgement remedy. The Court of Appeal has effectively asked and answered the philosophical question posed by Justice Lax in *Andersen v St. Jude*: what makes conduct "wrongful" at law?[7] The Court's answer is unprecedented. It is no longer the occurrence of a loss or injury. A breach of duty, breach of statute, or breach of contract is sufficient to ground a claim of disgorgement for wrongdoing.

19. Green JA, writing for the majority, set forth the essence of this new cause of action as follows:

> [86] The cause of action supporting the second category is not the unjust enrichment itself but the existence of a wrong (such as a tort, breach of contract, breach of fiduciary duty or perhaps even a crime) against the claimant which has the result of enabling the defendant to acquire a gain (sometimes described as an unjust enrichment), not necessarily from the claimant, that justifies the court in ordering the disgorgement of the wrongdoer's gains.

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[6] Reasons of the Court of Appeal at para. 179; ALC Leave Application, Tab 6

[7] Madam Justice Lax notes the significance of this question in Andersen v St. Jude Medical Inc., 2012 ONSC 3660; 219 ACWS (3d) 725 at para. 593

> …
> [92] Furthermore, notions of "compensation" which underpin the basic remedial responses to tort and breach of contract never seem far from the discussion when matters of restitution and disgorgement are being analyzed. In reality, however, concepts of compensation for loss have nothing to do with unjust enrichment-based claims or wrongful acquisition based claims, either with respect to the establishment of the cause of action or the remedial responses.
> …
> [139] While I agree with the conclusion reached by the applications judge, I would not express my reasons quite as he has done. I would not dismiss the application simply because the law with respect to waiver of tort is "uncertain". While that is certainly a relevant consideration, I would go further, for the reasons to follow, and say that the law has progressed to the point where it is reasonable to conclude that, depending on proof at trial, a court could find on the facts as pleaded that a claim for disgorgement is actionable (subject, of course, to possible defences) based on unjust enrichment of the appellant as a result of tortious wrongdoing. In so concluding, I would also assert that such a claim, where it is based on a claim of negligence, does not depend on proof of damage to individual tort victims; it is sufficient to prove a breach of a duty of care, i.e. the "wrong" that forms the basis of the tort. This is because of my conclusion that "waiver of tort" is now a misnomer which is productive of much confusion in current jurisprudence on the subject. It does not depend on an artificial concept of "waiver", i.e. a giving-up of a fully independently-actionable tort in favour of another claim, but on separate wrongful conduct leading not to injury to the claimant but to the unjust acquisition of a benefit.
> …
> [170] The time has come to jettison the terminology of waiver of tort and to recognize that a cause of action exists that, in principle, allows for the disgorgement of profits acquired as a result of the commission of a tortious wrong.
> …
> [188] … Since the cause of action based on unjust enrichment gained from wrongdoing does not depend on loss to or deprivation of the claimant, it follows that causal connection to damage is not a necessary element.[8]

20. This decision results in a fundamental shift in our jurisprudence regarding civil remedies for wrongs in Canada.

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[8] Reasons of the Court of Appeal at paras. 86, 92, 139, 170 and 188; ALC Leave Application, Tab 6

21. Traditionally, damages in Canada have been compensatory, awarded only upon proof of wrongdoing causing damage to the plaintiff. In tort, damages are meant to put the plaintiff in the position she would have been in had the tort not occurred. In negligence, the plaintiff must establish a duty, a breach of that duty, "but for" causation, and resulting loss or damage. In contract, damages are awarded to put the plaintiff in the position she would have been in if the contract had been performed. Disgorgement of profits, on the other hand, was a remedy limited to proprietary or fiduciary claims or, in exceptional cases, the acquisition of a benefit from a third party.[9] The majority decision of the Court of Appeal fundamentally changes the longstanding principles applying to compensation, damages and remedies.

22. This Court has, on numerous occasions, confirmed that "but for" causation is a hallmark principle for compensation in negligence – as compensation for a wrong.[10] There can be no redress and no compensation unless the plaintiff can establish not only that the defendant breached a duty (committed a wrong), but that the breach caused loss and damage to the claimant.

23. Breach of statute *per se* does not constitute a cause of action. There is no nominate tort of statutory breach giving a right to recovery. The civil consequences of breach of statute are subsumed in the law of negligence. Proof of all of the constituent elements of the tort of negligence is required.[11]

24. If the Court of Appeal's decision is allowed to stand, the long accepted requirements of duty, breach of duty, "but for" causation and resulting loss and damage will be circumvented by a new cause of action, one that is wholly divorced from principles of causation, damage and compensation.

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[9] As for example in Attorney General v. Blake (2000), [2001] 1 A.C. 268; [2000] 4 All. E.R. 385 (U.K.H.L.)

[10] Benhaim v. St-Germain, 2016 SCC 48, [2016] 2 S.C.R. 352; Ediger (Guardian ad litem of) v. Johnston, 2013 SCC 18, [2013] 2 S.C.R. 98; Clements (Litigation Guardian of) v. Clements, 2012 SCC 32, [2012] 2 S.C.R. 181; Resurface Corp. v. Hanke, 2007 SCC 7, [2007] 1 S.C.R. 333

[11] Queen v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205

25. The only limiting principle proposed by the majority decision is whether the "enrichment of the defendant is determined to be unjust" thereby warranting disgorgement. Whether enrichment is "unjust" depends on whether "it is appropriate to vindicate the deterrence/disincentive principle."[12] In this way, the Court of Appeal has put the cart before the horse, and enabled the "remedy to drive the wrong".[13]

26. This limiting principle is vague and subjective, and creates the risk of "*ad hoc* judicial moralism and "palm tree" justice."[14] It is effectively a statement that recovery is "predicated on the bare assertion that fairness so requires." [15]

27. The result is a new cause of action with no defined parameters, capable of being pursued by anyone who may be within the ambit of the risk, regardless of whether the person has suffered any injury, loss or damage whatsoever. This fundamentally shifts the focus of analysis from whether the plaintiff has suffered injury or loss caused by the defendant's wrongful conduct to whether that "wrong" warrants disgorgement of benefits or profits, notwithstanding the absence of any injury or loss.

28. Divorcing a monetary award from compensatory principles creates a fundamental problem. The majority refers to it as the problem of "multitudinous plaintiffs":

> [174] That leaves the problem that if all that is needed is for the claimant to fall within the ambit of risk, even if no loss is actually suffered, there could (but not necessarily would) be multitudinous plaintiffs. How does the court resolve how much any particular plaintiff should be able to recover? Obviously, the upper limit would have to be the amount of the profit or other enrichment acquired by commission of the wrong. If a number of claimants were to commence separate actions, would the first claimant to receive judgment be entitled to a windfall of the total profits earned by the defendant, leaving subsequent claimants with nothing? If the claimant has actually suffered a deprivation, maybe the amount of recovery for *that* claimant could be limited to the amount of which he or she has actually been deprived? But that tends then to place focus on the loss to the claimant,

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[12] Reasons of the Court of Appeal, at para. 170; ALC Leave Application, Tab 6

[13] No Harm, No Foul?: The Existence of Waiver of Tort as an Independent Cause of Action in Canadian Law, Annual Review of Civil Litigation, Justice Todd Archibald & Christian Vernon at 411

[14] Bhasin v Hrynew, 2014 SCC 71; [2014] 3 SCR 494 at para. 70

[15] Peel (Reginal Municipality) v. Canada, [1992] 3 S.C.R. 762, 1992 CarswellNat 15, at para. 57

> rather on the stripping away of any wrongfully-acquired gains obtained by the defendant.[16]

29. If anyone within the ambit of risk can claim the disgorgement of benefits or profits, then defendants who have committed a "wrong" but have caused little or no harm may be required to disgorge enormous sums of money to uninjured claimants, potentially resulting in financial failure. Such an approach creates a profound shift in judicial thinking that requires consideration by this Court.

30. The majority decision attempts to side-step this crucial issue by asserting that "…the class action procedure seems particularly suited to resolving such multiple-plaintiff claims in an appropriate manner since all class plaintiffs can receive a proportionate share."[17] But the *Class Actions Act*[18] and similar statutes across Canada do not create new causes of action.[19] They simply permit existing causes of action to be brought on an aggregate class basis. One cannot bootstrap the creation of a new cause of action by pointing to a procedural mechanism which expressly eschews the creation of new causes of action.

The Canadian and International Jurisprudence

31. ALC is the regulator of VLTs in Newfoundland and Labrador. Acting under constitutionally permissible legislation, it has the obligation to regulate VLT gambling in Newfoundland and Labrador, including determining which VLT games are approved for play in Newfoundland and Labrador. Government established ALC as the regulator to regulate and control VLT gambling and to preclude illegal, uncontrolled gambling. ALC must balance a wide range of interests in approving VLTs for use by the public and in enforcing the regulatory requirements for the protection of the public.

32. As the dissenting judge, Welsh JA, stated at paragraph 74:

> [74] In conclusion, I would note that gaming and betting by their very nature may result in addiction or dependency by some individuals. However, the use of VLTs is authorized by law following a policy decision by

[16] Reasons of the Court of Appeal at para. 174; ALC Leave Application, Tab 6
[17] Reasons of the Court of Appeal at para. 176; ALC Leave Application, Tab 6
[18] Class Actions Act, SNL 2001 c.C-18.1
[19] Bisaillon v Concordia University, [2006] 1 SCR 666, 2006 SCC 19 (CanLII) at para. 17

> government. Activities endorsed by law will not result in an actionable claim except where activity inconsistent or non-compliant with the law can be established.[20]

33. No other Canadian jurisdiction has recognized a cause of action as pleaded in the Statement of Claim or as recognized by the majority decision of the Court of Appeal. Canadian courts have rejected the concept of a generalized duty of care to all gamblers; a duty of care could potentially exist only for an individual person who could establish a special relationship of proximity.[21]

34. In the recent case of *Paton Estate v. Ontario Lottery and Gaming Corp.*, the Ontario Court of Appeal confirmed that a generalized duty of care to all gamblers does not exist and that a duty of care to an individual person might exist only if that person could establish a special relationship of proximity. The Ontario Court of Appeal recognized that, in certain circumstances, it might be possible for a casino owner to owe a duty of care to victims of an "obviously addicted", "out of control" "problem gambler" where a reasonable person would have realized that the person "could be using stolen funds to feed his or her addiction."[22] *Paton Estate* illustrated that specific facts would have to be pleaded and proven to establish such a special relationship of proximity between an individual player and ALC.

35. Courts in the United Kingdom, Australia, New Zealand and the United States have consistently held that there is no general duty of care to protect persons from gambling losses. This jurisprudence was extensively canvassed before the Newfoundland and Labrador Court of Appeal.[23]

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[20] Reasons of the Court of Appeal at para. 74; ALC Leave Application, Tab 6

[21] Paton Estate v. Ontario Lottery and Gaming Corp., 2016 ONCA 458; 349 O.A.C. 106 ; Moreira v. Ontario Lottery and Gaming Corporation, 2013 ONCA 121; 302 O.A.C. 106; Burrell v. Metropolitan Entertainment Group, 2011 NSCA 108; 309 N.S.R. (2d) 375; Walsh v. Atlantic Lottery Corp., 2015 NSCA 16; 355 N.S.R. (2d) 384

[22] Paton Estate v. Ontario Lottery and Gaming Corp., 2016 ONCA 458; 349 O.A.C. 106 , at paras. 31-32 and 34-36

[23] **United Kingdom:** Calvert v. William Hill Credit Ltd., [2008] EWHC 454 (Eng. Ch. Div.), affirmed Calvert v. William Hill Credit Ltd., [2008] EWCA Civ 1427 (Eng. C.A.) ; Ritz Hotel

36. In the United Kingdom, Justice Briggs stated that "the recognition of a common law duty to protect a problem gambler from self-inflicted gambling losses involves a journey to the outermost reaches of the tort of negligence, to the realm of the truly exceptional". Justice Briggs expressly rejected the notion that the Court should attempt to fashion some remedy for disgorgement of profits:

> 213. …It is tempting to try and fashion a remedy directed to requiring the bookmaker in such circumstances to disgorge its profit, in particular by analogy with the remedies available in equity to the victim of undue influence, even as against third parties with the requisite knowledge.
>
> 214. There are in my judgment at least two insuperable difficulties with such an analysis. The first is that the bookmaker's profit is not the obverse of the problem gambler's loss, in particular where the gambler bets on the enormous scale indulged in by the claimant. …
>
> 215. The second objection is that the common law of negligence seeks only to award compensation for loss, and does so by enquiring what the victim's position would be if the relevant breach of duty had not occurred. The equitable remedy of an account of profits operates in accordance with different principles, and there is in my judgment no simple crossover, in the absence of any proprietary equity or relevant fiduciary duty, by which the two can be run together. For the purposes of the common law remedy, once it is ascertained that the claimant would have been no worse off if the relevant duty had been performed, that is an end of the matter.[24]

37. The decision was upheld by the English Court of Appeal.[25]

Casino Ltd. v. Al Geabury, 2015 EWHC 2294 (QB); **Australia:** Foroughi v. Star City Pty Limited, [2007] FCA 1503 (Fed. Ct. Aus.) ; Politarhis v. Westpac Banking Corp., [2009] SASC 96 (South Australia S.C.); Kakavas v. Crown Melbourne Limited, [2013] HCA 25; **New Zealand:** Sinclair v. NZ Racing Board, [2015] NZHC 2067; **United States:** Taveras v. Resorts International Hotel Inc., et al., (2008) Civil No. 07-4555 (N.J. Dist. Court); Stevens v. MTR Gaming Group, 2016 No. 15-0821 (West Virginia C.A.); Caesars Riverboat Casino, LLC v. Kephart, (2009) 903 N.E. 2d 117 (Ind. C.A.); Ormanian, et al. v. Michigan Gaming Control Board, (2005) No. 254225 (Mich. C.A.)

[24] Calvert v. William Hill Credit Ltd., [2008] EWHC 454 (Eng. Ch. Div.), at paras. 2, 213-215

[25] Calvert v. William Hill Credit Ltd., [2008] EWCA Civ 1427 (Eng. C.A.)

38. In Australia, the High Court of Australia rejected a claim for restitution of gambling losses based upon alleged unconscionable conduct. The Court pointed out that: "The decisions of this Court, in which claims for relief from unconscionable conduct have been litigated, illustrate the necessity for close consideration of the facts of each case in order to determine whether a claim to relief has been established." The Court confirmed that: "…there is no general duty upon a casino to protect gamblers from themselves."[26]

39. The majority decision of the Newfoundland and Labrador Court of Appeal is unique among the principal common law jurisdictions in creating a new cause of action and remedy for disgorgement of benefits or profits instead of requiring proof of a duty of care based upon a special relationship of proximity, breach of that duty of care, causation, and compensation for resulting loss or damage. Whether such a cause of action and remedy should be recognized in Canada is a matter of public importance warranting consideration by this Court.

The Proposed Appeal Raises Issues of National Importance for the Video Lottery Industry in Canada, Including the Various Canadian Lottery Commissions and the Governments of the Provinces

40. The recognition of a broad new cause of action for disgorgement of benefits or profits based only upon the commission of a wrong, without proof of causation, loss or damage has profound implications for the video lottery gaming industry, including the Canadian Lottery Commissions, and the Governments of the Provinces.

41. ALC conducts and manages video lottery operations on behalf of the governments of the four Atlantic Provinces. Its net profits are distributed among the Atlantic Provinces and help fund hospitals, schools, roads, social services and other government activities for the benefit of the people of those provinces.

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[26] Kakavas v. Crown Melbourne Limited, [2013] HCA 25, at paras. 14, 26

42. ALC reported net video lottery receipts (revenue less prize winnings[27]) for 2018 of $140,039,000 for Newfoundland and Labrador and $439,136,000 for Atlantic Canada as a whole.[28] The proposed class period runs from April, 2006 and has not yet closed. The potential risk to ALC is therefore in the hundreds of millions of dollars. ALC, in turn, seeks to pass that risk on, in whole or in part, to VLT manufacturers.

43. Similar lottery schemes operate in every other Canadian province. [29]

44. The implications are enormous for both the Lottery Commissions and the Provinces. The majority of the Court of Appeal at paragraph 185 goes so far as to state:

> Further, such findings could lead to the conclusion that the manner of operation of VLTs was not socially useful, even though the appellant was performing a regulatory function, and that to vindicate the deterrence/disincentive principle disgorgement was appropriate.[30]

45. The control and management of lottery schemes, including VLTs, was set up for two important public purposes: (i) to control gaming, including VLTs, and eliminate illegal gambling and (ii) to provide revenue for provincial governments for important social services for the residents of their respective provinces. The majority decision of the Court of Appeal has the potential to seriously affect the legislative scheme, compromising its purpose and the revenue derived by provincial governments. This illustrates the important public policy implications of this decision, warranting consideration by this Court.

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[27] 93% or 95% of video lottery receipts are returned to players as prize winnings in Newfoundland and Labrador depending upon the specific terminal and game

[28] Atlantic Lottery Annual Report 2017-2018, pages 27-28

[29] For example, the Ontario Lottery and Gaming Corporation, Loto Quebec, the British Columbia Lottery Corporation the Alberta Gaming, Liquor and Cannabis Commission, the Manitoba Lotteries Corporation and the Saskatchewan Liquor and Gaming Authority

[30] Reasons of the Court of Appeal at para. 185; ALC Leave Application, Tab 6

The Proposed Appeal Raises Issues of Public Importance for the Canadian Economy

46. The implications of the majority decision extend far beyond this case and the video lottery gaming system in Canada. It has profound consequences for manufacturers and suppliers of virtually any product or service in Canada.

47. To date, remedies for the supply of defective products or services have been limited to compensation for loss or damage actually caused by the defect. Manufacturers and suppliers are only at risk for the loss or damage which the defect actually causes.

48. Now manufacturers and suppliers may be liable for disgorgement of benefits or profits even though no loss or damage has occurred or the loss or damage has been limited, either in the number of persons affected, the severity of injury, or both. Consider a manufacturer who discovers that a component may fail due to a faulty design. The failure may or may not have resulted in an accident, with or without any injury, loss or damage. Under disgorgement for wrongdoing, manufacturers are exposed to unlimited claims for disgorgement of benefits or profits resulting from the sale of the product, regardless of the extent of any injury, loss or damage.

49. As Justice Chapnik highlighted in her dissenting judgment in *Serhan Estate v Johnson & Johnson*, waiver of tort, now reframed by the majority as disgorgement for wrongdoing, "…basically introduces strict liability for a defective product into our law…."[31]

50. The introduction of strict liability, coupled with a remedy of disgorgement of benefits or profits, has very real implications for the Canadian marketplace.

51. The economic impact of the majority's approach has been analyzed and refuted by Edward Iacobucci and Michael Trebilcock. Their analysis is summarized as follows:

> …decoupling remedies from actual damages in negligence cases generally, or in products liability cases in particular, is not well founded from an economic perspective. Theory and evidence suggests that the deterrence and insurance aspects of negligence are best achieved by linking remedies to losses actually suffered. In many contexts, disgorgement of gains from

[31] Serhan Estate v Johnson & Johnson (2006), 85 O.R. (3d) 665; 2006 CanLII 20322 (Div. Ct.), at para. 253

> activities entailing negligent conduct may induce socially wasteful forms of over-deterrence. Economic analysis does not support the waiver of tort doctrine [disgorgement for wrongdoing].[32]

52. Iacobucci and Trebilcock further write as follows:

> There are two probable reactions from sellers in such a doctrinal world: either stop selling the product, or sell the product taking enormous care to avoid all possible tortious and non-tortious wrongs while raising prices to compensate for the additional costs of precaution and the possibility nevertheless of owing all the revenue to the plaintiffs because of an oversight. The consequence of this doctrine would predictably be fewer products being sold at higher prices. This clearly hurts sellers, but also hurts buyers, who must pay higher prices for precautions they do not want and for a lottery ticket that they do not want…[33]

53. These issues were at the forefront of the debate before Madam Justice Lax in *Andersen v St. Jude*, where she concluded that:

> the fundamental question for a Court to answer is whether the recognition (or not) of the waiver of tort doctrine is within the capacity of a court to resolve, or whether it has such far-reaching and complex legal effects that it is best left to consideration by the Legislature.[34]

54. This highlights a significant consideration that justifies intervention by this Honourable Court: whether it should affirm a new cause of action that promotes litigation in the absence of injury, loss or damage, conflicts with some of our most basic tenets of law, and generates ramifications – both legal and economic - that are "incapable of assessment".[35]

Conclusion

55. In summary, the majority decision of the Newfoundland and Labrador Court of Appeal significantly changes the law, creating a new cause of action for disgorgement of benefits

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[32] "An Economic Analysis of Waiver of Tort in Negligence Actions", 66U. Toronto L.J. 173, Spring 2016, Edward M. Iacobucci and Michael J. Trebilcock (Westlaw) at p. 1

[33] "An Economic Analysis of Waiver of Tort in Negligence Actions", 66U. Toronto L.J. 173, Spring 2016, Edward M. Iacobucci and Michael J. Trebilcock (Westlaw) at p. 11-12

[34] Andersen v St. Jude Medical Inc., 2012 ONSC 3660; 219 ACWS (3d) 725 at para. 594.

[35] Bhasin v Hrynew, 2014 SCC 71; [2014] 3 SCR 494 at para. 40

or profits. It raises an important question of law as to whether such a cause of action and resulting remedy should be recognized in Canadian law. The majority decision is out of step with other Canadian and international jurisprudence. The proposed appeal has important consequences for Lottery Commissions and provincial governments across Canada. It also has potentially significant consequences for Canadian businesses and the Canadian economy in general. The proposed appeal raises important issues warranting consideration by the Supreme Court of Canada.

PART IV - SUBMISSIONS REGARDING COSTS

56. The Applicants seek their costs of this application in accordance with the usual practice of this Court.

PART V - ORDERS SOUGHT

57. The Applicants seek an order granting leave to appeal to the Supreme Court of Canada from the decision of the Newfoundland and Labrador Court of Appeal, with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of February, 2019.

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PART VI – TABLE OF AUTHORITIES

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