S.C.C. File No.

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. –
SOCIÉTÉ DES LOTERIES DE L'ATLANTIQUE**

Applicant
(Appellant)

- and –

DOUGLAS BABSTOCK AND FRED SMALL

Respondents
(Respondents)

- and -

BALLY GAMING CANADA LTD. AND BALLY GAMING INC.

Interveners
(Interveners)

MEMORANDUM OF ARGUMENT OF THE APPLICANT, ATLANTIC LOTTERY CORPORATION INC.– SOCIÉTÉ DES LOTERIES DE L'ATLANTIQUE

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PART I – OVERVIEW AND BACKGROUND FACTS

1. Six years ago, this Court was asked to provide its guidance on the legal concept known as "waiver of tort". That case, *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, was a class action just like the present one. The Court was asked to determine whether waiver of tort could be asserted even if no underlying tort could be proved – an idea that had gained traction following the 2004 decision of the Ontario Superior Court in *Serhan Estate v. Johnson & Johnson*.

2. The Court declined to do so. Instead, it deferred the question, stating that whether to recognize waiver of tort as an independent cause of action involves "matters of policy that should not be determined at the pleadings stage". And so *Pro-Sys*, like many cases before it and even more since, was sent forward, ostensibly to trial, where the issue could be resolved based on a "full factual record".

3. However, like the vast majority of class proceedings, *Pro-Sys* never made it to trial. It settled and the waiver of tort issues that it raised went unresolved. A similar fate has met virtually every other class proceeding that has pleaded waiver of tort. In the years since *Pro-Sys*, class proceedings asserting a cause of action in "waiver of tort" have repeatedly come before the courts and have been allowed to proceed, with the decision in *Pro-Sys* frequently being relied upon as the controlling precedent. And not one of those cases has proceeded to trial.

4. Now, six years after *Pro-Sys* and 15 years after *Serhan Estate*, a majority of the Court of Appeal of Newfoundland and Labrador has stepped into the breach and created a new cause of action, holding that waiver of tort (which it renamed "disgorgement for wrongdoing") may entitle a plaintiff to a disgorgement remedy merely upon proof of breach of a duty of care, without any need for the plaintiff to prove injury or causation. This new cause of action cannot be reconciled with the existing law of negligence, where the courts have consistently and unequivocally held that injury, damage or loss is a necessary element of the claim. Without proof of damage, the requisite nexus between plaintiff and defendant disappears.

5. It now falls to this Court to address this highly problematic leap in the jurisprudence and to clear up the confusion surrounding waiver of tort.

6. The Court of Appeal's decision also raises issues regarding restitutionary remedies in the

context of breach of contract. Specifically, the Court of Appeal failed to consider whether the plaintiffs in this case could possibly prove, based on the facts as pleaded, that the defendant had earned any profits as a result of the specific contractual breach at issue. The assistance of this Court is required to provide a proper framework for this causation analysis, so that any remedy is firmly linked to the specific breach alleged, and thereby to ensure that profits earned as a result of the contract as a whole are not conflated with those earned as a result of the breach. Without such a framework, there is a risk of restitutionary awards that vastly exceed the profits actually earned from the alleged wrongdoing.

7. Finally, in an acknowledged departure from the principle that criminal statutes should be interpreted in the manner most favourable to the accused, the Court of Appeal opened the door to a very broad interpretation of the *Criminal Code*'s prohibition against the game known as "three-card monte". The Court of Appeal reasoned that "three-card monte" as defined in the *Code* might extend to any game whose "essence" is deceptive, and could therefore capture within its scope the video lottery games offered by the defendant that are at issue in the litigation. Such an interpretation is inconsistent with the relevant legislative history and fails to give effect to the specific words used in the definition, read in their entire context. When a proper interpretive approach is applied, the inescapable conclusion is that the *Code*'s prohibition against "three-card monte" is limited to sleight-of-hand games. The ramifications of this decision extend beyond the parties, as video lottery terminals are authorized in jurisdictions across the country, leaving provincial lottery operators exposed to findings that activities permitted by their respective regulators violate the *Criminal Code*.

8. Furthermore, the Court of Appeal decided that its new cause of action in "disgorgement for wrongdoing" extends to "wrongs" that consist of *Criminal Code* offences, thus creating not only unprecedented penal exposure but also unprecedented financial exposure.

9. The proposed appeal would permit this Court to provide the proper interpretation of the *Criminal Code* provisions at issue, and to answer the legal question as to the existence of civil wrongs grounded in them.

The Plaintiffs' Claim

10. The plaintiffs' claim is based upon an allegation that the applicant, Atlantic Lottery

Corporation ("ALC"), negligently offered a group of deceptive and harmful products – video lottery games (frequently referred to as "VLT games" or simply "VLTs"). The plaintiffs allege that these games are inherently addictive and, therefore, inherently dangerous.[1]

11. The Statement of Claim takes that core allegation, which sounds in negligence, and dresses it up in multiple different guises: a claim for misrepresentation under the *Competition Act*, for failing to disclose the games' allegedly dangerous features; a claim for breach of an implied contractual term that the games were not inherently dangerous; a claim that the deceptive nature of the games violates the *Criminal Code*'s prohibition against "three-card monte"; a claim in unjust enrichment; a claim for breach of the *Statute of Anne, 1710*; and a claim for "waiver of tort".[2]

12. For all of the complaints other than breach of the *Competition Act* and breach of the *Statute of Anne*, the plaintiffs sought an order requiring ALC to disgorge any profits or revenues earned as a result of its allegedly wrongful acts.[3]

13. The plaintiffs brought an application to certify the proceeding as a class proceeding, and ALC brought its own application to strike the claim for failure to disclose a reasonable cause of action. ALC's application to strike was heard first.

Decisions of Faour J. at First Instance

14. By order dated September 3, 2015, Faour J. dismissed ALC's application to strike in its entirety. Of relevance to the present application for leave to appeal, Faour J. held that:

(a) the law was unsettled as to whether waiver of tort could provide the basis for a disgorgement remedy upon proof merely of a breach of a duty of care in negligence;

(b) "restitutionary damages" may be awarded for breach of contract, where the

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[1] Statement of Claim, para. 12, Application Record ("AR"), Vol. III, Tab 9, p. 4

[2] Statement of Claim, paras. 36-40, 41, 47-48, 53-54, 55-59, 60 and 62, AR, Vol. III, Tab 9, p. 8-14

[3] Statement of Claim, para. 73(d) and (e), AR, Vol. III, Tab 9, p. 17-18

plaintiffs have suffered no loss; and

(c) because the *Criminal Code*'s definition of "three-card monte" includes games "similar" to three-card monte, evidence was needed as to the specific characteristics of the VLT games at issue. [4]

15. The certification application then proceeded with respect to the remaining issues, which included whether a class proceeding would be the preferable procedure. In finding that it would be, Faour J. relied heavily upon a crucial clarification offered by the plaintiffs, namely, that they were not alleging and, therefore, would not be proving any individual harm suffered by the members of the plaintiff class as a result of ALC's actions. Faour J. wrote:

> … the Plaintiffs have stated repeatedly that they are not alleging injury or harm.[5]

16. Indeed, the application judge noted that the plaintiffs had gone so far as to "deny individual injury or harm".[6]

17. This disclaimer by the plaintiffs was reflected in the order that ultimately issued on the certification application, which, in describing the nature of the plaintiffs' claims, stated:

> The plaintiffs claim entitlement to a restitutionary remedy for the class without proof of reliance or individual harm. [emphasis added][7]

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[4] Reasons for Judgment on Application to Strike Claim, paras. 30-32, 119 and 204-205, AR, Vol. I, Tab 2, p. 22-23, 45, 71

[5] Reasons for Judgment on Application to Certify, para. 111, AR, Vol. I, Tab 4, p. 113-114. See also Reasons for Judgment on Application to Certify, para. 126, where the application judge wrote: "They do not allege individual harm . . ." AR, Vol. I, Tab 4, p. 118-119.

[6] Reasons for Judgment on Application to Certify, para. 134, AR, Vol. I, Tab 4, p. 121. And see Reasons for Judgment on Application to Certify, para. 147, where the application judge states that the plaintiffs' claim is "not based on individual proof or individual harm". AR, Vol. I, Tab 4, p. 125

[7] Order of Faour J., dated December 30, 2016, para. 4(c), AR, Vol. I, Tab 5, p. 128

18. Based on the plaintiffs' disclaimer of individual harm, the application judge held that a class action was the preferable procedure. [8]

19. ALC appealed both the dismissal of its application to strike and the granting of the certification order to the Court of Appeal of Newfoundland and Labrador.

The Decision of the Court of Appeal

20. ALC's two appeals were heard together. On December 10, 2018, the Court of Appeal rendered a split decision.

21. All three judges agreed that the claims under the *Competition Act* and the *Statute of Anne, 1710* should be struck. However, with respect to the five other pleaded causes of action, while the dissenting judge, Welsh J.A., would have allowed the appeal, set aside the certification order, and struck the claim in its entirety, the majority (Green J.A. writing) found that the claim should be allowed to proceed, as certified. Green J.A.'s lengthy reasons can be distilled as follows.

22. He characterized the five remaining causes of action as being "essentially founded on allegations of deceit and failure to warn consumers of danger". More specifically, he described the plaintiffs' claim as alleging that VLT games are "inherently deceptive in their operation . . . leading to users developing dependency on and addiction to VLT gambling".[9]

23. Next, Green J.A. noted that all of the wrongs asserted by the plaintiffs were intended to provide the basis for a disgorgement remedy.[10] Green J.A. thus characterized the plaintiffs' claim, when viewed as a whole, as one seeking restitution for wrongdoing.[11] Green J.A. then turned to consider the five remaining asserted causes of action.

24. With respect to the claim in negligence, Green J.A. grouped it together with the claim for "waiver of tort". He acknowledged that "plea and proof of damage is a necessary element of a

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[8] Reasons for Judgment on Application to Certify, para. 134, AR, Vol. I, Tab 4, p. 121
[9] Reasons for Judgment of the Court of Appeal, para. 95, AR, Vol. II, Tab 6, p. 29-31
[10] Reasons for Judgment of the Court of Appeal, para. 102, AR, Vol. II, Tab 6, p. 33-34
[11] Reasons for Judgment of the Court of Appeal, para. 83 and 102, AR, Vol. II, Tab 6, p. 25, 33-34

cause of action in negligence". However, he went on to hold that the law of waiver of tort had "progressed to a point" such that a plaintiff could obtain disgorgement of profits merely upon proving breach of a duty of care, without proof of any harm suffered as a result of the breach.[12]

25. While explaining that not all breaches of a duty of care would justify a disgorgement remedy, Green J.A. could provide only limited guidance as to when such a remedy would be available, stating that it would depend on "the degree and seriousness of the breach of duty" and on the need to provide a "disincentive or deterrence to wrongful conduct".[13]

26. Accordingly, despite the plaintiffs' disclaimer of any loss or injury,[14] Green J.A. held that the claim for a disgorgement remedy arising from ALC's alleged breach of a duty of care should proceed to trial.[15]

27. With respect to the breach of contract claim, Green J.A. noted that the plaintiffs alleged breach of various implied contractual terms, including a promise that the games were "safe, interactive and entertaining" and not "inherently dangerous".[16] Green J.A. held that, while compensatory damages are the ordinary remedy for breach of contract, there are instances where

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[12] Reasons for Judgment of the Court of Appeal, para. 139, AR, Vol. II, Tab 6, p. 45-46

[13] Reasons for Judgment of the Court of Appeal, para. 162 and 166, AR, Vol. II, Tab 6, p. 54-56

[14] It should be noted that Green J.A. provided *obiter* commentary to the effect that, even if all of the elements of the tort of negligence (including loss caused by the defendant's breach of duty) must be pleaded in order to give rise to a right to the disgorgement remedy, the plaintiffs had pleaded all such required elements, as the Statement of Claim includes a plea of harm suffered as a result of the breach of duty. See, in this respect Reasons for Judgment of the Court of Appeal, para. 186 and 189-190, AR, Vol. II, Tab 6, p. 63-64. However, in this regard, Green J.A. was clearly in error. As discussed above, the plaintiffs have been very clear in disclaiming any harm caused by ALC's alleged breach of duty. Indeed, they reiterated that disclaimer in their factum before the Court of Appeal, relying on the fact that they had "disavowed any personal injury or harm", which they characterized as an "inconvenient fact" for ALC. See the plaintiffs' Court of Appeal factum, para. 188, AR, Vol. III, Tab 10, p. 88.

[15] Reasons for Judgment of the Court of Appeal, para. 201, AR, Vol. II, Tab 6, p. 67

[16] Reasons for Judgment of the Court of Appeal, para. 113, 130, AR, Vol. II, Tab 6, p. 37-38, 43

a defendant may be ordered to disgorge profits earned as a result of the breach. He noted that there was "no consensus" on what those instances might be and concluded that the breach of contract as pleaded by the plaintiffs might justify the "exceptional" remedy of disgorgement.[17]

28. With respect to the plea that VLT games fall within the *Criminal Code*'s prohibition against "three-card monte", Green J.A. considered the *Code*'s definition of "three-card monte", which reads as follows:

> . . . **[T]hree-card monte** means the game commonly known as three-card monte and includes any other game that is similar to it, whether or not the game is played with cards and notwithstanding the number of cards or other things that are used for the purpose of playing.[18]

29. Green J.A. held that evidence, including expert evidence, as to "what is commonly known as three-card monte and what the essential characteristics of the game can be considered to be" was needed in order to determine the type of conduct that Parliament intended to include within the statutory definition.[19]

30. Green J.A. further held that the remedy of disgorgement could be available upon proof of a breach of the *Criminal Code* and profit earned therefrom.[20]

31. The last cause of action considered by Green J.A. was the plaintiffs' claim in unjust enrichment. Because he had already held that the plaintiffs had pleaded sufficient wrongdoing (i.e., breach of a duty of care, breach of the *Criminal Code* and breach of an implied contractual term) so as to entitle them to a disgorgement remedy, Green J.A. held that it was unnecessary to consider whether the plaintiffs had also pleaded the requisite elements of a cause of action in what he termed "unjust enrichment *simpliciter*" – namely, enrichment of the defendant,

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[17] Reasons for Judgment of the Court of Appeal, para. 120-123, 129-131, AR, Vol. II, Tab 6, p.40, 42-43

[18] *Criminal Code*, R.S.C. 1985, c. C-46, s. 206(2); Reasons for Judgment of the Court of Appeal, para. 211, AR, Vol. II, Tab 6, p. 70

[19] Reasons for Judgment of the Court of Appeal, para. 206, 211, AR, Vol. II, Tab 6, p. 68-69, 70

[20] Reasons for Judgment of the Court of Appeal, para. 225-228, AR, Vol. II, Tab 6, p. 74-75

corresponding deprivation of the plaintiff, and a lack of juristic reason for the enrichment.[21]

32. Finally, Green J.A. held that no palpable and overriding error had been established with respect to the remaining procedural issues addressed in the application judge's decision certifying the proceeding.[22]

PART II – QUESTIONS IN ISSUE

33. It is submitted that the proposed appeal raises the following issues of national and public importance:

(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

(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?

34. The majority in the Court of Appeal held, as a matter of law, that a plaintiff can obtain a disgorgement remedy merely upon proving the breach of a duty of care, without any proof of loss or injury caused by that breach. In other words, a plaintiff could obtain a remedy for negligent conduct, without proving all of the elements of a cause of action in negligence. The

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[21] Reasons for Judgment of the Court of Appeal, para. 230, AR, Vol. II, Tab 6, p. 76

[22] Reasons for Judgment of the Court of Appeal, para. 252-253, AR, Vol. II, Tab 6, p. 82

majority described this new type of claim as "disgorgement for wrongdoing".[23]

35. The common law has never considered the mere breach of a duty of care to be wrongful or actionable. As this Court has held, in order to establish a cause of action in negligence, a plaintiff must prove not only breach of a duty, but also loss or damage caused by that breach:

> A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach.[24]

36. Without proof of injury or damage caused by the breach of duty, the plaintiff has no cause of action, and no cause for complaint. To borrow the pithy phrasing of Viscount Simonds in *The "Wagon Mound"*, there is no "negligence in the air":

> [T]here can be no liability until the damage is done. It is not the act but the consequences on which tortious liability is founded.[25]

37. To permit recovery for careless or negligent behaviour without proof of damage – as endorsed by the decision below – would effect a fundamental change in the law of negligence. One class action judge observed:

> As Professor Trebilcock noted, negligence has been predicated on a system of compensation for actual loss for nearly 200 years. The requirement that a plaintiff demonstrate damages has long been considered a fundamental tenet of tort law.[26]

38. Indeed, the decision below represents a marked departure from our system of private law more generally. In every area of private law, the particular elements of any given cause of action

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[23] Reasons for Judgment of the Court of Appeal, para. 83 and 139, AR, Vol. II, Tab 6, p. 25, 45-46

[24] *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3

[25] *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, [1961] A.C. 388 at 425 (J.C.P.C.), quoted with approval in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 at 405 (S.C.C.)

[26] *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660 at para. 593

ensure that there is a sufficient nexus between the parties so as to entitle the specific plaintiff to a specific remedy from the specific defendant. For some causes of action – such as breach of contract or breach of fiduciary duty – the link is provided by the particular relationship between the parties; proof of loss or harm is not needed. For others – such as the torts for which an alternative remedy in waiver of tort has historically been available – the nexus is provided by the defendant's appropriation of, or interference with, a property or proprietary interest of the plaintiff's.[27] And, as this Court recently pointed out, for unjust enrichment, it is the requirement of "corresponding deprivation" that provides the requisite link between plaintiff and defendant:

> According to Professor McInnes, this element serves the purpose of identifying the plaintiff as the person with standing to seek restitution against an unjustly enriched defendant. Even if a defendant's retention of a benefit can be said to be unjust, a plaintiff has no right to recover against that defendant if he or she suffered no loss at all, or suffered a loss wholly unrelated to the defendant's gain.[28]

39. In the case of negligence, the requisite link between plaintiff and defendant is provided by the loss, damage or injury caused by the defendant's careless behaviour:

> The defendant does not merely by behaving negligently give the plaintiff any cause for complaint in law. The plaintiff has such a cause for complaint if the defendant's negligence has caused damage to the plaintiff.[29]

40. The majority decision below would effect a radical departure from this paradigm. Moreover, without the requisite nexus, the amount awarded as a remedy to any given plaintiff would be completely random. As the Court of Appeal acknowledged, under this new cause of

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[27] Regarding disgorgement for breach of fiduciary duty, see *Soulos v. Korkontzilas,* [1997] 2 S.C.R. 217 at para. 45. Regarding waiver of tort, see J.M. Martin, "Waiver of Tort: An Historical and Practical Study" (2012), Can. Bus. L.J. 473 at p. 492-495, 501, 502-504, 517-519. And see The Honourable Mr. Justice Todd L. Archibald and Christian Vernon, "No Harm, No Foul? The Existence of Waiver of Tort as an Independent Cause of Action in Canadian Law" in *Annual Review of Civil Litigation* 2008 at p. 1, 4-6, 11-12 and 15

[28] *Moore v. Sweet*, 2018 SCC 52 at para. 43.

[29] *Distillers Co. (Biochemicals) Ltd. v. Thompson*, [1971] 1 All E.R. 694 at 468 (J.C.P.C.), quoted with approval in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 at 405 (S.C.C.)

action, the first plaintiff to obtain judgment could be awarded the entirety of the defendant's profits earned as a result of the breach of duty of care, leaving subsequent plaintiffs with no recovery at all.[30] While this concern might not arise in a class action, the new cause of action would, of course, be entitled to equal recognition outside of the class proceedings context, given the procedural nature of class action legislation.[31]

41. Such a regime would fundamentally distort private law, with the plaintiff acting to vindicate a public, not a private wrong. The plaintiff would take on a role akin to that of a regulator, albeit one without any statutory foundation. This conflation of the distinct roles of private litigants and public regulators would represent a radical change in the law. It has been described by commentators as a "tremendous leap into uncharted territory", one that would open the door to "potentially limitless litigation involving fantastic unmaterialized risk scenarios".[32]

42. This change in the law by the Court of Appeal is not an incremental one, designed to keep step with changing social needs or values. Rather, it represents a wholesale shift in private law, stemming from a series of decisions on certification motions wherein the courts refused to strike similar claims for waiver of tort – despite their fundamental incompatibility with related areas of tort law – on the basis that the cause of action was novel. In those cases, the courts reasoned that whether to recognize such a cause of action raised questions of policy that were unsuitable for determination at a preliminary stage.

43. More specifically, beginning with the 2004 decision of the Ontario Superior Court in *Serhan (Trustee of) v. Johnson & Johnson*, the courts have repeatedly certified class actions

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[30] This did not trouble the majority below. Green J.A. dismissed such concerns, saying, "It is inherent in this area that a claimant may receive a windfall which is regarded as the lesser evil than allowing a defendant to profit from a wrong." Reasons for Judgment of the Court of Appeal, para. 174-175, AR, Vol. II, Tab 6, p. 58-59.

[31] *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 at paras 49, 72, per Côté J. and at para. 204 per Karakatsanis J.

[32] The Honourable Mr. Justice Todd L. Archibald and Christian Vernon, "No Harm, No Foul? The Existence of Waiver of Tort as an Independent Cause of Action in Canadian Law" in *Annual Review of Civil Litigation* 2008 at p. 21; Sandra Barton, Mark Hines and Shawn Therien, "Neither Cause of Action nor Remedy: Doing Away with Waiver of Tort" in *Annual Review of Civil Litigation* 2015 at p. 9

asserting waiver of tort as a free-standing cause of action, untethered from any underlying actionable tort or other actionable wrongdoing. None of those cases actually reached any firm conclusion as to whether a plaintiff could obtain disgorgement merely upon proof of a breach of a duty of care. Rather, in each instance, the court held that the question was uncertain, that it raised "policy" considerations, and that its resolution required a trial.[33]

44. This Court declined the opportunity to clear up the uncertainty when *Pro-Sys* came before it in 2013, expressing the same reluctance to resolve matters of "policy" at the pleadings stage, and reasoning that evidence to be called at trial would help to resolve the legal debate.[34]

45. However, the voice of experience, embodied in Justice Lax's 2012 decision in *Andersen v. St. Jude Medical, Inc.*, which issued following the 138-day trial of a class action, suggests the contrary.[35] Waiver of tort based upon breach of a duty of care was pleaded in that case, but, because Justice Lax ultimately found that the duty of care had not been breached, she did not need to decide whether waiver of tort could provide the basis for any remedy. However, she did not stay wholly silent on the topic. In response to all of the earlier cases that had championed the need for, and benefits of, a trial in elucidating the nature and scope of waiver of tort, Justice Lax expressed serious doubts. She found that the evidence before her "did not illuminate . . . the important issues of policy that were meant to arise from the trial record".[36] Rather, in her view, the determination of whether the courts should recognize a cause of action for waiver of tort, based solely upon breach of a duty of care, engaged fundamental philosophical questions about the nature of tort law which did not require a trial at all:

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[33] See, e.g., *Serhan (Trustee of) v. Johnson & Johnson,* 2006 CanLII 20322 (Ont. Div. Ct.) at para. 68, lv to app. ref'd (C.A.), lv to app ref'd, 2007 CarswellOnt 2150 (S.C.C.), affirming 2004 CanLII 1533 (S.C.J.); *Peter v. Medtronic Inc.,* 22007 CanLII 53244 (S.C.J.); *Heward v. Eli Lilly &C*o., 2007 CanLII 2651 (Ont. S.C.J.), aff'd 2008 CanLII 32303 (Div. Ct.)*; LeFrançois v. Guidant Corp.* 2008 CanLII 15770 (Ont. S.C.J.), lv to app. ref'd 2009 CanLII 76 (Div. Ct.); *Tiboni v. Merck Frosst Canada Ltd.* 2008 CanLII 37911 (Ont. S.C.J.), lv to app ref'd 2008 CanLII 61238 (Div. Ct.); *Robinson v. Medtronic Inc.,* 2009 CanLII 56746 (S.C.J.); *Andersen v. St. Jude Medical, Inc.* 2010 ONSC 77

[34] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 97

[35] The decision pre-dated the hearing in *Pro-Sys*, but was not included in either party's authorities and was not cited by this Court in its decision.

[36] *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660 at para. 585

> On the basis of my experience, the answer to this and the other questions surrounding the waiver of tort doctrine is not dependent on a trial with a full factual record and may require no evidence at all.[37]

46. Unfortunately, Justice Lax's advice has gone unheeded. And the debate swirling around waiver of tort – including whether a plaintiff must prove all of the elements of an underlying tort – has continued unresolved, with lower courts frequently citing *Pro-Sys* as authority for the proposition that clarification and development of this "unsettled area of law" should not be tackled on a preliminary motion, but should instead be deferred until trial.[38]

47. However, what generally goes unacknowledged is the fact that class actions almost always settle before getting to trial – as, indeed, *Pro-Sys* did only recently.[39] As a result, the opportunity to resolve the legal uncertainty never arises. Rather than promoting judicial economy, continued pleading of waiver of tort leads to the squandering of judicial resources, prompting this *cri de coeur* from the litigation bar:

> [W]aiver of tort should, in the name of efficiency, be eliminated by the courts at the pleadings or certification stage of an action. In a post-*Hryniak* era, failing to do so improperly encourages plaintiffs with meritless claims to push forward, thereby squandering scarce judicial resources and unnecessarily increasing litigation costs.[40]

48. It is submitted that, after 15 years of uncertainty, it is time for the clarity that only this

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[37] *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660 at paras. 593-594

[38] See *Panacci v. Volkswagen*, 2018 ONSC 6312 at para. 36; and see *N&C Transportation Ltd. v. Navistar International Corporation*, 2016 BCSC 2129 at para. 60-63, varied (although not on this point) 2018 BCCA 312; and see *Evans v. Bank of Nova Scotia*, 2014 ONSC 2135 at para. 55, lv. to app. ref'd 2014 ONSC 7249 (Div. Ct.); and see *Watson v. Bank of America Corp.*, 2014 BCSC 532 at para. 158-160, varied (although not on this point) 2015 BCCA 362; and see *Sweetland v. GlaxoSmithKline Inc.*, 2016 NSSC 18 at para. 25-28 and para. 82 and 2016 NSSC 139; and see *Kalra v. Mercedes Benz*, 2017 ONSC 3795 at para. 28; and see *Fairhurst v. Anglo American PLC*, 2014 BCSC 2270 at para. 39-40; and see *Walter v. Western Hockey League*, 2017 ABQB 382 at para. 22, aff'd 2018 ABCA 188; and see *Godfrey v. Sony Corporation*, 2016 BCSC 844 at para. 117-119, aff'd 2017 BCCA 302, leave to appeal granted 2018 CanLII 51179

[39] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2018 BCSC 2091

[40] Sandra Barton, Mark Hines and Shawn Therien, "Neither Cause of Action nor Remedy: Doing Away with Waiver of Tort" in Mr. Justice Todd L. Archibald, *Annual Review of Civil Litigation* 2015 at p. 19

Court can provide. In *Pro-Sys* and prior cases, deferring a decision on the scope of waiver of tort might have been seen as justified because the plaintiffs had pleaded other causes of action with more apparent substance and credibility, waiver of tort having been added as a possible fall-back or make-weight. By contrast, in this case, the plaintiffs have disavowed individual loss or injury in favour of a purely restitutionary claim, and the Court of Appeal's decision allows the claim to proceed primarily on the basis of a waiver of tort disgorgement theory. No previous decision has presented so starkly a brave new world where essentially negligence-based claims can be advanced without any assertions of causation or injury. This Court has the benefit of the reasoning of the judge at first instance and both the majority and dissenting decisions in the Court of Appeal and is well positioned to resolve the issue at last.

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

49. In the context of breach of contract, the "exceptional" remedy of disgorgement is limited to benefits realized as a result of the breach.[41] This means that there must be a causal link between the profits to be disgorged and the breach of contract alleged, and the one must not be too remote from the other. Indeed, even those academics who advocate in favour of broad availability of disgorgement for breach of contract recognize these minimal limitations.[42]

50. In the present case, the plaintiffs plead that the contract they entered into with ALC contained an implied term that the games they played would be "safe". The plaintiffs further plead that ALC breached this implied term by offering VLT games that were "inherently dangerous" in that they would "lead to dependency and addiction". However, even assuming these allegations to be true, the plaintiffs do not plead any facts linking the allegedly dangerous nature of the games – which comprises the alleged breach of contract – to ALC's profits.[43]

51. The only fact that could possibly serve as a causal link between the alleged breach of contract and any portion of ALC's profits is addiction: the plaintiffs would need to prove that

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[41] *Attorney General v. Blake*, [2001] 1 A.C. 268 at 284-285; *Bank of America Canada v. Clarica Trust Company*, 2002 SCC 43 at para. 25

[42] Lionel D. Smith, "Disgorgement of the Profits of Breach of Contract: Property, Contract and Efficient Breach" (1994) Can. Bus. L.J. 121 at p. 136

[43] Statement of Claim, paras. 34, 35 and 46-52, AR, Vol. III, Tab 9, p. 8, 11-12

their addiction caused them to play VLT games when they otherwise would not have. However, as noted by the Court of Appeal, the plaintiffs do not allege that they or any members of the class are addicted to VLT games. They merely allege that they played the games.[44]

52. Accordingly, on the facts pleaded, the allegedly addictive quality of the games – which is the precise breach of contract alleged by the plaintiffs – had no effect on the plaintiffs and therefore no effect on their decisions to play. Regardless of whether the games were addictive or not – regardless of whether the contract was breached or not – the plaintiffs would have played the same amount, and ALC would have generated the same profits. Thus, having deliberately decided not to plead the causal link, the plaintiffs cannot possibly establish "but-for" causation of the gains realized by ALC.

53. However, the Court of Appeal did not engage in any such analysis. Green J.A. failed to consider whether the plaintiffs had pleaded facts capable of establishing that, but for the alleged breach of contract, ALC would not have earned the profits at issue.[45] This failure to grapple with issues of causation underlines the need for assistance from this Court to articulate a legal framework and to clarify that the profits earned as a result of a breach of contract (and, therefore, the profits that may be the subject of a disgorgement order) may not necessarily be equivalent to the profits earned through the operation of the contract as a whole.

54. In the present case, given that the only remedy sought for the pleaded breach of contract is a disgorgement remedy,[46] and given that a disgorgement remedy is clearly not available on the facts as pleaded, allowing that aspect of the claim to proceed would obviously fail to further class actions' goals of judicial economy, behaviour modification, and access to justice.[47] Rather, it would only serve to squander judicial resources.

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[44] Reasons for Judgment of Court of Appeal, para. 115, AR, Vol. II, Tab 6, p. 38; see also Reasons for Judgment on Application to Certify, para. 43, AR, Vol. I, Tab 4, p. 90-91: ". . .nor do [the plaintiffs] allege any . . . addiction".

[45] Reasons for Judgment of the Court of Appeal, para. 120, 122, 123 and 132, AR, Vol. II, Tab 6, p. 40, 43-44

[46] Statement of Claim, paras. 60-61, 72-73, AR, Vol. III, Tab 9, p. 13-14, 17-18

[47] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 15

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

55. The Court of Appeal's decision regarding the alleged *Criminal Code* contraventions raises two issues of national importance on which this Court's direction is required.

56. First, VLT games are authorized in a number of provinces pursuant to section 207(1) of the *Criminal Code*, which allows provincial governments to conduct and manage lottery schemes.[48] The Court of Appeal's determination that VLT games could be characterized as "similar" to three-card monte so as to contravene section 206(1) of the *Criminal Code* (and not be saved by section 207(1)) raises the spectre of criminal liability for activities which those provinces have decided, as a matter of public policy, to pursue.

57. Second, the Court of Appeal has decided, with no jurisprudential and scant academic support, that there exists in Canadian law a claim for disgorgement of profits based on criminal wrongdoing – a new cause of action that is inconsistent with the existing cause of action for unjust enrichment, as recognized in *Garland*. In the absence of immediate guidance from this Court, the Court of Appeal's decision sets the scene for provisional recognition of another non-existent cause of action.

58. Each of these issues is discussed below.

(i) The Court of Appeal's overly broad interpretation of the Criminal Code could affect lottery schemes authorized by provincial governments

59. The issue before the Court of Appeal was whether the plaintiffs had pleaded sufficient facts to bring ALC's conduct – and, specifically, its offering of VLT games – within the scope of the *Criminal Code*'s prohibition against three-card monte.

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[48] Affidavit of Patrick Daigle sworn February 7, 2019, paras. 7-16, AR, Vol. III, Tab 11, p. 131-133; and see *Video Lottery Regulations*, CNLR 760/96; *Gaming Centers Control Regulations*, PEI Reg EC 409/05, ss. 1(1)(l), 3, 4, 5; *Video Lottery Regulations*, NS Reg 42/95; *Video Lottery Scheme Regulation*, NB Reg 2008-112; *Act respecting lotteries, publicity contests and amusement machines*, CQLR c. L-6, s. 1(a.1) and Ch. III, Div. I.1; *Video Lottery Regulation*, Man Reg 84/2014; *The Alcohol and Gaming Regulation Act, 1997*, SS 1997, c. A-18.011, s. 12(1)(d) and 15(4)(d)(i) and the *Gaming Regulations, 2007*, RRS c A-18.011 Reg 5, s. 6(1)(c) and 7.1(1)(f); *Gaming, Liquor and Cannabis Act*, RSA 2000, c. G-1, ss. 1(1)(j.1), 46

60. The Court of Appeal refused to apply the rule of construction requiring penal statutes to be read narrowly, reasoning that, on an application to strike, the "benefit of the doubt" must be given to the plaintiffs.[49] However, giving a plaintiff the "benefit of the doubt" as to whether the pleaded facts could make out a cause of action does not equate to misinterpreting (or refusing to interpret) a relevant statute.

61. It is well established that the *Criminal Code* should be interpreted not only so as to favour the liberty of the accused, but also so as to give the public clear notice of what constitutes criminal wrongdoing. As this Court explained in *R. v. McIntosh*:

> Our criminal justice system presumes that everyone knows the law.
>
> …Therefore, an ambiguous penal provision must be interpreted in the manner most favourable to accused persons, and in the manner most likely to provide clarity and certainty in the criminal law. [Emphasis added.][50]

62. However, the Court of Appeal failed to give effect to those principles. Rather, in a decision that moves away both from the principle of narrow interpretation and from the clarity and certainty that are essential to the criminal law, the Court of Appeal declined to interpret the *Code*'s prohibition against three-card monte, while at the same time suggesting that factual evidence might justify reading it as extending far beyond its apparent literal scope so as to include any game whose "essence" is deceptive. The limits of such an offence are not easy to discern.[51]

63. Moreover, there is no reason to believe that Parliament intended to create such a wide-ranging offence. The *Criminal Code* already provided that: "Everyone is guilty of an indictable offence … who, with intent to defraud any person, cheats in playing at any game or in holding the stakes or in betting on any event".[52]

64. Indeed, the impetus for the enactment of the specific prohibition against "three-card

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[49] Reasons for Judgment of the Court of Appeal, para. 204, AR, Vol. II, Tab 6, p. 68

[50] *R. v. McIntosh,* [1995] 1 S.C.R. 686 at paras. 38-39

[51] Reasons for Judgment of the Court of Appeal, para. 208, AR, Vol. II, Tab 6, p. 69

[52] *The King v. Rosen and Lavoie* (1920), 61 D.L.R. 500 at 502-503, per Martin J., referencing s. 442 of the *Criminal Code;* the equivalent today is *Criminal Code,* R.S.C. 1985, c. C-46, s. 209

monte" was a 1920 decision of the Quebec Court of Appeal that three-card monte was *not* in itself a fraud that contravened the *Criminal Code* provision. Three-card monte was described in the decision as a game played with three cards, involving sleight of hand, wherein the player tries to spot the position of a particular card, while the dealer tries to induce the player to choose the wrong card.[53] As the *Hansard* record shows, it was the Crown's inability in that case to prove that three-card monte was inherently fraudulent that led Parliament to criminalize the game itself, and to extend the definition so as to avoid the possibility of an individual skirting the offence by changing the number of cards used or by playing with things other than cards.[54]

65. By contrast, the VLT games at issue are described in the Statement of Claim as "a form of continuous electronic gaming" that "mimic on screen the mechanical reel slot machine".[55] Thus, the games are not played with cards or things; they do not call on the player to follow a card or other object (or even an on-screen icon) through a series of manipulations; they do not involve sleight of hand; and they do not invite the player to spot, and bet on the location of, any particular card or object or icon. By opening the door to the possibility that such games fall within the *Criminal Code*'s prohibition against "three-card monte", the Court of Appeal has stretched the statutory language far beyond what Parliament intended, thereby threatening a direct impact on lottery operations in all provinces in which VLTs operate.

(ii) No Restitution for Criminal Acts

66. While courts have intervened in exceptional circumstances to prevent murderers from obtaining benefits flowing directly from their crime, there is no precedent for the adoption of a general cause of action for disgorgement of profits obtained through crime.[56]

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[53] *The King v. Rosen and Lavoie* (1920), 61 D.L.R. 500 at 502-503, per Martin J. and at 504 per Howard J.

[54] *House of Commons Debates*, 13th Parl, 5th Sess. Vol. II at p. 1857-1858 (11 April 1921) (Hon. D.A. LaFortune)

[55] Statement of Claim, paras. 12 and 17, AR, Vol. III, Tab 9, p. 4-5

[56] Maddaugh & McCamus note that "in the simple case where a "hit man" is paid to assault the plaintiff, there is no clear authority supporting a restitutionary claim forcing the criminal to disgorge the profits gained through the wrongdoing." Peter D. Maddaugh and John D.

67. The reason for this is fundamental to the division between private law and public law. Crimes involve the breach of a duty owed to the state, not to a particular individual; and the policy of preventing criminals from profiting from their crimes is a matter for Parliament. Indeed, Parliament has legislated in this very area, enacting provisions in the *Criminal Code* regarding the restitution of property obtained through the commission of an offence.[57]

68. Of course, a breach of the *Criminal Code* may also form part of the factual basis for a claim in unjust enrichment. The most notable example is provided by this Court's decision in *Garland v. Consumers' Gas Co.*, where liability was imposed in unjust enrichment, with the *Criminal Code* violation being relevant to the analysis of juristic reason.[58]

69. However, the decision below would open an entirely new (albeit rather foggy) avenue of recovery to plaintiffs. Under the Court of Appeal's approach, it is not necessary for a plaintiff to satisfy the three-part test for unjust enrichment. Rather, the plaintiff relies solely on "the existence of a crime" and on the profits earned therefrom. This new cause of action would be available even where the defendant "acquires a benefit which does not originate from the claimant", and even where the plaintiff "has suffered no deprivation or loss."[59]

70. The implications of such a new cause of action are far-reaching.

71. Without intervention and guidance from this Court, the Court of Appeal's decision can thus be expected to vastly increase both penal exposure to the three-card monte offence, and financial exposure based on alleged breaches of that provision and others in the *Criminal Code* (or perhaps other statutes), particularly in the class action arena.

McCamus, The Law of Restitution, (Thomson Reuters, 2018), at 23:400. See also Graham Virgo, *The Principles of the Law of Restitution,* 2d ed. (Oxford University Press, 2006) at p. 540 (considering English law)

[57] See e.g., *Criminal Code*, R.S.C. 1985, c. C-46, s. 491.1; and see Graham Virgo, *The Principles of the Law of Restitution,* 2d ed. (Oxford University Press, 2006) at p. 541; Andrew Burrows, *The Law of Restitution,* 3d ed. (Oxford University Press, 2011) at p. 641

[58] *Garland v. Consumers' Gas Co.*, 2004 SCC 25, paras. 30 and 55

[59] Reasons for Judgment of the Court of Appeal, para. 225, 229-232, AR, Vol. II, Tab 6, p. 74-76

PART IV – SUBMISSIONS REGARDING COSTS

72. If leave to appeal is granted, ALC respectfully requests that costs be in the cause.

PART V – ORDER REQUESTED

73. For all of the foregoing reasons, it is respectfully requested that this Honourable Court grant leave to appeal the Order of the Court of Appeal of Newfoundland and Labrador, dated December 10, 2018, with costs in the cause.

February 7, 2019

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Julie Rosenthal, Daniel Simmons and Michael Eizenga

Lawyers for the Applicant (Appellant), Atlantic Lottery Corporation Inc. – Société des loteries de l'Atlantique

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S.C.C. File No.

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. – SOCIÉTÉ DES LOTERIES DE L'ATLANTIQUE

Applicant (Appellant)

- and -

DOUGLAS BABSTOCK AND FRED SMALL

Respondents (Respondents)

- and -

BALLY GAMING CANADA LTD. AND BALLY GAMING INC.

Interveners (Interveners)

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