SCC File No. 38521

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.

APPLICANT
(Appellant)

A N D

DOUGLAS BABSTOCK AND FRED SMALL

RESPONDENTS
(Respondents)

A N D

BALLY GAMING CANADA LTD. AND BALLY GAMING INC.

INTERVENERS
(Interveners)

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

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

A N D

DOUGLAS BABSTOCK AND FRED SMALL

RESPONDENTS
(First Respondents)

A N D

BALLY GAMING CANADA LTD. AND BALLY GAMING INC.

INTERVENERS
(Interveners)

RESPONSE TO APPLICATIONS FOR LEAVE TO APPEAL
(DOUGLAS BABSTOCK AND FRED SMALL, RESPONDENTS)
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW & STATEMENT OF THE FACTS

OVERVIEW

"Where a defendant has obtained the enrichment through some wrongdoing on his own, he cannot then assert that it would be unjust to return the enrichment to the plaintiff."[1]

1. The Court of Appeal took this admonition from Canada's highest court to heart. All the Decision below determined is that it may be possible, following a trial, for the Respondents/Plaintiffs to obtain a restitutionary remedy if they can show the Applicant breached a duty, a contract or contravened the *Criminal Code*. Nothing more.

2. The "new" cause of action theory advanced by the Applicant is simply not borne out by the extensive analysis of the Court of Appeal. Rather, the Court below was obliged to permit claims with a possibility of success to proceed, regardless of their novelty or uniqueness. While the theory of the Respondents' case may not represent the most well-trodden ground, it nevertheless finds its anchor in traditional concepts of restitution, settled principles of damages and academic consideration. In fact, no party to this application can dispute that all courts agree that the threshold finding for waiver of tort to apply is predicate wrongdoing. That itself is a straightforward concept and revealed in the very detailed pleadings considered below.

3. The notion that waiver of tort is somehow new, untenable or novel as the Applicant suggests, has been answered by numerous appellate courts already. The Court of Appeal for Ontario has expressly rejected this characterization "the claim is not so much 'novel' … [but] one of the lesser appreciated areas within the scope of the law of restitution", which has engendered "needless complexity".[2] Whether it is properly known to the law as an independent cause of action or a remedy, all courts agree on: "at the very least, waiver of tort requires some form of wrongdoing."[3]

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[1] *Garland v. Consumers' Gas Co*., 2004 SCC 25 at para. 65.

[2] *Aronowicz et al. v. Emtwo Properties Inc. et al.* (2010), 98 O.R. (3d) 641 (C.A.) at para. 81, P.D, Maddaugh & J.D. McCamus, *The Law of Restitution*, loose-leaf (Aurora: Canada Law Book, 2009) at p. 24-1.

[3] See e.g. *Aronowicz et al. v. Emtwo Properties Inc. et al*. (2010), 98 O.R. (3d) 641 (C.A.) at para. 82; *Arora v. Whirlpool Canada LP*, 2013 ONCA 657 at paras. 117–118, 121; *Harris v. Glaxosmithkline Inc.,* 2010 ONCA 872; *Koubi v. Mazda Canada Inc.,* 2012 BCCA 310; *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36.

4. At the same time, this Honourable Court has consistently affirmed that complex matters which disclose substantive questions of law are best addressed at trial "where evidence concerning the facts could be led and where arguments about the merits of a plaintiff's case could be made."[4]

5. The key question at trial was: were the Applicant's actions in marketing VLT games lawful if the Applicant also knew those games were deceptive and defective? The damages sought are restitutionary rather than compensatory. As the damages claimed are benefit or profit-based, rather than loss-based, the claim is perfectly suited for a disgorgement remedy and potential aggregate damages treatment.

6. That's why the Applicant's submissions address the wrong question. The issue is not whether the claims advanced are likely to succeed on the merits at trial but whether a cause of action has been formally advanced in the pleading. To the extent that the Applicant attempts to defeat the merits of the claims now,[5] those arguments ought to be rejected: "certification is a procedural motion which concerns the form of an action, not its merits. Contentious factual and legal issues between the parties cannot be resolved on a class certification motion."[6]

7. Given the above, there can be no issue whatsoever of public or national importance raised by the Court of Appeal's interlocutory pleadings decision below.

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[4] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p. 972.

[5] The following authorities relied upon by the Applicant are merits decisions and therefore have no application to the issues on this application: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27; A*ndersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217; *Moore v. Sweet*, 2018 SCC 52; *Attorney General v. Blake*, [2001] 1 A.C. 268; *Bank of America Canada v. Clarixe Trust Co*., 2002 SCC 43; *R. v. McIntosh*, [1995] 1 S.C.R. 686, *The King v. Rosen and Lavoie* (1920), 61 D.L.R. 500 (Que. C.A.); *Garland v. Consumers' Gas Co*., 2004 SCC 25.

[6] *Pardy et al. v. Bayer Inc*., 2004 NLSCTD 72 at para. 91, leave to appeal ref'd 2005 NLCA 20.

STATEMENT OF FACTS

8. This action concerns the lawfulness of the Applicant's actions in marketing VLT line of games which it knows, or ought to know, are defective in design, deceptive and inherently dangerous. Pursuant to section 5 of the *Lotteries Act* and *Video Lottery Regulations,* the Applicant holds a monopoly over VLTs in the Province of Newfoundland and Labrador.[7] The Applicant Third Parties are suppliers of video lottery machines and software to the Applicant.

9. The Respondents allege that the provision of inherently deceptive games has been perpetrated by a governmental entity charged with acting in the public interest:

> VLTs are a form of continuous electronic gaming which differs from lotteries in that they electronically programmed to create cognitive distortions of the perception of winning, which cognitive distortions are intended to keep the consumer engaged and losing money. VLTs are inherently deceptive, inherently addictive and inherently dangerous when used as intended.[8]

10. In support of the certification application, the Respondents tendered evidence that what a player sees on the VLT screen is not actually the game itself: "how the randomness is generated and the probabilities of each winning combination are concealed from the player" in contrast to games like Black Jack or Roulette where the probabilities and randomness are transparent.

11. The pleadings assert that the VLT games conceal and misrepresent the following key aspects: randomness, the number of symbols, the weighting of symbols per reel and the probability of winning each combination. Further, the games contain animated spinning reels that do not represent the <u>actual</u> video reels which are stored inside the computer. They encourage maximum bet of up to 45 times the minimum bet (thereby encouraging 45 times the increased losses). They display asymmetric reels to create near misses in the form of disproportionately high numbers of jackpot symbols in non-winning combinations. They frequently indicates a win when in reality, the win is really just a disguised loss.

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[7] Statement of Claim, paras. 2, 4 – 9, LTA, Vol. 3, Tab 9; *Lotteries Act*, S.N.L. 1991, c. 53, s. 5; *Video Lottery Regulations*, C.N.L.R. 760/96, s. 5.
[8] Statement of Claim, at para. 12, LTA, Vol. 3, Tab 9.

12. If the Applicant is ultimately found liable, the Respondents seek restitutionary damages in the form of disgorgement of profits, not personal injury or compensatory damages. The Applicant has exhaustive records of the spending on each game that it operates.

13. By agreement of the parties, the certification application was heard by the Trial Division in two parts: (a) cause of action questions; and then (b) the balance of the certification test in the *Class Actions Act*.[9] By Reasons dated October 1, 2014 and December 30, 2016, the court refused to, respectively, strike any of the claims and certified the action as a class proceeding.

14. The Court of Appeal for Newfoundland and Labrador heard the Applicant's appeal in October 2017. By Reasons for Decision dated December 10, 2018, as corrected January 22, 2019, the Court granted leave to appeal, struck the claims based on the *Statute of Anne* and the *Competition Act* and upheld the certification order.

PART II - STATEMENT OF THE QUESTIONS IN ISSUE

15. The Respondents submit that each of the issues posed by the Applicant are premature and can only be answered after a full review of the merits on a proper evidentiary record, not a pleadings motion. For example, the answers to the Applicant's questions, at this stage, are obvious:

(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, absent damage, injury or loss?

   <u>Answer</u>: No such "new" cause was recognized below and even if it was, it is possible, based on a full evidentiary record that disgorgement is available once a merits determination disposes of the nature, kind and extent of the breach.

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

   <u>Answer</u>: That will necessarily depend on evidence at trial, factual and expert evidence, tying the nature and extent of the breach to profits earned. If the breach can be linked to certain profits earned, the remedy will flow. If the breach cannot be decisively linked to earned profits, no remedy could flow by way of disgorgement.

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[9] *Class Actions Act*, S.N.L. 2001, c. C-18.1, s. 5.

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

Answer: Pursuant to the express language of the *Criminal Code*, games "similar" to "three-card monte" are prohibited. In order to determine a game's essential characteristics and determine "similarity", expert factual evidence is necessarily required.

16. Given that these questions cannot be definitively answered without a full factual record, this Court's intervention now would not assist lower appellate courts or litigants one way or the other.

PART III - STATEMENT OF ARGUMENT

A. Overview of the Claims At Issue

17. The claims asserted in this action were aptly described below as ones with a common theme: causes of action based on unjust enrichment gained by the commission of a wrong that could lead to restitutionary remedies or disgorgement.[10] In this way, the causes of action are 'gain-based' and not 'compensation-based' or best understood as claims "rooted in a claim for disgorgement as a remedy based on unjust enrichment gained by commissions of a wrong without reference to loss, injury, damage or deprivation to or of the claimants."[11]

18. This reality is lost in the Applicant's submissions. Instead, the Applicant ignores all of the jurisprudence and academic consideration concerning restitutionary remedies and argues that this is a "new type of claim" affecting a "fundamental change in the law", evidencing a "marked departure" or "distortion of private law" and a "wholesale shift".[12] The Applicant's disregard for the review of this very issue which the Court of Appeal undertook below is of course in an effort to elevate the questions herein to ones of national import.

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[10] *Atlantic Lottery Corporation Inc.-Société des loteries de l'Atlantique v Babstock*, 2018 NLCA 71 at paras. 102–103, ("*Atlantic*").
[11] *Atlantic*, at para. 104.
[12] Applicant's Memorandum of Fact & Law, at paras. 4, 5, 7, 34, 37, 38, 40, 41, 42.

B. This Request to Review a Pleadings Motions Raises No Issues of National Import Warranting Review

19. Firstly, there is no dispute the Courts below were only permitted to strike the claims if he found that there was no chance that the action could succeed:

> "if there is a chance that the plaint ff might succeed, then the plaintiff should not be driven from the judgment seat. … the proposition that *it is singularly inappropriate to use the rule's summary procedure to prevent a party from proceeding to trial on the grounds that the action raises difficult questions*, has been affirmed repeatedly in the law century".[13] [emphasis added]

20. The prevailing principles surrounding Rule 14.24 applications (or section 5(1)(a) in a class action context) have settled an incredibly stringent test in order to strike:

> "…if there is any possible basis whatsoever on which a plaintiff might successfully argue entitlement at law, it is inappropriate to anticipate any defence a defendant may plead, even though it may be a very strong one, and, on the basis of evaluating that defence, strike the Statement of Claim as having no chance of success. That issue can only be determined at trial after hearing all of the evidence relevant to the matters pleaded by all parties, and the legal arguments of the parties. On an application under rule 14.24, it is not appropriate to make a preliminary determination of the success of any defence the defendant might plead."[14] [emphasis added]

21. *A fortiori* in a case such as this where the Applicant has not plead, has not delivered a Statement of Defence,[15] has not joined issue and has not particularized its defences. Even if it had, this Court has made it expressly clear that the potential to present a strong defence shall not prevent a plaintiff with proceeding with an action. In fact, in such circumstances, novelty of the claim itself might be a critical factor militating **in favour** of hearing the case on its merits so that new claims, duties or law can be delineated.[16] This is precisely what the Court of Appeal decided, i.e. that the action deserves a chance to be heard on its own merits.

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[13] *Sparkes v. Imperial Tobacco Canada Limited*, 2010 NLCA 21 at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at paras. 18, 33.

[14] *Walsh v. Tra Company Limited*, 2007 NLCA 50 at para. 16.

[15] *Babstock v. Atlantic Lottery Corporation Inc.*, 2016 NLTD(G) 216 at para. 20.

[16] *Hunt v. Carey*, [1990] 2 S.C.R. 959 at pp. 972, 975.

22. Moreover, the *Imperial Tobacco* line of authority on motions to strike also emphasizes an access to justice theme.[17]

23. With these principles firmly in mind, the Courts below correctly held:

(a) an action may only be struck if there is no possibility it can succeed;

(b) in each of the causes of action, "I must accept the allegations made by the Plaintiffs as true";

(c) the case is not about gambling per se but whether the Defendant presented and operated games which were inherently dangerous and that the hazardous nature of the games was concealed from users;

(d) both parties accept that the Defendant is validly authorized to operate games but "the existence of a regulatory scheme is not a full answer to allegations of wrongdoing";

(e) the Plaintiff alleged that in the operationalization of its regulatory role, the Defendant failed to provide a safe and non-deceptive service, which must be taken as true on a motions to strike;

(f) the Plaintiff argues that the Defendant is an exceptional position as regulator and provider which engages its statutory duty to act in the public interest – "together with knowledge it is presumed to have concerning the design features and impacts of VLT games, a failure to warn amounts to a breach of that duty. Given that this issue has not been specifically addressed in any authority, I cannot say at this stage that it is plain and obvious that it cannot succeed"; and

(g) the question is whether there is a reasonable possibility that the existing law may be uncertain and may develop or change when confronted with the actual evidence.[18]

24. Importantly, appellate courts across Canada are following suit. Those courts are applying the test to strike a pleading and there are no inconsistencies whatsoever but rather continued and recent uniform application and consideration.[19] Where the jurisprudence constitutes such an overwhelming body of precedent, further review by Canada's highest Court is not warranted.

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[17] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42

[18] *Babstock v. Atlantic Lottery Corporation Inc.- Société des loteries de l'Atlantique*, 2014 NLTD(G) 114 at paras. (respectively) 12, 14, 16, 8, 57, 109, 113, 150; *Atlantic*, at paras. 96–97.

[19] *Brozmanova v. Tarshis*, 2018 ONCA 523 at para. 14; *The City of Saint John v. Hayes*, 2018 NBCA 51 at para. 21; *Clark v. Hunka*, 2017 ABCA 346 at para. 20; *Skalbania v. 0055498 B.C. Ltd.*, 2018 BCCA 247 at para. 16.

Whether these causes of action succeed or fail will fall to be determined by the evidentiary record before the trial judge.

25. The seminal case governing preliminary motions to strike a pleading remains this Court's holding in *Hunt v. Carey*,[20] applied, adopted and confirmed by the decision in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company.*[21] The Newfoundland Court of Appeal specifically identified this is as the prevailing, controlling and appropriate test below,[22] mindful of the fact that the novelty of the cause of action shall militate in favour of a full hearing and that the pleading must be read as generously as possible.[23]

26. It is also critical to be mindful of the fact that the test at issue sets an extremely low threshold and requires the facts pleaded to be true or accepted on their face.

C. No Jurisprudential Conflict Regarding the Sustainability of these Pleadings

27. Secondly, the Applicant attempts to paint a picture that as soon as individualized damages have been disavowed by a plaintiff, there can never be a 'complete' tort or breach of contract. By so doing, the Applicant ignores all well-settled appellate jurisprudence that has repeatedly confirmed that restitutionary (instead of compensatory) damages are sufficient to anchor a claim for breach of contract[24] and/or that the very act of tortious or criminal conduct *may* entitle a plaintiff to a remedy.[25]

28. Despite this authoritative jurisprudence, the premise underpinning much of the Applicant's argument is that somehow a "new" cause of action was recognized on a pleadings motion below. This Honourable Court ought to reject that underlying assumption as there no

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[20] *Hunt v. Carey*, [1990] 2 S.C.R. 959.
[21] *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 31.
[22] *Atlantic*, at para. 97.
[23] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25; *Hunt v. Carey*, [1990] 2 S.C.R. 959 at pp. 978–979, 989; *Temilini v. Ontario Provincial Police (Commissioner)*, [1990] O.J. No. 860 (C.A.) at para. 8, leave to appeal to S.C.C. ref'd [1990] S.C.C.A. No. 364.
[24] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 59, leave to appeal to the S.C.C. ref'd [2007] S.C.C.A. No. 346; *Cassano v. The Toronto-Dominion Bank*, 2007 ONCA 781 at para. 27, leave to appeal to S.C.C. ref'd [2008] S.C.C.A. No. 15.
[25] *Heward et al. v. Eli Lilly & Co. et al*. (2008), 91 O.R. (3d) 691 (Div. Ct.) at paras. 21, 26, 32, 36, *Serhan Estate v. Johnson & Johnson*, [2006] O.J. No. 2421 (Div. Ct.) at para. 49, leave to appeal ref'd C.A., leave to appeal to S.C.C. ref'd [2006] S.C.C.A. No. 494.

doubt whatsoever at law that, simply put, "waiver of tort allows a plaintiff to claim disgorgement damages based on the tortfeasor's gain or benefit instead of compensatory damages based on the loss suffered".[26] That proposition is a very old one.

29. This principle has recently been affirmed by this Honourable Court: "[a]n action in waiver of tort is considered by some to offer the plaintiff an advantage in that it may relieve them of the need to prove loss in tort, or in fact at all."[27] In that same decision, this Court found that a pleadings appeal is not the proper place to resolve the particular circumstances in which waiver of tort can be pleaded, presumably because there is no full evidentiary record.[28] There is no principled reason for a different result to flow here: "I cannot say that it is plain and obvious that a cause of action in waiver of tort would not succeed."[29] Nothing has changed in the meantime and thus this application should be dismissed.

i. The Threshold Issue & Distinction Necessary To Examine the Decision Below

30. The Court of Appeal went to great lengths to explain the principles and jurisprudential treatment underpinning the following distinction: (a) restitution of benefits conferred on someone who has been unjustly enriched at the claimant's expense – **restitution for unjust enrichment** – or (b) restitution or disgorgement of benefits acquired as a result of the commission of a wrong – **restitution for wrongdoing**.[30] Neither the Decision below nor this application can be properly considered without first appreciating this distinction. As eminent academics and the Court below acknowledged, this distinction in the law of restitution is "fundamental".[31]

31. There is no doubt that the first category, restitution for unjust enrichment, "has been the traditional focus of the study of restitution and has occupied the greater part of most texts on the

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[26] *2105582 Ontario Ltd. (Performance Plus Golf Academy) v. 375445 Ontario Ltd. (Hydeaway Golf Club)*, 2017 ONCA 980 at para. 63.
[27] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 93; P.D. Maddaugh & J.D.McCamus, *The Law of Restitution*. Toronto: Canada Law Book, 2013 (loose-leaf updated May 2013, release 10) at 24-4.
[28] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 97.
[29] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 97.
[30] *Atlantic*, at para. 83.
[31] *Atlantic*, at para. 84; A. Burrows, *The Law of Restitution*, 3rd Ed. (Oxford: Oxford University Press, 2011) at 9; *321665 Alberta Ltd. v. Mobil Oil Canada Ltd.*, 2010 ABQB 522 at para. 10.

subject".[32] In this category, the remedy is the return of the benefit: "the cause of action is the unjust enrichment and the remedy is restitution. *Liability does not depend on the defendant's fault*. All that is required, once a benefit and a deprivation have been established, is a lack of a juristic reason for the defendant's enrichment."[33]

32. The second category – restitution for wrongdoing – squarely at issue here, has admittedly "not been as well-developed conceptually as the first category".[34] This category of cases tends to be analyzed using the terminology of 'waiver of tort', which is nothing more than "archaic language for the simple idea that some forms of wrongdoing exceptionally allow the successful plaintiff to demand disgorgement of the defendant's gain as an alternative to compensation for loss."[35]

33. Restitution for wrongdoing may be best understood in this fashion:

> "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. … **recovery by the plaintiff does not necessarily depend on the plaintiff having suffered any loss or deprivation**, although such a loss or deprivation may have occurred. Instead, **the focus is not on repairing an injury to the claimant but on stripping away the gains acquired by the defendant as a result of the wrong he or she has committed** so as to vindicate the notion that a wrongdoer should not profit from his or her wrong."[36] [emphasis added]

34. Restitution for unjust enrichment is merely another way of saying compensation for damages while restitution for wrongdoing is really more properly described as a reversal of benefits.[37] Simply put, the distinction is:

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[32] *Atlantic*, at para. 85.
[33] *Atlantic*, at para. 85 [emphasis added].
[34] *Atlantic*, at para. 88.
[35] *Atlantic*, at para. 88; M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham, ON; LexisNexis Canada Inc., 2014) at 9.
[36] *Atlantic*, at para. 86.
[37] *Atlantic*, at para. 90.

> "Within the law of civil wrongdoing, and especially tort, 'restitution' may refer to a remedy that requires the defendant to repair the losses that the plaintiff suffered as a result of the breach. That measure of relief aims to restore the plaintiff's status quo ante. Still within the law of civil wrongdoing, 'restitution' alternatively may refer to a remedy that requires the defendant to give up every enrichment received – from either the plaintiff or a third party – by virtue of having breached an obligation owed to the plaintiff. That measure of relief aims to restore the defendant's *status quo ante*."[38]

35. Once these doctrines of restitution are properly untangled, the Decision below reflects nothing more that authorization to proceed to seek such remedies following a merits determination. Ultimately, the merits of the action will turn on whether restitution is available for the commission of wrongful acts *per se*. To the extent that the Applicant has grossly mischaracterized the matters at issue, this Court ought to take a hard look at precisely what the Court below decided – permission to proceed with the claim as it could not safely be deemed doomed to fail.

ii. Disgorgement Remedy Potentially Available Upon Proof of Breach Alone

36. The Court of Appeal recognized that when it comes to the principles relating to restitution and unjust enrichment, "there is no universal agreement as to how these two terms should be employed"[39] and that the notion of restitution for wrongdoing "has not been as well-developed conceptually".[40] This is consistent with academic authority that has found, no category of tortious conduct can be automatically excluded for resolving disgorgement claims.[41]

37. The Applicant's submissions ignore this possibility all together, that restitutionary damages may flow upon proof of breach alone. Instead, its arguments are premised entirely on the more traditional approach to damages – compensatory and compensatory alone. The logical conclusion of the Applicant's argument is that restitutionary damages are never available, regardless of wrongdoing or *per se* breaches, in any case, for all time. This was already rejected

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[38] *Atlantic*, at para. 90, relying upon M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham, ON; LexisNexis Canada Inc., 2014) at 10 – 11.
[39] *Atlantic*, at para. 83.
[40] *Atlantic*, at para. 88.
[41] *Atlantic*, at para. 166, relying on John D. McCamus, "Waiver of Tort: Is There a Limiting Principle?" (2014) 55:3 Can. Bus. L.J. 333 at p.352.

below as a result of the Applicant's misplaced attempt to characterize the claims as compensatory:

> "**it is not open to the appellant [Applicant] to argue the appeal on the basis that something other than disgorgement based on wrongful acquisition** (namely a claim for compensation) was the essence of the claims being made. To do so would in effect be to set up a straw man for the purpose of knocking it down without advancing any substantive argument with respect to the real issues in dispute."[42] [emphasis added]

38. As discussed *supra*, the distinction between compensatory and restitutionary damages for wrongdoing underpins the entirety of the Decision below and ought not be lost on this application. While damages for wrongdoing may be more unusual that seeking relief for "old fashioned" compensatory damages, that does not also mean there is no cause of action, which is the assertion of the Applicant. As the Court below determined, since the purpose of this claim is not to "vindicate the right to compensation for loss but to vindicate the idea that a wrongdoer should not profit from his wrongdoing", the necessity of proving loss falls away.[43] This possibility has been affirmed by this Court and other appellate courts across Canada:

- claim for compensatory damages not necessary to ground breach of contract if relief sought was disgorgement of benefits received from the breach[44]
- damages available for contractual breach without proof of loss[45]
- remedy available for benefits acquired by a contract-breaker rather than for losses suffered by the innocent party[46]

39. As set out by the Court of Appeal below:[47]

> "The claimants [Respondents] have also pleaded that they have been wronged not only by tortious conduct but also by criminal conduct. All of the foregoing circumstances, together with the proposition that the claimants have a legitimate expectation that the contract not be performed in a manner that would knowingly

[42] *Atlantic*, at para. 108.
[43] *Atlantic*, at para. 173.
[44] *Cassano v. The Toronto-Dominion Bank*, 2007 ONCA 781; *Markson v. MBNA Canada Bank*, 2007 ONCA 334.
[45] *French v. Paris*, [1928] S.J. No. 36 (C.A.); *Whiten v. Pilot Insurance Co.*, 2002 SCC 18.
[46] *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43; *Attorney General v. Blake and Another*, [2000] UKHL 45.
[47] *Maddaugh & McCamus*, at 25-20, 25-19; *Atlantic*, at para. 129.

> be harmful to then **could, assuming proof, bring the case within the 'exceptional circumstances' notion expressed in *Blake***."[48] [emphasis added]

40. The notion put forth by the Applicant that these claims are simply unknown to law and accordingly require clarification or direction by this Court as matter of public import is simply not borne out by the breadth of authority available. At very least, the principles or approach to disgorgement are "best hammered out on the anvil of concrete cases"[49] not preliminary motions without evidence.

iii. Disgorgement of Profits May Be the Remedy for Breach of Contract

41. The Applicant asks this Court to resolve how causation ought to be approached in a restitutionary situation, claiming that the Court of Appeal did not engage in any causation analysis. The fundamental flaw in this argument is the assumption that a court can, or should, engage in a purely fact-based inquiry on a motion to strike. Whether or not the Respondent may ultimately be able to prove a connection between the *per se* breach of contract and profits earned therefrom, is a pure question of fact that cannot (and should not) be determined without a full evidentiary record, including expert evidence – and full testing and cross examination on sides (or, here, three sides).

42. As recently as February of this year, this Honourable Court expressly re-affirmed that causation is a matter of fact which depends on all of the circumstances of the case:[50]

> "Once again, the analysis of causation raises a question of fact [*Lonardi,* at para. 41; *Benhaim*, at paras. 36 and 92). … while such guideposts from the academic literature may help in sifting through the facts, the analysis of causation remains a context-based exercise which does not lend itself to legal theorizing."[51]

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[48] *Atlantic*, at para. 131.
[49] *Attorney General v. Blake and Another*, [2000] UKHL 45; *The Reid-Newfoundland Company v The Anglo-American Telegraph Company Limited (Newfoundland)*, [1912] UKPC 29 at 291 E.
[50] *Salomon v. Matte-Thompson*, 2019 SCC 14 at paras. 32, 84.
[51] *Salomon v. Matte-Thompson*, 2019 SCC 14 at paras. 196–197.

43. In fact, this Honourable Court has gone so far as to say, just last year, that causation "without a doubt, is a question of fact".[52] The Applicant suggests this Court ought to intervene to confirm that profits earned as a result of any breach are not necessarily equivalent to profits earned through the operation of the contract as whole. In principle, the Respondents do not disagree that the disgorgement damages may or may not equate to all profits earned. This will turn entirely on the evidence, expert and otherwise. Right now, the question is not only premature but moot.

44. Therefore, the notion that this Honourable Court ought to now consider in the air and unanchored to any factual matrix whether profits which are the subject of a disgorgement order are equivalent to the profits earned through the operation of the contract as a whole, is posing an impossible (and improper) question.

iv. It is Possible That Certain Lottery Schemes Fall Within the Meaning of "Three-Card Monte" in the Criminal Code

45. The Applicant describes the Court of Appeal's refusal to strike the *Criminal Code* alleged contraventions as having "stretched the statutory language far beyond what Parliament intended, thereby threatening a direct impact on lottery operations in all provinces in which VLTs operate".[53] However, the Court of Appeal did not make any such determination at all. All the Court below found was that it was not in a position, without evidence, to find, one way or another, whether VLTs might constitute prohibited games, entirely unconnected to either chance or skill, the very mischief Parliament attempted to prevent.

46. The Applicant's position begs the following question: how is the potential for an evidentiary assessment of the characteristics of Newfoundland's VLTs to determine their similarity to three-card monte a matter of national importance? The Applicant argues as if this case comes to this Court following a trial or a summary judgment motion. The Court of Appeal merely found that it might be possible for VLTs to be sufficiently "similar" to three-card monte to fall within the prohibition of the *Code*. But, expert evidence on the nature, effect and operation of VLTs would obviously be required before any court to make a final determination on the

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[52] *Brunette v. Legault Joly Thiffault, s.e.n.c.r.l.*, 2018 SCC 55 at para. 86; *Benhaim v. St-Germain*, 2016 SCC 48 at paras. 36, 92; *Montreal (Ville) v. Lonardi*, 2018 SCC 29 at para. 41.
[53] Memorandum of Argument of the Applicant, at para. 65.

issue. For example, are there hidden odds? How are VLTs programmed to give impressions of the odds? What are the prize structures? How volatile are the games?

47. For the purposes of a motion to strike, the Court of Appeal was required to analyze the relevant provisions of the *Code* and the pleadings. A review of both shows that the claim advanced cannot be said to be doomed to fail. Section 206 of the *Code* broadly prohibits lotteries, gambling, gaming, slot machines and video devices used for gambling, making it an offence for any person who:

> 206 (1)(g) induces any person to stake or hazard any money or other valuable property or thing on the result of any dice game, three-care monte, punch board, coin table or on the operation of a wheel of fortune.
>
> ….
>
> 206 (2) In this section, "three-card monte" means the game commonly known as three-care 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.[54] [emphasis added]

48. While these prohibitions generally exempt provincial governments who operate lottery schemes, the *Code* expressly carves out from that exemption games or schemes that involve "three-card monte":

> 207(1) Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful,
>
> (a) for the government of a province, either alone or in conjunction with the government of another province, to conduct and manage a lottery scheme in that province, in that and the other province, in accordance with any law enacted by the legislature of that province;
>
> …
>
> 207(4) In this section, "lottery scheme" means a game or any proposal, scheme, plan, means, device, contrivance or operation described in any of paragraphs 206(1)(a) to (g), whether or not it involves betting, pool selling or a pool system or betting other than.
>
> (a) three-card monte, punch board or coin table. [emphasis added]

49. Accordingly, even if the Applicant is the lawful delegate of the Province for the purposes of section 207(1), it is nevertheless still *prima facie* prohibited from operating or managing

[54] *Criminal Code of Canada, R.S.C.* 1985, c. C-46, s. 206.

games involving three-card monte, including any other game that is **similar** to it, whether or not the game is played with cards, as described in the section 206(2) statutory definition. Whether or not the Applicant ultimately contravened the *Criminal Code* therefore turns entirely on whether or not video lottery terminals are "similar" to three-card monte, **a pure question of fact** and one that has been properly pleaded.[55] The courts below had no other legal conclusion available to them under these circumstances but to hold that:

> "In this case, the *Code* contains a definition of 'three-card monte', and in so doing, it uses the words 'or any other game that is similar to it, whether or not the game is played with cards…'. This is a broad definition, and invites evidence as to the characteristics of the impugned games as set out on the VLTs to determine whether they are, in fact, similar to 'three-card monte'. … The fact that one is electronic and the other uses physical cards is not sufficient to determine the question."[56] [emphasis added]
>
> "What is unclear is whether the similarity must be in relation to the methodology, including the ostensible rules of play and implements used or in relation only to the 'essence' of the game, ie. the mischief (a certain type of fraud or deception) to which the crime is directed. This is a matter of interpretation which should only be done against the backdrop of evidence as to what is commonly known as three-card monte and what the essential characteristics of the game can be considered to be. It is only then that one would be able to determine whether the pleaded facts (assuming proof at trial) of deception and false representations of fairness and legitimacy in the operation of VLTS fit a properly-interpreted extended definition of three-card monte."[57] [emphasis added]

50. The above statement is without doubt a correct statement of the law. Without evidence, it was therefore impossible at first instance to determine it was plain and obvious that the Applicant was not operating a game "similar" to three-card monte, contrary to the statutory prohibition.

51. As a matter of law, the jurisprudence confirms that under section 206(1)(g), a game need not be identical in order to fall within the prohibition: it is sufficient for a game to share some of the same fundamental characteristics or "bears some resemblance" to one of the named

[55] Statement of Claim, at paras. 12, 14, 16, 26, 38, LTA, Vol. 2, Tab 9.
[56] *Babstock v. Atlantic Lottery Corporation Inc.- Société des loteries de l'Atlantique*, 2014 NLTD(G) 114 at paras. 30–31, LTA, Vol. 1, Tab 2.
[57] *Atlantic*, at para. 211.

prohibited games.[58] Expert evidence is required to resolve the factual question of whether VLTs bear some resemblance to three-card monte. This approach, adopted below, is also consistent with fundamental principles of statutory interpretation:

> "The type of three-card monte to which the *Criminal Code* prohibition is directed is obviously the mischief of the potential for cheating participants in an improper way. … Whether that [VLTs] can be said to be congruent with the 'essence' of three-card monte or a game similar to it is a matter that may well depend on expert evidence as to just what the mischief of three-care monte is perceived to be and whether VLTs exhibit the same essential characteristics. **That requires a trial**."[59] [emphasis added]

52. The definition of "three-card monte" in the *Criminal Code* is intentionally and decidedly broad and indicates an intention to take into account advances in technology and games which are "similar", whether or not they include a deck of cards. Any other interpretation would frustrate the legislative intent as it is clear the mischief to be prevented is not restricted to actual, physical card games.

53. It would be an absurdity to adopt the antiquated, literal, technical and narrow definition urged by the Applicant, with reliance on Hansard Debates from almost a century ago.[60] As the Court of Appeal held, such an interpretation "pre-determines that similarity has to mean physical similarity, not similarity in effect, without taking into consideration any advances in technology."[61]

54. The Statement of Claim has pleaded, with sufficient particularity, how VLTs are "similar" or "bear some resemblance" to three-card monte. The Respondents are obliged to do nothing more at this stage of the proceeding. The pleading includes, amongst other things, the following allegations:

> 12. VLTs are a form of continuous electronic gaming which differs from lotteries in that they are electronically programmed to create cognitive distortions of the perception of winning, which cognitive distortions are intended to keep the consumer engaged and losing money.

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[58] *R. v. Andrews*, [1975] S.J. No. 406 (C.A.) at paras. 12–13.
[59] *Atlantic*, at paras. 207–208.
[60] Memorandum of Argument of the Applicant, at para. 64
[61] *Atlantic,* at para. 214.

> 16. The difficulty of figuring out the odds is augmented by the variable prize structures used by VLTs and the resulting volatility of the games. The experience of this volatility and changing odds from non-linear payables makes it impossible for the player to determine, with any accuracy, the true odds of winning during any given play session.
>
> 26. VLTs are so programmed, fixed and manipulative that they do not fit any reasonable definition of "slot machine", "fair game of chance" or the definition of "lottery scheme" in s. 207(4) of the *Criminal Code of Canada.* They more closely resemble sleight-of-hand trickery such as three-card monte, outlawed by the *Criminal Code*.
>
> 38. The Plaintiffs also plead that VLTs are not lotteries or games of chance within the meaning of the *Criminal Code*. Rather, they are so unconnected with chance or skill and so manipulatives and deceptive as to fall within the prohibition against "three-card monte", and any other game of trickery and sleight-of-hand that is similar to it, contained in s. 206(1)(g) of the *Code*. Consequently, the Defendant's conduct and management of VLTs is not a permitted lottery pursuant to s. 207(1) of the *Criminal Code*, and is not authorized by the *Code*.[62]

55. As such, it was perfectly correct for the two courts below to find that these alleged pleaded similarities were sufficient to *prima facie* meet the *Criminal Code's* requirement of "any other game similar to" as the statute does not require physical cards in order to meet the test of similarity: "I cannot determine at this stage of the proceeding that it is impossible for the Plaintiffs to prevail on this point at trial".[63] In fact, the threshold question of "similarity" can only be determined on a full factual evidentiary record:

> "Expert evidence as to what is commonly known as, and the nature or essence of, three-card monte and what common characteristics exist that would make it similar to other games would be relevant to making the factual determinations of similarity."[64]

56. Whether or not particular VLTs in the Province of Newfoundland Labrador have the intrinsic components of three-card monte is a specific question of fact, not a question of national legal import.

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[62] Statement of Claim, at paras. 12, 14, 16, 26, 38, LTA, Tab 9.

63*Babstock v. Atlantic Lottery Corporation Inc.- Société des loteries de l'Atlantique, 2014 NLTD(G)* 114 at para. 32, Application Record, Vol. 1, Tab 2.

64 Atlantic, at para. 206.

D. Wrong Record, Wrong Issue, Wrong Time

57. Wrong time – this was a pleadings motion only. Wrong issue – pleading may only be struck if doomed to fail, a decidedly high bar. Wrong record – only the pleadings may be reviewed and there is no evidentiary factual foundation available for review.

58. While appellate consideration may very well be warranted and necessary following a disposition on the merits, intervention now will not contribute to settling this body of jurisprudence any further. The only thing that will contribute to more judicial guidance on the restitutionary principles is a full airing on the merits.

E. No Prejudice To The Applicant If Leave Is Denied

59. While certification orders are determinative of that procedural issue, they do not dispose of any substantive rights as between the parties.[65] Moreover, that is it not 'plain and obvious' that these claims are doomed to failure is not an issue of national importance. On the contrary, there is significant import in favour of denying this application for leave.

60. If the application is denied, the Applicant will have lost nothing at all. All of the Applicant's procedural protections or defences remain squarely intact and it will have its day in court to argue the merits of all these allegations. Conversely, certification was argued in this case in October 2014 and September 2015. Given very long reserves by both the motions judge and the Court of Appeal, 4.5 years have now passed since that procedural hearing. It is time for this class to have their day in court.

61. As Justice Green (formerly Chief Justice of the Supreme Court Trial Division) aptly concluded his judgment:

> "The arguments of the appellant… amount in essence to an attempt to reargue the factual and discretionary issues decided by the applications judge. No palpable or overriding error, nor any error in principle has been demonstrated. I am not persuaded that the judge erred in reading his conclusion"[66]

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[65] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16; *Davis v. Canada (Attorney General)*, 2008 NLCA 49 at para. 14.
[66] *Atlantic,* at para. 253.

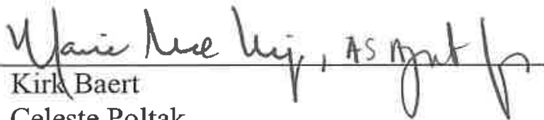
PART IV - SUBMISSIONS IN SUPPORT OF COSTS

62. The Respondents requests their costs of this application.

PART V - ORDER SOUGHT

63. The Respondents respectfully requests that this application for leave to appeal be dismissed, with costs of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of March 2019.



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PART VI - TABLE OF AUTHORITIES

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PART VII - LEGISLATION

***Lotteries Act*, S.N.L. 1991, c. 53, s. 5**

***Video Lottery Regulations*, C.N.L.R. 760/96, s. 5**

***Class Actions Act*, S.N.L. 2001, c. C-18.1, s. 5**

***Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 206**

***Code criminel* (L.R.C. (1985), ch. C-46), s. 206**