S.C.C. File No. 38521

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

BETWEEN:

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

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

AND:

DOUGLAS BABSTOCK and FRED SMALL

RESPONDENTS
(First Respondents)

AND:

**BALLY GAMING CANADA LTD. and
BALLY GAMING INC.**

INTERVENERS
(Interveners)

APPLICANTS' REPLY TO RESPONSE TO LEAVE TO APPEAL
(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada)*

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REPLY MEMORANDUM OF ARGUMENT

1. The Applicants adopt the submissions set forth in the Reply of Atlantic Lottery Corporation Inc. (ALC). These submissions are supplementary to those of ALC.

2. The Respondents assert that no new cause of action was recognized by the majority decision of the Court of Appeal of Newfoundland and Labrador.[1] That is patently incorrect. Justice Green could not have been clearer when he stated:

> [170] The time has come to jettison the terminology of waiver of tort and to recognize that a cause of action exists that, in principle, allows for the disgorgement of profits acquired as a result of the commission of a tortious wrong.

3. The cases cited by the Respondents to suggest that disgorgement for wrongdoing is not new - including this Court's decision in *Pro-Sys* - merely acknowledge the competing parasitic and independent action schools of thought.[2] They do not decide between the two theories. The majority decision of the Court of Appeal marks the first time that an appellate court in Canada has decided that waiver of tort, renamed disgorgement for wrongdoing, is an independent cause of action, not merely an election of remedies.

4. As a result, the Respondents' attempt to cast the leave applications as an inappropriate method to determine the merits of their case on a pleadings motion is misguided. To the extent that *Hunt v Carey* and the cases that have followed suit indicate that novel questions of law ought to survive a pleadings motion, they are irrelevant. The majority did not uphold certification of the class action on the basis that a novel question of law should survive a pleadings motion. The majority answered the novel question: an action for disgorgement for wrongdoing is now the law. The question for this Court is whether the majority decision should be upheld.

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[1] Respondents' Response, at para. 15(a)
[2] Respondents' Response, at paras. 28-29; Pro-Sys Consultants Ltd. v Microsoft Corporation, [2013] 3 SCR 477, 2013 SCC 57 (CanLII), at paras. 93-97

5. The Respondents have also advanced the old, well-worn argument that this Court should not consider the issue in the absence of a factual record following a trial.[3] Once again, the plaintiffs in a class proceeding seek to avoid consideration by this Court of whether waiver of tort, now renamed disgorgement for wrongdoing, is a separate cause of action. This important legal question can and should be resolved now – no trial record is required to fully address whether this cause of action exists in Canadian law.

6. Writing for the majority, Justice Green recognized that he was rejecting case law and academic commentary indicating that waiver of tort was not an independent cause of action and that no separate cause of action should be recognized. While calling it an "incremental development", the majority of the Court of Appeal expressly decided between two different and competing theories concerning waiver of tort.[4] The development of this new cause of action took place without the necessity of a full trial record. The allegations in the Statement of Claim, assumed to be true at this stage, provided the factual context to decide the issue.

7. Experience has demonstrated that a full factual record is not necessary to decide the important legal and policy questions underlying this issue. The need for a factual record was tested in a 138 day trial before Justice Lax in 2012. Justice Lax concluded that the evidence did not illuminate the important policy issues that were meant to arise from the trial record; the answers to the questions surrounding the waiver of tort doctrine were not dependent upon a trial record.[5]

8. The issues relating to disgorgement for wrongdoing are purely legal issues embodying important policy considerations. The determination of whether disgorgement for wrongdoing is available as a cause of action merely upon proof of a "wrong" (an incomplete cause of action in tort, breach of contract or a crime), without any requirement of causation of loss or harm to the plaintiff, is a question of law. It is a threshold legal issue

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[3] Respondents' Response, para. 15(a)
[4] Reasons of the Court of Appeal, at paras. 177-179
[5] Andersen v. St. Jude Medical Inc., 2012 ONSC 3660; 219 ACWS (3d) 725, at paras. 585, 593-594

without which the Plaintiffs in this case have no justiciable claim. The resolution of that question may be guided by broad policy considerations. But it is not dependent upon a specific set of facts. The issue in this appeal is about the existence of a cause of action and, if it exists, its constituent elements. It is not about its application to specific facts.

9. While the application of causation principles is a question of fact, the question of whether the Plaintiffs must establish that the "wrongs" pleaded in the Statement of Claim caused a loss or damage to the Plaintiffs is purely a question of law.

10. It is not unusual that such fundamental legal issues concerning the existence of a cause of action should be decided without a trial. *Donaghue v. Stevenson* was decided on a plea of *demurrer* by the defendant that the statement of claim did not disclose a cause of action. In *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*[6], this Court decided on a pleadings motion that a contractor may be tortiously liable for negligence to a subsequent purchaser of a building for the cost of repairing construction defects. In *Seneca College of Applied Arts & Technology v. Bhadauria*,[7] this Court concluded on a pleadings motion that a civil right of action did not arise from a breach of Ontario's *Human Rights Code*. In *R. v. Imperial Tobacco Canada Ltd.*[8], this Court struck out a third party claim against the Government of Canada which was held not to be sustainable on the pleadings. In *Holland v. Saskatchewan,*[9] this Court declined to recognize a new tort of negligent breach of statutory duty by acting outside or contrary to law. Concerns over the chilling effect and specter of indeterminate liability militated against recognizing such a new cause of action. In summary, this Court has repeatedly demonstrated its willingness to decide questions of law concerning the existence and elements of a cause of action without a full factual record.

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[6] Winnipeg Condominium Corporation No. 36 v. Bird Construction Co., [1995] 1 SCR 85; 1995 CanLII 146 (SCC)
[7] Seneca College of Applied Arts & Technology v. Bhadauria, 1981 CarswellOnt 117; [1981] 2 S.C.R. 181 (CanLII)
[8] R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42 (CanLII)
[9] Holland v. Saskatchewan, [2008] 2 SCR 551; 2008 SCC 42 (CanLII)

11. This Court has the benefit of both the majority and dissenting opinions of the Court of Appeal on this important issue. The majority of the Court of Appeal has extensively analyzed the disgorgement for wrongdoing issue. Justice Welsh has provided a useful counterpoint in her dissent. In addition, this Court has the benefit of other judicial decisions since its decision in *Pro-Sys*. The time is now ripe for the Court to take up consideration of this important issue.

12. The benefit of considering this new cause of action on a pleadings motion is, to borrow from Justice Abella, "obvious".[10] It may avoid a protracted and expensive trial. It will also serve the values of better access to justice, proportionality, and cost-savings, not only for the parties to this action but for all cases that seek to advance claims on the basis of disgorgement for wrongdoing. The culture-shift encouraged by this Court in *Hryniak v, Mauldin* favours consideration of the new cause of action by this Court, at this time.[11]

13. The *Class Actions Act* requires that a cause of action must exist for certification to be granted. But courts in the principal common law jurisdictions, including Canada, the United Kingdom, Australia, New Zealand and the United States have held that there is no general duty of care to protect persons from gambling losses. Justice Briggs in England expressly rejected the notion that the Court should attempt to fashion some remedy for disgorgement of profits.[12] And as Justice Welsh pointed out in dissent in this case, the use of VLTs is authorized by law following a policy decision of government.[13]

14. The claim for disgorgement of profits seeks to do an end run around the class certification process. The Legislature has said that VLT gaming is legal and permissible. ALC is empowered to approve which VLT games may be played in the Province. If ALC has breached a duty of care, then only those to whom a duty was owed and who have suffered

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[10] Syl Apps Secure Treatment Centre v. B.D., [2007] 3 SCR 83, 2007 SCC 83 (CanLII) at para. 19, wherein this Court determined whether a new duty of care should be recognized on a pleading motion.

[11] Hryniak v. Mauldin, [2014] 1 SCR 87, 2014 SCC 7 (CanLII)

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

[13] Reasons of the Court of Appeal, at para. 74

loss or damage caused by the wrong should be entitled to recover. That is the compensatory model of damages that has existed for hundreds of years. That determination is quintessentially an individualistic assessment. The Plaintiffs have expressly disavowed any claim to loss or damage. The class proceeding therefore does not disclose a cause of action if the normal compensatory principles apply. Certification should be denied. This case should only proceed to trial if the majority of the Court of Appeal is correct that disgorgement of profits is a separate cause of action requiring only proof of a "wrong" (an incomplete cause of action in tort, breach of contract or a crime) without the need for causation of loss or damage to the Plaintiffs.

15. The time has come for this Court to take up the consideration of this important legal issue. This appeal raises an important issue of law that affects the nature and type of civil remedies for wrongs in Canada. It has important implications for the video lottery gaming industry in Canada, including the various lottery commissions and the provincial governments. It has implications for the Canadian economy, affecting manufacturers and suppliers of a wide range of products and services.

16. Right issue – whether disgorgement for wrongdoing is a separate cause of action is a threshold question which is determinative of the motion to strike. Right record – only the pleadings are necessary for this pure question of law. And right time – the Court of Appeal majority's stunning "incremental development" of a new cause of action and this Court's call for a culture-shift to avoid unnecessary trials makes this proposed appeal timely.

17. It is respectfully submitted that leave to appeal should be granted.

All of which is respectfully submitted this 29th day of March, 2019.

as agent for

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