S.C.C. File No. 38521

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

BETWEEN:

ATLANTIC LOTTERY CORPORATION INC.

Appellant (Appellant)

- AND –

DOUGLAS BABSTOCK AND FRED SMALL

Respondents (Respondents)

- AND –

BALLY GAMING CANADA LTD. AND BALLY GAMING INC.

Interveners (Interveners)

AND BETWEEN:

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

Appellants (Respondents)

- AND –

DOUGLAS BABSTOCK AND FRED SMALL

Respondents (Respondents)

- AND –

BALLY GAMING CANADA LTD. AND BALLY GAMING INC.

Interveners (Interveners)

FACTUM OF THE APPELLANT, ATLANTIC LOTTERY CORPORATION INC. – SOCIÉTÉ DES LOTERIES DE L'ATLANTIQUE

(pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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I. PART I – OVERVIEW AND THE FACTS

1. Fifteen years ago, on a certification motion, an Ontario judge pronounced the law to be "unsettled" as to whether a cause of action could be brought for "waiver of tort" based solely upon an alleged breach of a duty of care, without proof of causally linked loss or injury.[1] The judge made that pronouncement despite the fact that not a single case – not in Canada, England, the United States, Australia or New Zealand – had ever held such a claim to be tenable. Over the fifteen years that followed, little changed. Canadian courts hearing certification motions continued to describe the law as "unsettled", while the other common law jurisdictions continued to be free of any suggestion that such a claim could be maintained in their respective courts.

2. Now, in a sweeping judgment, a majority of the Newfoundland Court of Appeal has stepped into the breach and has recognized a "new" waiver of tort-type cause of action that would not only permit a disgorgement remedy for all torts (in itself a major change in the law), but would also grant a remedy where no tort has been committed – where the plaintiff can prove only breach of a duty of care, without proof of any resulting loss or injury.

3. The decision, if allowed to stand, would strike at the very foundations of negligence law, the animating principles of which are intimately bound up with the concept of harm and which has, as a result, always required proof of loss or injury caused by the defendant's breach. Moreover, this radical change in the law is not justified – as other changes to the common law have been – by any evolving or unanswered societal need. While the majority below pointed to the need to deter risky behaviour, such deterrence is already provided by the compensatory regime of negligence law. And for behaviour that causes no harm but merely poses a risk to the public at large, the requisite degree of deterrence, as carefully calibrated by the legislative branch and taking into account the costs and benefits, is more properly provided by public law.

4. This radical modification to the law of negligence endorsed by the majority below should therefore be rejected and this Court should clarify that a disgorgement remedy is not available upon proof merely of a breach of a duty of care.

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[1] *Serhan v. Johnson and Johnson*, [2004] O.J. No. 2904 ("*Serhan*") at para. 38

5. The Court below further erred in permitting the plaintiffs to seek disgorgement for breach of contract, despite the plaintiffs' failure to plead any causal link between the breach alleged and the profits claimed as a remedy. While the alleged contractual breach is that certain games offered by the appellant are dangerously addictive, the plaintiffs have disclaimed any allegation of harm. If the plaintiffs cannot prove harm, then they cannot prove that any of the profits were earned as a result of the games' allegedly addictive characteristics, which is the specific breach of contract alleged. Thus, the disgorgement remedy that the plaintiffs seek is not available on the facts pleaded. Given that the plaintiffs do not seek compensatory damages, a class action would not be the preferable procedure to decide whatever might remain of the breach of contract claim.

6. Finally, the Court of Appeal erred in holding that the plaintiffs have a reasonable prospect of succeeding in their allegation that the video lottery games at issue, which the plaintiffs describe as "[mimicking] on screen the mechanical reel slot machine", fall within the *Criminal Code*'s definition of "three-card monte". When the well-established rules of statutory interpretation are applied, it is apparent that the *Criminal Code*'s definition extends only to games that share the specific features of three-card monte, namely, a player attempting to follow one of a number of cards or other things through a series of manipulations and then betting on his or her ability to locate the particular card or thing. That definition cannot possibly extend to the appellant's games as described in the Statement of Claim, which share none of these features.

A. The Claim

7. The plaintiffs' claim is based upon one main allegation, namely, that the appellant, 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.[2]

8. The Statement of Claim takes that core allegation, which sounds in negligence, and dresses it up in multiple different guises: a claim that the deceptive nature of the games violates the *Criminal Code*'s prohibition against "three-card monte"; a claim for misrepresentation under

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[2] Statement of Claim issued April 26, 2012 ("Statement of Claim"), para. 12, Joint Appellants' Record ("JAR"), Vol. II, Tab 8, p. 94

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 safe; a claim for breach of the *Statute of Anne, 1710*; a claim for negligently failing to warn the plaintiffs of the dangers posed by the games; a claim in unjust enrichment; and a claim for "waiver of tort".[3]

9. For all of the claims 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 from the VLT games.[4]

10. 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.

B. Decisions of Faour J. at First Instance

11. By order dated September 3, 2015, Faour J. dismissed ALC's application to strike. Of relevance to the within appeal, Faour J. held that:

(a) 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;

(b) "restitutionary damages" may be awarded for breach of contract, where the plaintiffs have suffered no loss;

(c) it may not be necessary to prove loss or injury to make out a claim in negligence;

(d) with respect to the claim in unjust enrichment, the contracts entered into by class members to play the VLT games could not serve as a juristic reason, because the plaintiffs had alleged a breach of those contracts; and

(e) the law was unsettled as to whether waiver of tort could provide the basis for a

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[3] Statement of Claim, paras. 36-40, 41, 47-48, 53-54, 55-59, 60 and 62, JAR, Vol. II, Tab 8, pp. 98-99, 101-104

[4] Statement of Claim, paras. 64, 73(d) and (e), JAR, Vol. II, Tab 8, pp. 104, 107-108

> remedy upon proof merely of a breach of a duty of care.[5]

12. The certification application was then heard with respect to the remaining issues, including whether a class proceeding would be the preferable procedure. In holding that the action should be certified, Faour J. relied heavily upon a clarification offered by the plaintiffs, namely, that they were not alleging and, therefore, would not be proving any 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.[6]

13. Indeed, the application judge noted that the plaintiffs had gone so far as to "deny individual injury or harm".[7] This disclaimer was of central importance to the decision to certify, with Faour J. relying upon it to find that there is an identifiable class, and that the claims raise common issues, and that a class proceeding is the preferable procedure.[8] The disclaimer was also reflected in the certification order that ultimately issued, which states:

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[5] Reasons for Judgment on Application to Strike Claim dated October 1, 2014 ("Application to Strike Reasons"), paras. 30-32, 119, 151-154, 173 and 204-205, JAR, Vol. I, Tab 1, pp. 10-11, 33, 43, 48 and 59

[6] Reasons for Judgment on Application to Certify dated December 30, 2016 ("Certification Reasons"), paras. 111 and 126, JAR, Vol. I, Tab 3, pp. 101-102, 106-107: "They do not allege individual harm . . ." And see paras. 72 and 77, pp. 88 and 90: ". . . no harm to any of the consumers of the product offered by the Defendant is alleged . . ." And see Application to Strike Reasons, para. 152, JAR, Vol. I, Tab 1, p. 43: "[The defendant argues that] the Plaintiffs say they have not suffered personal loss, do not allege any suicidal ideation or addiction, and therefore they have not made out a full claim in tort. The Plaintiffs agree that they have renounced any claim to personal injury."

[7] Certification Reasons, para. 134, JAR, Vol. I, Tab 3, p. 109. And see para. 147, p. 113, where the application judge states that the plaintiffs' claim is "not based on individual proof or individual harm".

[8] Certification Reasons, paras. 77, 111, 126, 131 and 134, JAR, Vol. I, Tab 3, pp. 90, 101-102, 106-107, 108-109.

> The plaintiffs claim entitlement to a restitutionary remedy for the class without proof of reliance or individual harm. [emphasis added][9]

14. 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.

C. The Decision of the Court of Appeal

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

16. 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 asserted causes of action (negligent breach of duty to warn, breach of contract, unjust enrichment, breach of the *Criminal Code*, and waiver of tort), 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.

17. He characterized the five remaining causes of action as being "essentially founded on allegations of deceit and failure to warn consumers of danger". 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".[10]

18. Green J.A. noted that all of the wrongs asserted by the plaintiffs were intended to provide the basis for a disgorgement remedy[11] and he characterized the plaintiffs' claim, when viewed as a whole, as one seeking restitution for wrongdoing.[12] Green J.A. then turned to consider the five asserted causes of action.

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[9] Order of Faour J. dated December 30, 2016, para. 4(c), JAR, Vol. I, Tab 4, p. 116

[10] Reasons for Judgment of the Court of Appeal of Newfoundland and Labrador dated December 10, 2018 ("Court of Appeal Reasons"), para. 95, JAR, Vol. II, Tab 5, p. 29

[11] Court of Appeal Reasons, para. 102, JAR, Vol. II, Tab 5, pp. 33-34

[12] Court of Appeal Reasons, paras. 83 and 102, JAR, Vol. II, Tab 5, pp. 25 and 33-34

19. With respect to the claim in negligence (or negligent failure to warn), 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 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 resulting harm.[13]

20. While explaining that not all breaches of a duty of care would justify a disgorgement remedy, Green J.A. provided 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".[14]

21. Accordingly, despite the plaintiffs' disclaimer of any loss or injury,[15] 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.[16]

22. With respect to the breach of contract claim, Green J.A. noted that the plaintiffs alleged

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[13] Court of Appeal Reasons, paras. 133 and 139, JAR, Vol. II, Tab 5, pp. 44 and 45-46

[14] Court of Appeal Reasons, paras. 162 and 166, JAR, Vol. II, Tab 5, pp. 54 and 55-56

[15] Green J.A. provided *obiter* commentary to the effect that, even if all of the elements of the tort of negligence must be pleaded, the plaintiffs had pleaded all required elements, as the Statement of Claim includes a plea of harm suffered as a result of the breach of duty. Court of Appeal Reasons, paras. 186 and 189-190, JAR, Vol. II, Tab 5, pp. 63 and 64. However, Green J.A. was 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 before the Court of Appeal, noting 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, JAR, Vol. III, Tab 18, p. 154. And, as discussed above, the disclaimer of harm was central to Faour J.'s decision to certify the claim, in respect of which the Court of Appeal found no palpable and overriding error or error in principle: Court of Appeal Reasons, para. 253, JAR, Vol. II, Tab 5, p. 82

[16] Court of Appeal Reasons, para. 201, JAR, Vol. II, Tab 5, p. 67

breach of various implied contractual terms, including an implied promise that the games were "safe, interactive and entertaining" and not "inherently dangerous".[17] Green J.A. held that, while compensatory damages are the ordinary remedy for breach of contract, there are instances where 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.[18]

23. 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.[19]

24. 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.[20]

25. Green J.A. further held that the remedy of disgorgement could be available upon proof of a breach of the *Criminal Code* and proof of profit earned therefrom.[21]

26. 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 so as to entitle them to a disgorgement remedy, Green J.A. held that it was unnecessary to

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[17] Court of Appeal Reasons, paras. 113 and 130, JAR, Vol. II, Tab 5, pp. 37-38 and 43

[18] Court of Appeal Reasons, para. 120-123, 129-131, JAR, Vol. II, Tab 5, pp. 40-41, 42-43

[19] *Criminal Code*, R.S.C. 1985, c. C-46, s. 206(2); Court of Appeal Reasons para. 211, JAR, Vol. II, Tab 5, p. 70

[20] Court of Appeal Reasons, paras. 206 and 211, JAR, Vol. II, Tab 5, pp. 68-69 and 70

[21] Court of Appeal Reasons, paras. 225-228, JAR, Vol. II, Tab 5, pp. 74-75

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, corresponding deprivation of the plaintiff, and a lack of juristic reason for the enrichment.[22]

27. Finally, Green J.A. held that no palpable and overriding error had been established with respect to the remaining issues addressed in the certification decision.[23]

II. PART II – QUESTIONS IN ISSUE

28. This appeal raises the following questions:

(a) Should this Court recognize a cause of action – whether under the name "waiver of tort" or "restitution for wrongdoing" or otherwise – that would provide for a disgorgement remedy upon proof of a breach of a duty of care (including breach of a duty to warn), without any proof of resulting loss or harm?

(b) Should the plaintiffs' claim for breach of contract be allowed to proceed as a class action, notwithstanding the lack of any causal link between the asserted breach of contract and the disgorgement remedy sought?

(c) Is there any reasonable prospect of the plaintiffs succeeding in their claim that the VLT games offered by ALC fall within the *Criminal Code*'s prohibitions regarding "three-card monte"? If not, does the Statement of Claim disclose a tenable cause of action in unjust enrichment?

III. PART III – ARGUMENT

A. The Plaintiffs' Claim in "Waiver of Tort" Should Be Struck

(i) Overview

29. The majority below purported to recognize a new cause of action, to which they referred by various names, such as "disgorgement [for] tortious wrongdoing"[24] or "unjust enrichment

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[22] Court of Appeal Reasons, para. 230, JAR, Vol. II, Tab 5, p. 76

[23] Court of Appeal Reasons, paras. 252-253, JAR, Vol. II, Tab 5, p. 82

[24] Court of Appeal Reasons, para. 165, JAR, Vol. II, Tab 5, p. 55

gained through tortious wrongdoing".[25] While the Court of Appeal characterized this as a "new" cause of action, it is more accurately described as a radical modification to the law of negligence, which would award a remedy upon proof merely of a breach of a duty of care, without the need to prove any resulting loss or harm.

30. The decision below is wrong in law.[26] Regardless of the nomenclature used, whether "waiver of tort" or "restitution for wrongdoing", a plaintiff's entitlement to a remedy should depend upon establishing all of the elements of an underlying cause of action (in negligence, or otherwise). The Court of Appeal's holding to the contrary is fundamentally inconsistent with the law of negligence and is without precedent in other common law jurisdictions. It is unsupported by policy considerations, would blur the lines between private and public law, and would effect an unwarranted intrusion on the proper domain of the legislature.

31. This Court should discard the confusing term "waiver of tort". It should clarify that the relevant inquiry is whether any given cause of action entitles a plaintiff to elect a remedy that is based upon the benefit that has been enjoyed by the defendant, rather than upon the harm that has been suffered by the plaintiff. And this Court should clarify that, in all instances, a plaintiff cannot claim any remedy without proving all of the elements of an underlying, recognized cause of action.

(ii) The Decision Below Would Permit Gains-Based Remedies for <u>All</u> Torts

32. It is not controversial that, for certain torts, damages may be quantified by reference to the benefit enjoyed by the defendant as a result of the wrong committed. The best-known examples of torts[27] for which such restitutionary, gains-based damages may be awarded are

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[25] Court of Appeal Reasons, para. 181, and see paras. 171 and 173, JAR, Vol. II, Tab 5, pp. 61 and 57-58

[26] Whether to strike a claim for failure to disclose a cause of action is a question of law, reviewable on a correctness standard. See e.g., *Edwards v. Law Society of Upper Canada*, <u>2001 SCC 80</u>

[27] Gains-based remedies may be available for other non-tortious causes of action, most notably, breach of fiduciary duty.

trespass and conversion.[28] As explained by Professor Weinrib, the award of a gains-based remedy for such torts, which involve the wrongful use or disposition of another's property, is consonant with the principles of corrective justice. It reflects and corrects the particular characteristics of the wrong, which consists of using or selling property to which the plaintiff has an exclusive right. The gains-based remedy (which Professor Weinrib terms "restitutionary damages") returns to the plaintiff the benefit realized from the defendant's wrongful appropriation of the plaintiff's exclusive right of use:

> In appropriating the benefits from using or alienating the object, the defendant implicitly asserts the ownership that alone would entitle the defendant to those benefits. Restitutionary damages reverse the wrong by showing, through the return of the benefits, that the law considers the defendant's implicit assertion of ownership to be a nullity, whose consequences are to be undone.[29]

33. Thus, a gains-based remedy for torts such as trespass or conversion reflects, and flows logically from, the nature of the plaintiff's right and the nature of the wrong committed.[30] Because the defendant wrongfully appropriated the plaintiff's right to the exclusive use and benefit of the property, the gains-based remedy restores to the plaintiff the wrongfully appropriated benefit. Without such a correlation between the plaintiff's right, the defendant's infringement of that right and the gain realized, a gains-based remedy is not justified:

> For the gain to take on the normative quality of wrongfulness, it must be the materialization of a possibility – the opportunity to gain – that rightfully belonged to the plaintiff.[31]

34. In the present case, the Court of Appeal went much farther than simply recognizing a

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[28] See e.g., *Daniel v. O'Leary*, 1976 CarswellNB 150 (Q.B.) at paras. 4-7, Book of Authorities ("BOA"), Tab 5; *Rossiter v. Swartz and Swartz*, 2013 ONSC 159 at para. 48; *Ministry of Defence v. Ashman* (1993), 66 P. & C.R. 195 (C.A.) at 201, BOA, Tab 9; *Jackson v. Penfold*, [1931] 1 D.L.R. 808 (Ont. C.A.) at 810, BOA, Tab 7; *Transit Trailer Leasing Ltd. v. Robinson*, [2004] O.J. No. 1821 (S.C.J.) at paras. 74-75

[29] Ernest J. Weinrib, *"Restitutionary Damages as Corrective Justice"*, (2000) 1 Theoretical Inquiries L. 1 ("Weinrib") at 13, BOA, Tab 24

[30] *One Step (Support) Ltd. v. Morris-Garner*, [2018] UKSC 20 at para. 95

[31] Weinrib at 8 and 11, BOA, Tab 24

gains-based remedy for torts involving the wrongful appropriation of exclusive rights of use. It held that gains-based remedies should be available for all "tortious wrongdoing".[32] That would effect a profound change in the law, as no Canadian case law can be found actually awarding a gains-based remedy for such torts as negligent misrepresentation, libel, assault, nuisance, or negligence.[33] It is open to serious question whether such a far-reaching change to the law of torts is consonant with this Court's guidelines about incremental change to the common law.[34]

35. But the Court of Appeal went even further. Not only did it endorse the availability of gains-based remedies for all torts, it also held that such remedies should be available even in instances where no tort has been committed. It held that a disgorgement remedy may be awarded where the defendant owed a duty of care to the plaintiff and where that duty was breached, even though the plaintiff did not suffer any resulting injury or loss:

> If enrichment is brought about by the commission of a wrong, i.e. the breach of a duty of care owed to the claimant, it is arguable that that should be sufficient.
> . . .
> . . . I am therefore satisfied that it is appropriate to recognize unjust enrichment gained as a result of wrongdoing as a cause of action that can encompass a wide variety of torts, including negligence (in the sense of the breach of a duty of care), even in circumstances where there is no proof of loss to the claimants.[35]

36. This represents an extraordinary leap into uncharted territory.

(iii) The Decision Below Would Fundamentally Alter the Law of Negligence

37. The law of negligence has always required a plaintiff to prove not only the breach of a duty of care, but also injury or loss caused by that breach of duty:

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[32] Court of Appeal Reasons, para. 170, JAR, Vol. II, Tab 5, p. 57

[33] See, e.g., *Networth Industries v. Cape Flattery*, [1997] B.C.J. No. 3174 (B.C.S.C.) at para. 23, BOA, Tab 10; and see *Reid v. Ford Motor Co.*, 2006 BCSC 712 at paras. 29 and 31.

[34] *R. v. Cuerrier*, [1998] 2 S.C.R. 371 ("*Cuerrier*") at para. 43, per McLachlin J.; *R. v. Martineau*, [1990] 2 S.C.R. 633 at 682, per Sopinka J.

[35] Court of Appeal Reasons, paras. 173 and 177, JAR, Vol. II, Tab 5, pp. 58 and 59

> [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.[36]

38. It is the plaintiff's injury that renders the defendant's conduct wrongful. If no injury has been suffered, then no legal wrong has been committed:

> A person who acts without reasonable care does no wrong in law; he commits no tort. He only does wrong, he only commits a tort, if his lack of care causes damage to the plaintiff.[37]

39. As this Court has explained, to award a remedy without proof of injury caused by the defendant's breach of duty would be inconsistent with the principles of corrective justice that animate the law of negligence.[38]

40. While the majority below acknowledged and accepted this point,[39] they held that, since the plaintiffs were asserting a "new" cause of action and not negligence, their disclaimer of loss or injury was irrelevant.[40]

41. However, this purportedly new cause of action is indistinguishable, in all respects except one, from negligence. Both require proof that the defendant owed the plaintiff a duty of care (in accordance with the two-stage *Cooper-Anns* test). And both require proof that the defendant breached that duty. The key difference – indeed, the only difference – between this "new" cause

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[36] *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, [1961] A.C. 388 (J.C.P.C.) at 425, BOA, Tab 11, quoted with approval in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 at 405

[37] *Browning v. War Office*, [1963] 1 Q.B. 750 at 765, per Lord Diplock, BOA, Tab 3, quoted with approval in *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 at para. 26; see *Clements v. Clements*, 2012 SCC 32 ("*Clements*") at para. 16; *Davidson v. Lee, Roche & Kelly*, 2008 ONCA 373 at para. 6; *Ring v. Canada (Attorney General)*, 2010 NLCA 20 at para. 50; Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 10th ed. (Toronto: LexisNexis, 2015) at p. 120, BOA, Tab 16; *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634 at paras. 43-45; *Coady v. Burton Canada Co.*, 2013 NSCA 95 at paras. 203 and 206; *Double Bar L Ranching Ltd. v. Bayvet Corp.*, 1996 CanLII 5057 (Sask. C.A.) at p. 20

[38] *Clements* at paras. 7 and 21

[39] Court of Appeal Reasons, para. 133, JAR, Vol. II, Tab 5, p. 44

[40] Court of Appeal Reasons, para. 108 and 188, JAR, Vol. II, Tab 5, pp. 36 and 63-64

of action and negligence is that negligence requires proof of injury or loss caused by the defendant's breach of duty, while the "new" cause of action does not. Rather than recognizing a new cause of action, the majority below endorsed an unprecedented and unwarranted alteration to the law of negligence.

42. Proof of causally linked loss or injury is not an arbitrary requirement in the law of negligence, and it cannot be discarded without rendering the law incoherent. Considerations of harm pervade all aspects of negligence law, including the determination of whether a duty of care is owed: the first part of the *Anns* test turns on whether "the harm that occurred [was] the reasonably foreseeable consequence of the defendant's act".[41]

43. The proposed "new" cause of action is, in that sense, self-contradictory. On the one hand (and as stated by the majority below), it does not require the plaintiff to prove loss or injury. But, on the other hand, it does require the plaintiff to have suffered loss or injury, because such loss or injury is a necessary component of the duty of care analysis. This internal inconsistency may go some way towards explaining why no other common law jurisdiction has followed where the majority below would lead.

(iv) The Decision Below Would Put Canada Out-of-Step with Other Common Law Jurisdictions

44. To recognize a cause of action for mere breach of a duty of care, without proof of causally linked loss or injury, is without precedent in any other common law jurisdiction. No such cause of action is recognized in England, whether under the heading "waiver of tort", "restitution for wrongdoing" or otherwise. English courts and scholars have been clear that the plaintiff's right to invoke waiver of tort is dependent upon establishing a completed tort. As explained by Viscount Simon in *United Australia Limited v. Barclays Bank Limited*:

> When the plaintiff "waived the tort" and brought assumpsit, he did not thereby elect to be treated from that time forward on the basis that no tort had been committed; indeed, if it were to be understood that no tort had

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[41] *Cooper v. Hobart*, 2001 SCC 79 at para. 30 [emphasis added]; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 7; and see *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 45

> been committed, how could an action in assumpsit lie?[42] [emphasis added]

45. The clarity of the House of Lords' decision on this point has not been lost on English commentators. Peter Birks explains that it is "the tort itself [that] generates the restitutionary right".[43] And Clerk & Lindsell say:

> . . . [T]he tort is the foundation of the claim.[44]

46. Graham Virgo makes the same point:

> . . . the tort constitutes the cause of action on which the restitutionary claim is founded. All the claimant is doing is waiving the right to obtain remedies assessed by reference to the loss suffered, and instead he or she elects remedies which are assessed by reference to the benefit gained by the defendant as a result of committing the tort.[45]

47. As does Professor Burrows:

> The starting point [of restitution for wrongs] is that the claimant can establish that the defendant has committed a civil wrong against it. The essential question at issue is not whether there is a cause of action but rather the purely remedial question of whether, instead of claiming compensation for the civil wrong, the claimant is entitled to restitution for that civil wrong to strip away all, or some, of the wrongdoer's wrongful profits.[46]

48. The law in the United States is to the same effect, namely, that no restitutionary remedy

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[42] *United Australia Limited v. Barclays Bank Limited*, [1941] A.C. 1 at 18, BOA, Tab 15

[43] Peter Birks, *Unjust Enrichment*, 2nd ed. (Oxford: Oxford University Press, 2005) at p. 15, BOA, Tab 38

[44] Michael A. Jones and Anthony M. Dugdale, eds., *Clerk & Lindsell on Torts*, 21st ed. (London: Sweet & Maxwell, 2006) at 31-02, BOA, Tab 35

[45] Graham Virgo, *The Principles of the Law of Restitution*, 2nd ed. (Oxford: Oxford University Press, 2006) at pp. 454-455, BOA, Tab 27

[46] Andrew Burrows, *The Law of Restitution*, 3rd ed. (Oxford: Oxford University Press, 2011) at pp. 9-10, BOA, Tab 17; and see G.H.L. Fridman, *Restitution*, 2nd ed. (Scarborough: Thomson Canada Limited, 1992), at pp. 355-356, BOA, Tab 25; and see Lord Goff of Chieveley & Gareth Jones, *The Law of Restitution*, 7th ed. (London: Sweet & Maxwell, 2007) at para. 36-001, BOA, Tab 33

is available under a "waiver of tort" or restitution-for-wrongs doctrine, unless the plaintiff is able to prove an underlying and independent legal wrong.[47] Accordingly, the *Restatement* explains that the question of the wrongfulness of the defendant's conduct is to be determined not by the law of restitution, but rather by other areas of the law:

> The law of restitution and unjust enrichment requires the surrender of benefits wrongfully obtained, but it does not answer the question whether the defendant's conduct is wrongful in a particular case. As a practical matter, therefore, the contours of the claim in restitution to recover benefits wrongfully obtained will be determined by principles of law outside the scope of this Restatement.[48]

49. And Corbin states as follows with respect to waiver of tort:

> The cause of action is a tort, and the tort exists as the cause of action and must be proved as the cause of action from first to last.[49]

50. Similarly, in both Australia and New Zealand, a restitutionary claim based on waiver of tort is available only where an underlying tort is made out.[50]

51. The only case law supporting the notion that a gains-based remedy might be awarded upon proof merely of a breach of a duty of care is a line of Canadian class action certification decisions. That line of case law stretches back 15 years and is based upon a foundational error in *Serhan v. Johnson and Johnson*, in which Cullity J. certified a claim for "waiver of tort", holding

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[47] W. Page Keeton, ed., *Prosser and Keeton on The Law of Torts*, 5th ed. (St. Paul, Minn.: West Publishing Co., 1984) at pp. 672-673, BOA, Tab 44; and see Russell Brown and Moin A. Yahya, "*Serhan v. Johnson & Johnson*: A Case Comment", (2005) 43 Alta. L. Rev. 469 at 475

[48] *Restatement (Third) of Restitution and Unjust Enrichment*, § 3 (2011), para. d, BOA, Tab 39

[49] Arthur L. Corbin, "Waiver of Tort and Suit in Assumpsit" (1910) 19 Yale L.J. 221 at 235, BOA, Tab 19

[50] Indeed, Australian courts have refused a disgorgement remedy even where the tort of inducing breach of contract is made out: *Hospitality Group PTY Ltd. v. Australian Rugby Union Ltd.*, [2001] FCA 1040 at paras. 156, 160-162. And see *Rickard & Wilson & Active Safety Services Pty Ltd v. Testel Australia Pty Ltd*, [2019] SASCFC 16 at paras. 116-122; *Bomac Laboratories Ltd v Hoffman-La Roche Ltd.* (2002) 7 NZBLC 103,627 at paras. 137-138, BOA, Tab 2

that the law was "unsettled" as to whether a cause of action could be maintained based solely upon a breach of a duty of care, without proof of resulting loss or injury.[51]

52. Cullity J. relied on two then-recent decisions –*Transit Trailer Leasing Ltd. v. Robinson*[52] and *Amertek Inc. v. Canadian Commercial Corporation*[53] – as authority for holding that the law on this point was unsettled. However, neither case offers support for the proposition that a plaintiff can recover a gains-based remedy for mere breach of a duty of care and neither indicates that the law was, at that time, in any way unsettled. In *Transit Trailer*, the court emphasized that the plaintiff's entitlement to a remedy depends upon proving the elements of an underlying tort.[54] Similarly, in *Amertek*, the court explained waiver of tort as a choice between possible remedies and found that the plaintiff had proved completed causes of action in breach of contract, breach of fiduciary duty, and fraudulent misrepresentation.[55]

53. Prior to the decision in *Serhan*, there was no precedent for asserting that a plaintiff could obtain a remedy without proving a completed cause of action. As one commentator said:

> Never before had incomplete causes of action been sufficient to ground a legal remedy.[56]

54. Nevertheless, Cullity J.'s decision was upheld on an ensuing appeal to the Divisional Court, where the majority relied upon four cases which they suggested supported the view that a gains-based remedy should be obtainable, even if the plaintiff is unable to establish an

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[51] *Serhan* at paras. 35 and 38

[52] *Transit Trailer Leasing Ltd. v. Robinson*, [2004] O.J. No. 1821 (S.C.J.) ("*Transit Trailer*")

[53] *Amertek Inc. v. Canadian Commercial Corporation*, [2003] O.J. No. 3177 (S.C.J.) ("*Amertek*")

[54] *Transit Trailer* at para. 85

[55] *Amertek* at paras. 369-372, 382-386, 411 and 425. It should also be noted that the trial judgment in *Amertek* was reversed on appeal and the claim was dismissed in its entirety, [2005] O.J. No. 2789 (C.A.)

[56] Greg Weber, *"Waiver of Tort: Disgorgement Ex Nihilo"*, (2014) 40 Queen's L.J. 389 ("Weber") at 405, BOA, Tab 26

underlying tort.[57] However, as with the cases relied upon by Cullity J., the cases cited by the Divisional Court do not provide a firm foundation for such a view.

55. In the first case, *National Trust Co. v. Gleason*, the plaintiff's claim for money had and received was dismissed.[58] In the second, *Mahesan v. Malaysia Government Housing*, the plaintiff proved two completed causes of action against the defendant: breach of fiduciary duty and fraud. [59] In the third case, *The Universe Sentinel*, the plaintiff's claim was for money had and received, and all of the elements of the cause of action for payment under duress were made out.[60]

56. The fourth case relied upon by the Divisional Court is the 1920 American decision in *Federal Sugar Refining Co. v. U.S. Sugar Equalization Board*, in which the defendant was alleged to have induced a third party to breach its contract with the plaintiff, knowing that it was thereby wrongfully depriving the plaintiff of the benefit of the contract. Dismissing the defendant's objection that the plaintiff had not pleaded its ability to fulfill the contract, the Court allowed the claim to proceed as an action for money had and received.[61] In the century since *Federal Sugar* was decided, American courts have cited the case primarily with respect to whether a gains-based remedy is available for tortious interference with contractual relations, without suggesting that the underlying tort need not be made out.[62] And the English courts have expressly refused to follow it, dismissing it as "not sufficiently persuasive to secure a visa for

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[57] *Serhan Estate v. Johnson & Johnson*, (2006) 85 O.R. (3d) 665 (Div. Ct.) at paras. 59-60

[58] *National Trust Co. v. Gleason* (1879), 77 N.Y. 400 at 409 (C.A.)

[59] *Mahesan v. Malaysia Government Housing*, [1979] A.C. 374 at 377-378 and 384, BOA, Tab 8. It should be noted that the court analysed this as a claim of fraud.

[60] *The Universe Sentinel*, [1983] 1 A.C. 366 at 383, BOA, Tab 14

[61] *Federal Sugar Refining Co. v. U.S. Sugar Equalization Board*, (1920) 268 F.575 (S.D.N.Y. Dist. Ct) at 583

[62] See for example *Developers Three v. Nationwide Insurance Company*, 64 Ohio App. 3d 794 (Ohio Ct. App. 1990) at 799-802

admission into English jurisprudence".[63]

57. Thus, at the time that *Serhan* was decided, far from the law being "unsettled", there was in fact little to no judicial precedent supporting the proposition that a gains-based remedy for a wrong could be awarded without proof of an underlying cause of action. The problem was not corrected when the issue reached this Court a decade later in *Pro-Sys Consultants Ltd. v. Microsoft*. In repeating *Serhan*'s characterization of the law as "unsettled", the Court referred to the same four cases that had been relied upon by the Divisional Court in *Serhan* and stated that, in both the United States and in England, the jurisprudence as well as the academic writers had "largely rejected the requirement that the underlying tort must be established in order for a claim in waiver of tort to succeed".[64]

58. However, as discussed above, neither the jurisprudence nor the weight of the commentary in either England or the United States had endorsed the availability of such a gains-based remedy without an underlying cause of action.[65] As Professor McInnes states in his text, *The Canadian*

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[63] *Halifax Building Society v. Thomas*, [1996] Ch. 217 at 230, BOA, Tab 6

[64] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 96.

[65] The main proponent in Canada of permitting a gains-based remedy in "waiver of tort" without the need to establish an underlying tort has been John McCamus. See, e.g., John McCamus, "Waiver of Tort: Is There a Limiting Principle?" (2014) 55 Can. Bus. L.J. 333, BOA, Tab 31. Those other scholars who are most frequently cited as supporting such a theory are, in fact, much more muted and nuanced in their views. See, e.g., J. Beatson, ch. 8, "The Nature of Waiver of Tort", in *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (Oxford: Oxford University Press, 1991), BOA, Tab 28, whose essay seems to be focussed on the need to recognize a cause of action for what, in Canada, has been termed unjust enrichment; and Daniel Friedmann, "Restitution for Wrongs: The Basis of Liability" in W.R. Cornish et al., eds, *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Oxford: Hart Publishing, 1998), BOA, Tab 22, whose focus is on remedying the appropriation of another's "protected interest" (such as debt, goodwill, commercial opportunity) and remedying "restitutionary wrongs" in which gain itself is an element, often "crucial and decisive" of the

Law of Unjust Enrichment and Restitution (published one year after the decision in *Pro-Sys*), the "great bulk" of modern scholarship is of the view that no gains-based remedy is available under the rubric of "waiver of tort" unless the plaintiff has "fully established the commission of a tort".[66]

59. Thus, in holding that a gains-based remedy might be awarded for breach of a duty of care, without proof of causally linked loss or injury, the decision of the court below did not bring Canadian law into harmony with the law of other common law jurisdictions. On the contrary, it is without parallel in England, Australia, New Zealand or the United States, and has as its sole support a line of certification decisions that (incorrectly) viewed the law on this point as "unsettled".[67]

(v) Policy Considerations Weigh Against a Gains-Based Remedy for Mere Breach of a Duty of Care

60. The recognition of a new cause of action is typically driven by one of two needs: either the jurisprudential need to rationalize a number of different causes of action which are all explicable by the same set of principles (as happened with unjust enrichment in *Peel (Reg. Municipality) v. Canada*);[68] or the need to protect interests that have not previously been

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wrongfulness of the conduct (i.e. but for the defendant's gain there would be no wrong) – see pp. 152-154.

[66] Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham: LexisNexis Canada Inc., 2014) at p. 35, fn 183; see also p. 8-9, BOA, Tab 37

[67] It should be noted that *Pro-Sys* did not purport to settle any question of law, as it declined to determine the legal issue before it. Accordingly, this Court's jurisprudence regarding when it will depart from its own precedent is not engaged on the present appeal. And even if it were, the concerns about legal certainty that animate that jurisprudence are not applicable here. By determining the waiver of tort issue (which *Pro-Sys* declined to do), this Court will be promoting certainty. See *Canada v. Craig*, 2012 SCC 43 at para. 27. And, with respect to an earlier decision of this Court regarding waiver of tort (which was not discussed in *Pro-Sys*) see *Arrow Transfer v. Royal Bank*, [1972] S.C.R. 845 at 877, per Laskin J.

[68] *Peel (Reg. Municipality) v. Canada*), [1992] 3 S.C.R. 762

protected by private law (as happened with the tort of intrusion on seclusion in *Jones v. Tsige*).[69] However, the decision of the court below does not meet either of these two needs.

61. In recognizing a cause of action of "disgorgement for tortious wrongdoing" and in allowing a gains-based remedy even when no underlying cause of action has been proven, the decision of the court below does not provide a principled explanation of other established causes of action, since (as discussed above) no such cause of action has been recognized in Canada or in other common law jurisdictions.[70]

62. Nor is such a cause of action needed to protect interests that have not previously been protected by the common law. Given the requirement to prove the breach of a duty of care in negligence, it stands to reason that this "new" cause of action is intended to vindicate the very same interest as is protected by the existing law of negligence – namely, a person's interest in being free from harm or injury caused by the carelessness of another. The law of negligence already protects that interest, by providing a right to damages intended to fully compensate the plaintiff for his or her loss. Accordingly, the Court of Appeal's proposed new cause of action would seem to be aimed at a need that has already been met. Certainly, on the facts of the present case, there is no reason to believe that the existing law of negligence is incapable of answering the needs of any plaintiff who might have been injured as a result of the alleged negligent conduct of ALC. Given that the plaintiffs could have sought redress of their protected interest through an existing cause of action, recognition of a new cause of action is unwarranted.[71]

63. On the other hand, if this new tort is not intended to protect a plaintiff's interest in being free from carelessly caused loss or injury, but is instead (as indicated by the majority below) intended to deter risky behaviour more generally,[72] then different objections arise.

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[69] *Jones v. Tsige*, 2012 ONCA 32 at para. 65

[70] With the exception, of course, of the class action certification decisions, discussed above.

[71] *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205 at paras. 41-43

[72] Court of Appeal Reasons, paras. 160, 162 and 166, JAR, Vol. II, Tab 5, pp. 53-56

64. First, any need for deterrence is already met by the existing law of punitive damages, which are designed to, *inter alia*, "act as a deterrent to the defendant and to others from acting in [the objectionable] manner".[73] Moreover, to the extent that effective deterrence requires a defendant to be stripped of his or her profit earned as a result of the wrongdoing in question, punitive damages can serve precisely that purpose.[74]

65. Second, the stated goal of deterring risky conduct does not differ in any material way from the purpose of negligence law, which is to protect individuals from unreasonably caused harm. As discussed above, that need is already met by the existing law of negligence. Moreover, while the majority below sought to liken the deterrence rationale of its new cause of action to the deterrence rationale that underpins class actions,[75] the analogy is not apt. While the majority below would use the new cause of action to deter risky behaviour generally, class actions are intended to deter risky behaviour that causes harm:

> Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation.[76]

66. Third, to the extent that the deterrence rationale articulated by the court below does not relate to the interest of individuals in being free from unreasonably caused harm (which interest is vindicated by the law of negligence), but rather relates to the broader interests of society as a whole in deterring unreasonable risk, then the proposed new cause of action represents an improper straying into the realm of public law. While private law concerns itself with the relationships between individuals, public law governs the relations between an individual and

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[73] *Hill v. Church of Scientology*, [1995] 2. S.C.R. 1130 at para. 196; and see *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 ("*Whiten*") at para. 68

[74] *Whiten* at para. 72

[75] Court of Appeal Reasons, para. 176, JAR, Vol. II, Tab 5, p. 59

[76] *Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46 ("*Western*") at para. 29; and see *Dennis v. Ontario Lottery and Gaming Corporation*, 2013 ONCA 501 at para. 53

society as a whole. To borrow the language of *Blackstone's Commentaries*, public law is concerned with "duties due to the whole community".[77]

67. Deterring unreasonable risk (as opposed to remedying actual harm suffered by litigants) is the proper purview of public regulators, not private litigants. Unlike private litigants (or, as the majority below would have it, the courts),[78] public regulators are best equipped to balance competing interests, weighing the costs and benefits of any given activity in order to identify which pose a risk that is unacceptable to the public at large. Public regulators are also able to determine the optimal means of deterring such activities and the optimal level of deterrence. This Court has recognized the danger of that public regulatory role being usurped by private litigants, particularly in the context of punitive damages, where it has tried to guard against the rise of "private Attorneys General".[79] In the present context, the risk of an improper blurring of the boundaries between private and public law is greater than in the case of punitive damages, due to the absence of a completed actionable wrong.

68. Moreover, if the new cause of action seeks to vindicate the interests of society as a whole, then it should not (as the majority below would have it do) grant a remedy to any individual plaintiff. As Justice Archibald and Christian Vernon state:

> Simply telling the defendant that he or she should not be permitted to benefit from the wrong does not answer the question why he or she should give up their profit to a particular plaintiff who has suffered no loss.[80]

69. The majority below would answer Justice Archibald's question by pointing to the particular characteristics of class actions, explaining that "all class plaintiffs can receive a

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[77] 4 Bl. Com. p. 5, as quoted with approval in *Re: McNutt* (1912), 47 S.C.R. 259 at 266

[78] Court of Appeal Reasons, para. 170, JAR, Vol. II, Tab 5, p. 57

[79] *Whiten* at para. 44

[80] The Honourable Mr. Justice Todd Archibald and Christian Vernon, "No Harm, No Foul? The Existence of Waiver of Tort as an Independent Cause of Action in Canadian Law", Annual Review of Civil Litigation 2008 ("Archibald") at p. 17, BOA, Tab 43; and see Weinrib at 2, BOA, Tab 24; *Halifax Building Society v. Thomas*, [1996] Ch. 217 at 229, BOA, Tab 6

proportionate share" of any disgorgement award.[81] However, the courts have made it clear that class action legislation is procedural and that it does not change the substantive law.[82]

70. Moreover, the proposed new cause of action would not be confined to class proceedings, but could be asserted with equal merit in an individual claim. As acknowledged by the majority below, this could result in the first plaintiff to obtain a judgment being awarded all of the defendant's profits, regardless of the number of persons who were endangered by the conduct in question. And those subsequent potential plaintiffs would be precluded from obtaining any remedy, despite having been exposed to the same risk as the first to obtain judgment.[83]

71. Finally, while the proposed new cause of action has most frequently been asserted in class proceedings – presumably because of a perception that, by eliminating some of the individual issues, it will facilitate certification – it is far from clear that it is consonant with the goals of class actions, or the interests of justice more broadly. In addition to deterring behaviour that causes widespread harm, class actions are also intended to facilitate access to justice in order to ensure that injuries do not go unremedied.[84] However, the proposed new cause of action will not facilitate access to justice for injured plaintiffs, as it is indifferent to their injuries and will distribute a defendant's profits to all class members without regard to the injuries that any individual may have suffered.[85]

72. It is these concerns – among others – that have led a multitude of commentators to inveigh against permitting a gains-based remedy upon proof of a breach of a duty of care, without proof of causally linked loss or injury. One commentator decried the prospect of

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[81] Court of Appeal Reasons, para. 176, JAR, Vol. II, Tab 5, p. 59

[82] *Bou Malhab v. Diffusion Metromedia CMR*, 2011 SCC 9 at para. 52; *Barrette c. Ciment du St-Laurent inc.*, 2008 SCC 64 at para. 111

[83] The majority below dismissed such concerns, reasoning that the windfall to be enjoyed by the first plaintiff was a "lesser evil", preferable to allowing a defendant to profit from wrongdoing. Court of Appeal Reasons, para. 175, JAR, Vol. II, Tab 5, pp. 58-59

[84] *Western* at para. 28

[85] See *O'Brien v. Bard Canada Inc.*, 2015 ONSC 2470 at para. 162

"disgorgement arising out of legal nothingness".[86] Another criticized the proposed new cause of action on the basis that it would permit "gains-based damages to be awarded on an unprincipled basis",[87] and a third warned against the commercial uncertainty that would be created by such a change in the law.[88] A fourth described it as a "radical form of waiver of tort".[89] Commentators have also raised concerns about labelling conduct as "wrongful" (and, therefore, meriting a remedy), despite the fact that it is not, in any legal sense, wrongful (because it does not constitute a recognized actionable wrong).[90]

73. In addition, leading law and economics scholars have opined that "there is no economic justification" for awarding a remedy for an incomplete negligence claim. They warn of "economic distortions" that would result, with "over-deterrence" leading to economically undesirable outcomes, such as over-investing in precautions and higher costs for consumers:[91]

> In short, the waiver of tort doctrine, in whatever its guise, decouples remedies in the products liability context from actual losses and in so doing decouples the law from the economic common sense that underpins traditional approaches to tort law (as well, we might add, corrective justice rationales for tort law).[92]

74. Thus, far from solving any problem that the common law has been unable to address, the "new" cause of action recognized by the court below will serve only to introduce a number of

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[86] Weber at 424, BOA, Tab 26

[87] Sandra Barton et al., "Neither Cause of Action nor Remedy: Doing Away with Waiver of Tort", Annual Review of Civil Litigation 2015 ("Barton") at p. 18, BOA, Tab 41

[88] Archibald at p. 17, BOA, Tab 43

[89] Michael Rosenberg, "Waiving Goodbye: The Rise and Imminent Fall of Waiver of Tort in Class Proceedings", (2010) 6 Can. Class Action Rev. 37 at p. 54, BOA, Tab 36; and see Barton at p. 18; BOA, Tab 41; and see J.M. Martin, "Waiver of Tort: an Historical and Practical Survey", (2012) 52. C.B.L.J. 473, at pp. 12-13 and 25, BOA, Tab 29

[90] Weber at 418, BOA, Tab 26; and see Archibald at pp. 17-18, BOA, Tab 43

[91] Edward M. Iacobucci and Michael J. Trebilcock, "An Economic Analysis of Waiver of Tort in Negligence Actions", (2016) 66 U. Toronto L.J. 173 ("Iacobucci") at 187-188, 191 and 193-194, BOA, Tab 23

[92] Iacobucci at 195, BOA, Tab 23

new problems into Canadian private law, all while intruding into the proper sphere of public law which is the domain of the legislature.

(vi) The Court of Appeal's Decision Would Represent a Fundamental Change in the Common Law

75. The change in the law that was adopted by the Court of Appeal (and that had been considered by its predecessor cases, beginning with *Serhan*) has been described by scholars as a "tremendous leap",[93] a "fundamental shift", and a "sea-change in the realm of private law."[94] Its potential effects have been described as "profound", "broad-reaching" and "perhaps revolutionary".[95] Even Cullity J. recognized that it might have "serious and possibly far-reaching implications".[96]

76. The decision below thus goes far beyond the type of incremental, step-wise change that this Court has recognized as the appropriate domain of the judiciary. Instead, it veers into the type of far-reaching law reform that is more properly reserved for the legislature. As Iacobucci J. explained in *Salituro*:

> . . . [I]n a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.[97]

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[93] Barton at p. 7, BOA, Tab 41

[94] Archibald at pp. 2 and 30, BOA, Tab 43

[95] Charles Murray, "An Old Snail in a New Bottle? Waiver of Tort as an Independent Cause of Action", (2010) 6 Can. Class Action Rev. 5 at pp. 6-7, 22 and 35, BOA, Tab 21

[96] *Serhan* at para. 46

[97] *R. v. Salituro*, [1991] 3 S.C.R. 654 at 670; and see *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para. 51; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34 at paras. 42, 46, 48; *Cuerrier*, at para. 43, per McLachlin J.

(vii) Conclusion on "Waiver of Tort"

77. For all of the foregoing reasons, this Court should discard the unhelpful language of "waiver of tort" and expressly recognize that the relevant inquiry is whether the particular tort supports a gains-based remedy. The Court should further clarify that a gains-based remedy is just that – a remedy, for which the proof of a completed, recognized cause of action is a necessary pre-condition. Such a result would conform to the views reflected by the weight of the jurisprudence and legal scholarship, and it would be supported by sound jurisprudential and policy considerations, and it is the type of legal determination that is appropriate to make on a motion to strike/motion to certify.[98]

78. The Court should further recognize that whether any given tort will support a gains-based remedy will depend upon the nature of the right asserted by the plaintiff and the nature of the wrong committed by the defendant. Guiding principles can be gleaned from the areas of the law in which gains-based remedies are well-established, such as breach of fiduciary duty, trespass and conversion.

79. In the present case, because the plaintiffs' disclaimer of loss or damage means that they cannot establish any cause of action in negligence, the question as to whether a gains-based remedy might be warranted does not even arise. The plaintiffs' claims in negligence and in waiver of tort should accordingly be struck.

B. The Plaintiffs Cannot Establish an Entitlement to a Disgorgement Remedy for Breach of Contract

80. Perhaps recognizing the problems facing their negligence and waiver of tort claims, the plaintiffs attempt to repackage them as a claim for breach of contract. However, the disclaimer of any harm (i.e., addiction) is equally problematic for the contract claim, as it removes the causal link required to connect any of ALC's profits to the breach.

81. The plaintiffs claim that ALC breached its contract with them by offering VLT games

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[98] *Andersen v. St. Jude Medical, Inc.* 2012 ONSC 3660 at para. 585; and see *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24 at paras. 73-74 and 78

that were "inherently dangerous" in that they would "lead to dependency and addiction".[99] On this basis, they seek disgorgement of ALC's profits earned through the operation of the games. However, the plaintiffs do not plead any causal connection between the alleged breach and the profits claimed. They do not plead that they are dependent or addicted, nor do they plead that their addiction led them to play more than they otherwise would have, thereby leading to increased profits for ALC.

82. There must be a causal link between the breach of contract and the remedy sought. Just as a defendant will only be liable to compensate for such losses as are caused by its breach of contract,[100] so too will a defendant only be required to disgorge those profits that it realized as a result of its breach (similar to the causal link required in the case of disgorgement remedies for breach of fiduciary duty[101] or patent infringement[102]). As this Court has stated:

> Restitution damages can be invoked when a defendant has, as a result of his or her own breach, profited in excess of his or her expected profit had the contract been performed but the plaintiff's loss is less than the defendant's gain. [Emphasis added.][103]

83. The causal link ensures 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 gains-based awards that vastly exceed the profits actually earned from the alleged wrongdoing. Even those commentators who advocate in favour of broad availability of disgorgement for breach of contract recognize that such causation limitations apply.[104] As James

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[99] Statement of Claim, para. 47, JAR, Vol. II, Tab 8, p. 101

[100] Angela Swan and Jakub Adamski, *Canadian Contract Law*, 3th ed. (Toronto: LexisNexis Canada Inc., 2012) at p. 471, BOA, Tab 18: "It is a truism that a defendant will only be liable for the losses caused by its breach of contract".

[101] *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 at paras. 77 and 79

[102] *Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34 at paras. 101-105

[103] *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43 at para. 30, see also para. 25; and see *Attorney-General v. Blake*, [2000] E.M.L.R. 949 (UKHL) at 966-697, BOA, Tab 1

[104] See, e.g., Lionel D. Smith, "Disgorgement of the Profits of Breach of Contract: Property, Contract and Efficient Breach," (1994) 24 Can. Bus. L.J. 121 at pp. 7-8, BOA, Tab 32

Edelman has pointed out, the need to consider issues of causation and remoteness in relation to disgorgement is not surprising, since "the only difference between compensatory damages and disgorgement damages is that the former aim to put the claimant in the position as if the wrong had not occurred and the latter aim to put the defendant in that position."[105]

84. The majority below acknowledged the need for a causal link,[106] but stopped short of engaging in the causation analysis: they did not consider whether any facts were pleaded which could establish that any of ALC's profits were acquired as a result of the alleged breach.

85. The contract alleged in the Statement of Claim is to "provide a safe, interactive and entertaining way to play games of chance with the opportunity to win small cash prizes in exchange for small frequent cash bets". Its terms allegedly include a warranty that "VLTs were of merchantable quality and fit for use" and, in the alternative, a promise to use reasonable care and skill in providing VLT gaming. The plaintiffs also plead that the contract carried with it an implied duty of good faith "not to offer or supply an inherently dangerous service or product".[107]

86. The plaintiffs allege that ALC breached these terms by promoting VLTs "which were inherently dangerous to users and which [ALC] knew or ought to have known would lead to dependency and addiction" and by failing to warn the Plaintiffs of the games' inherent danger.[108] Thus, the plaintiffs identify the breach of contract as comprising the addictive nature of the games (and ALC's failure to warn of it).

87. The only profits attributable to such a breach would be those earned as a result of the

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[105] James Edelman, *Gain-Based Damages* (Oxford and Portland, Oregon: Hart Publishing, 2002) at 103, BOA, Tab 30

[106] Court of Appeal Reasons, paras. 120, referring to "remedies for disgorgement of profits made by defendants *as a result of* the contractual breach", and 122, describing the remedy as "disgorgement of a benefit unjustly acquired *as a result of* a wrong, a breach of contract." [emphasis added] JAR, Vol. II, Tab 5, p. 40

[107] Statement of Claim, paras. 46-48 and 50, JAR, Vol. II, Tab 8, pp. 101-102

[108] Statement of Claim, para. 47-48, JAR, Vol. II, Tab 8, p. 101

games' allegedly addictive nature – in other words, those incremental profits earned over and above those that would have been earned by "safe" games. To prove which profits were earned as a result of the games' addictive nature, the plaintiffs would need to prove: (a) that they were addicted; and (b) the extent to which their addiction caused them to play VLT games when they otherwise would not have.

88. However, the plaintiffs have not pleaded such a causal link. As discussed above, they have disclaimed any injury or harm (which would include addiction). As a result, the plaintiffs cannot possibly establish that any of ALC's profits resulted from the alleged breach of contract.

89. Given that the plaintiffs cannot succeed in their claim for a disgorgement remedy and are not seeking compensatory damages, the only possible remaining remedy for breach of contract would be punitive damages. Such a claim does not meet the test for certification, in that a class action would not be the preferable procedure to resolve the common issues, as required by paragraph 5(1)(d) of the *Class Actions Act*.[109] Allowing such a claim to proceed would not further class actions' goals of judicial economy, behaviour modification, and access to justice.[110] As discussed at paragraphs 65 and 71 above, class actions are designed to deter conduct that causes harm, and are designed to provide access to justice for persons who are harmed. They are not intended to facilitate claims in which litigants are playing a role that is purely that of a private Attorney General – as this claim for breach of contract would be, with the only possible remedy being that of punitive damages.

90. In the circumstances, a class action would not be preferable to the use of an individual proceeding[111] to resolve the breach of contract claim.[112]

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[109] SNL 2001, c. C-18.1, as amended, s. 5(1)

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

[111] *Hollick* at para. 30

[112] No deference is owed to the decisions below on this issue, as both proceeded based upon an error in principle, having wrongly concluded that the plaintiffs could establish the right to a disgorgement remedy for breach of contract. See *Fischer v. IG Investment Management Ltd.*,

C. VLT Line Games Cannot Possibly Constitute "Three-Card Monte"

(i) Overview

91. The third and final issue before this Court is whether the plaintiffs have any reasonable chance of succeeding in their claim that ALC, by operating video lottery line games, contravened the *Criminal Code* prohibition against inducing a person to stake or hazard money "on the game commonly known as three-card monte" or a game "similar to it".[113]

92. The Statement of Claim describes the games as "a form of continuous electronic gaming" that "mimic on screen the mechanical reel slot machine".[114] (On the certification motion, Faour J. said: "[L]ike the traditional slot machines after which they are modeled, the player attempts to see if the machine will 'line up' matching symbols in order to win the game".[115]) The plaintiffs allege that the games are "manipulative and deceptive" and are "unconnected with chance or skill".[116] Based on these facts, the plaintiffs allege that the video lottery line games fall within the *Criminal Code*'s definition of "three-card monte".

93. Three-card monte is a game in which a player tries to follow one of three cards through a series of manipulations and then bets on his or her ability to locate the particular card. Section 206(2) of the *Criminal Code* extends the meaning of "three-card monte" to include "any other game that is similar to it, whether or not the game is played with cards and notwithstanding the

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2013 SCC 69 at para. 65

[113] *Criminal Code*, s. 206(2). It should be noted that the Statement of Claim also includes allegations that the offering of VLTs was contrary to the *Criminal Code* because the province was not authorized to delegate the conduct and management of the VLT business to the appellant, and because the appellant had effectively delegated the conduct and management of VLTs to the various bars and clubs where they are located. The plaintiffs have abandoned those allegations. See Application to Strike Reasons, paras. 24-25, JAR, Vol. I, Tab 1, p. 9

[114] Statement of Claim, paras. 12 and 17, JAR, Vol. II, Tab 8, pp. 94-95

[115] Certification Reasons, para. 48, JAR, Vol. I, Tab 3, p. 80

[116] Statement of Claim, para. 38, JAR, Vol. II, Tab 8, p. 99

number of cards or other things that are used for the purpose of playing".[117]

94. On its face, this extended definition encompasses games in which a player tries to follow a card or other object through a series of manipulations and bets on the location of the particular card or object. But the majority in the court below held that the definition might reach much further – that, in criminalizing three-card monte, Parliament may have intended to criminalize all games that give "the illusion of a straight-forward gambling game" but that are "actually played in a deceptive way without following rules so as to cheat participants".[118]

95. The majority in the court below erred in that they did not consider the grammatical and ordinary meaning of "three-card monte" as defined in the *Criminal Code*. Nor did they consider the context in which the words are used, or the legislative debates surrounding the introduction of the provision. Rather, they decided that 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"[119] would be required in order to interpret the provision. Once the Court of Appeal's errors are corrected and the legal exercise of statutory interpretation is undertaken, it becomes clear that the plaintiffs cannot succeed in their claim.

(ii) The Definition of "Three-Card Monte" Extends Only to Games which Share Features with the Original

(a) **The *Criminal Code* Provisions**

96. Section 206 of the *Criminal Code* prohibits the operation of lotteries and games of chance. Included in that section are a number of offences that prohibit inducing a person to stake any money or property on a game of "three-card monte".[120] Subsection 206(2) defines "three-card monte" as follows:

> In this section, "three-card monte" means the game commonly known as three-card monte and includes any other game that is similar to it, whether

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[117] *Criminal Code*, R.S.C. 1985, c. C-46, s. 206(2)

[118] Court of Appeal Reasons, para. 208, JAR, Vol. II, Tab 5, p. 69

[119] Court of Appeal Reasons, para. 211, JAR, Vol. II, Tab 5, p. 70

[120] *Criminal Code*, R.S.C. 1985, c. C-46, s. 206(1)(g)-(j)

> 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.

97. Section 207 then carves out certain exemptions from section 206's prohibitions. Notably, paragraph 207(1)(a) allows the government of a province to conduct and manage a "lottery scheme", but excludes the game of three-card monte from such permitted schemes:

> **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 of betting other than
>
> (a) three-card monte, punch board or coin table;

98. Accordingly, the VLT line games are a permitted "lottery scheme" unless they come within the *Code*'s definition of three-card monte. In interpreting that definition, the proper approach is as set out in *Rizzo & Rizzo Shoes*:

> Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[121]

(b) Grammatical and Ordinary Sense

99. As this Court has recognized, in order to mine the "grammatical and ordinary sense" of a word or phrase, resort to a dictionary definition may be of assistance.[122] In the present case, use of a dictionary definition is particularly appropriate, as the *Code* indicates that the term "three-card monte" is to have the meaning "commonly" ascribed to it.

100. The *Canadian Oxford Dictionary* defines "three-card monte" as follows:

> **three-card monte** *noun see* MONTE 2
>
> **monte**…*noun Cards* . . . **2** (in full **three-card monte**) a game of

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[121] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, citing Elmer Driedger, *Construction of Statutes* (2nd ed. 1983) at p. 87

[122] See, e.g., *R. v. Davis*, [1999] 3 S.C.R. 759 at para. 43

> Mexican origin played with three cards, similar to three-card trick. . . .
>
> **three-card trick** *noun* a card game in which players bet on which of three cards lying face down is the queen.[123]

101. A 1920 decision of the Quebec Court of Appeal in *Re Rosen*, decided at a time when the *Criminal Code* did not specifically address the game itself, provides further guidance as to what is "commonly known as three-card monte". Consistent with the above dictionary definition, Martin J. described the game as:

> . . . a game played with three cards, say, two black ones and a red one, shuffled or manipulated by the dealer and placed face down and the opponent backs his ability to spot the position of a particular card. By sleight of hand or quickness of movement, the dealer endeavours to induce the person backing his opinion to put his hand on the wrong card.[124]

102. The *Criminal Code* definition of three-card monte extends to "similar" games. Given that three-card monte is a game:

(a) played with three cards,

(b) in which the player bets on the position of a particular card,

(c) following a series of manipulations in which the dealer, by sleight-of-hand or quickness of movement, attempts to induce the player to bet wrong,

then a game which is "similar" (i.e., which is of the same nature or kind, alike, or has a resemblance to it)[125] would share in at least some of those characteristics.

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[123] *Canadian Oxford Dictionary*, 2nd ed. (Don Mills, Ontario: Oxford University Press, 2004) ("*Canadian Oxford Dictionary*") at 1004 and 1620, BOA, Tab 20; and see *Shorter Oxford English Dictionary on Historical Principles*, 5th ed (Oxford University Press, 2002) at Vol. 1, p. 1825 and Vol. 2, p. 3252, BOA, Tab 42; *Merriam-Webster's Collegiate Dictionary*, 11th ed. (Springfield, Mass.: 2003) at 1302, BOA, Tab 34; *People v. Williams*, 93 Misc.2d 726 (N.Y. Misc. 1978) ("*People*") at 728

[124] *The King v. Rosen and Lavoie* (1920), 61 D.L.R. 500 (Que. C.A.) at 502-503, per Martin J. and see at 504, per Howard J., quoting from *The King v. The Governor of Brixton Prison*, [1912] 3 K.B. 568 at 570, BOA, Tab 13

[125] *Canadian Oxford Dictionary* at 1449, BOA, Tab 20

103. The remainder of subsection 206(2) provides assistance in determining which characteristics must be shared in order for a game to be "similar" to three-card monte. It refers to games being "similar" regardless of number of cards or other things used to play. Parliament thereby indicated which characteristics of the game could be changed (i.e., a change in the number of cards, or a change from cards to other things) and which could not (i.e., betting on the position of something, following a series of manipulations), in order for a game to remain within the definition of "three-card monte".

104. The definition would thus extend to games played with a number of cards or other things, in which a player bets on the position of a particular card or thing, following a series of manipulations in which the opponent, by quickness of movement or sleight-of-hand, attempts to induce the first player to bet wrong.

(c) The Context in Which the Words are Used

105. An examination of the definition of "three-card monte" in its context offers further support for the view that "similar" was intended by Parliament to mean similar in concrete terms, not similar "in essence" or "in effect", as the majority in the court below held.[126]

106. Three-card monte is first referenced in a list of prohibited games: "dice game, three-card monte, punch board, coin table or . . . the operation of a wheel of fortune".[127] That list does not describe the games based on abstract concepts, such as whether they are deceptive. Rather, it sets out specific games or types of games, identified by reference to physical things (e.g., punch board), or mode of play (e.g., operation of a wheel of fortune).

107. The "associated words" interpretive rule (*noscitur a sociis*) provides that the shared feature of words, linked by "and" or "or", which serve an analogous grammatical and logical function within a provision, may limit the scope of any one of the words listed.[128] Here, the

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[126] Court of Appeal Reasons, paras. 211, 214, JAR, Vol. II, Tab 5, pp. 70-71

[127] *Criminal Code*, R.S.C. 1985, c. C-46, s. 206(1)(g)

[128] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada, 2014) ("Sullivan") at §8.58, BOA, Tab 40; *R. v. Goulis* (1981), 33 O.R. 2d 55 (C.A.) at

"associated words" rule suggests that "three-card monte", like the games with which it is listed, refers to a game that can be identified by reference to its concrete features, such as the physical actions involved (i.e., sleight-of-hand or manipulation) and the mode of play (i.e., betting on the location of an object).

108. A review of other *Criminal Code* provisions pertaining to gaming supports this interpretation. Section 209 of the *Code* prohibits cheating at play.[129] This Court has held that the "gist" of that offence is "perpetrating some fraud or ill-practice", such as by creating a deceptive impression in order to induce someone to play a game.[130] But in the present case, the Court of Appeal held that the very "deceptive" conduct that is targeted by section 209 may also be the gravamen of the three-card monte offences. It held that the "mischief" of three-card monte may be "the giving of the illusion of a straight-forward gambling game played by fair and known rules . . ., whereas in reality it is actually played in a deceptive way without following rules so as to cheat participants."[131]

109. The Court of Appeal's interpretation of "three-card monte" would result in a second – and redundant – prohibition on cheating at play, offending against the principle that no legislative provision should be interpreted so as to make it "mere surplusage".[132]

(d) **The Intention of Parliament**

110. Finally, the *Hansard* record (which may provide insight into both the purpose and scope of legislation and is admissible on a motion to strike "to assist the court in discerning the proper interpretation of a statute", and of which the court may take judicial notice)[133] makes it clear that

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paras. 11 and 19, BOA, Tab 12; *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58 at paras. 30-35

[129] *Criminal Code*, R.S.C. 1985, c. C-46, s. 209

[130] *McGarey v. The Queen*, [1974] S.C.R. 278 at 284-285

[131] Court of Appeal Reasons, para. 208, JAR, Vol. II, Tab 5, p. 69

[132] *R. v. Proulx*, 2000 SCC 5 at para. 28

[133] *R. v. Imperial Tobacco Canada Ltd.* ("*Imperial Tobacco*"), 2011 SCC 42 at para. 128; *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248 at paras. 37-38, per

Parliament's intention was to prohibit a specific activity – namely games in which one person bets on the location of a particular object following a series of manipulations, while the other person attempts to induce a wrong guess by sleight-of-hand. The intent was not to prohibit deceptive games more broadly.

111. The impetus for the three-card monte provisions was the 1920 decision in *Re Rosen* (mentioned above), where the Quebec Court of Appeal held that three-card monte was not in itself fraudulent (as sleight-of-hand was not cheating) and, accordingly, did not contravene the *Criminal Code* provision of cheating at play.[134]

112. It was the Crown's inability in that case to prove that three-card monte was fraudulent that led Parliament to criminalize the game.[135] During the debates, the then-Minister of Justice indicated that the proposed legislative provision was also aimed at games "on similar principles" as three-card monte – i.e., games that involved betting on the result of a sleight-of-hand trick:

> As I understand, what is sought to be struck at is not only this particular game with cards, but any game on similar principles which involves betting upon a guess which a man makes as to the result of some sleight-of-hand trick.[136]

113. Another member of the government explained that the definition of "three-card monte" was designed to prevent people from skirting the prohibition by altering the number of cards used, or by playing with objects other than cards.[137]

114. Thus, when the words of subsection 206(2) are read in context, in their grammatical and ordinary sense, harmoniously with the intention of Parliament, it is clear that Parliament intended to prohibit games in which a player is invited to bet on the location of a particular object

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Iacobucci and Arbour JJ., for the majority; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66 at paras. 55-57

[134] *The King v. Rosen and Lavoie* (1920), 61 D.L.R. 500 (Que. C.A.) at 503, per Martin J.

[135] *House of Commons Debates,* 13th Parl., 5th Sess. Vol. II (11 April 1921) ("*House of Commons Debates Vol. II*"), p. 1858 (Hon. D.A. Lafortune)

[136] *House of Commons Debates*, 13th Parl., 5th Sess., Vol. IV (26 May 1921), at pp. 3921-3922

[137] *House of Commons Debates Vol. II* at p. 1858

following a series of manipulations designed to induce error.

(iii) No Expert Evidence Is Required to Interpret the Three-Card Monte Provision

115. The majority below declined to determine the interpretive question before them. Instead, they identified the interpretation favoured by the plaintiffs and then held that the actual interpretive exercise should be deferred until trial, on the basis that expert evidence would be required to determine "just what the mischief of three-card monte is perceived to be".[138]

116. However, expert evidence as to the meaning of words in a statute is generally inadmissible (with exceptions only for technical or scientific terms).[139] "Three-card monte" is a non-technical term, which is consistently defined in ordinary dictionaries[140] and in judicial decisions.[141] Expert evidence is not required.

117. Indeed, the majority's view that expert evidence is required to understand the provision would render the criminal law impermissibly uncertain. The principle *nullum crimen sine lege, nulla poena sine lege* – that there can be no crime or punishment except in accordance with law that is certain and unambiguous – requires that the *Criminal Code* provide "fair notice" of conduct that will be considered criminal.[142]

118. It is a corollary of this principle of fair notice that expert evidence cannot be required to define the elements of an offence:

> Expert evidence cannot serve to define the elements of an offence, but only to help the court determine whether the elements are made out on the

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[138] Court of Appeal Reasons, paras. 206 and 208, JAR, Vol. II, Tab 5, pp. 68-69

[139] Sullivan at pp. 43-45, paras. 3.39 to 3.42, and pp. 56-57, para. 4.6, BOA, Tab 41; *Canada Safeway Ltd. v. Manitoba,* 2003 MBCA 78 at para. 7, leave to app ref'd 2004 CarswellMan 137, BOA, Tab 4

[140] See footnote 123.

[141] *The King v. The Governor of Brixton Prison,* [1912] 3 K.B. 568 at 570, BOA, Tab 13; *The King v. Rosen and Lavoie* (1920), 61 D.L.R. 500 (Que. C.A.) at 502-503; *People* at 311

[142] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code,* [1990] 1 S.C.R. 1123 at 1155, per Lamer J., concurring, and at 1141, per Dickson C.J. for the majority

facts of a particular charge.[143]

119. Thus, the majority below erred in holding that "three-card monte" as defined in subsection 206(2) could not be interpreted without expert evidence.

120. As detailed below, paragraph 206(1)(g), correctly interpreted, could not possibly apply to the facts pleaded, even giving the plaintiffs the benefit of the doubt.

(iv) VLTs as Described in the Statement of Claim Cannot Possibly Fall within the Definition of Three-Card Monte

121. A question of statutory interpretation can be decided on a motion to strike. And a claim will be struck if it is plain and obvious that the facts pleaded do not come within the properly interpreted statutory provision. For example, in *Imperial Tobacco*, this Court struck a claim on the grounds that it was plain and obvious that Canada could not qualify as a "manufacturer" under British Columbia's *Tobacco Damages and Health Care Costs Recovery Act*.[144] As the Court explained, while the plaintiff is given the benefit of the doubt, the claim will be struck, if no facts are pleaded to which the statutory provision, properly construed, could apply.[145]

122. In this case, the Statement of Claim describes VLT games as "a form of continuous electronic gaming", with "virtual reels" that "mimic on screen the mechanical reel slot machine".[146] A slot machine is a machine which, once activated "produces random combinations of symbols which must match for the player to win".[147] Of course, a slot machine does not involve the player in any attempt to follow the movements of a particular object or symbol through a series of manipulations. Nor does it involve the player staking any money on his or her ability to identify the location of the desired object or symbol.

123. Thus, it is clear that the VLT games, as described in the Statement of Claim, cannot

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[143] *R. v. Levkovic*, 2013 SCC 25 at paras. 73

[144] *Imperial Tobacco* at paras. 121-132

[145] *Imperial Tobacco* at para. 22

[146] Statement of Claim, para. 12 and 17, JAR, Vol. II, Tab 8, p. 94-95

[147] *Canadian Oxford Dictionary* at 1466, BOA, Tab 20

possibly fall within the scope of the three-card monte offence (notwithstanding the plaintiff's conclusory statement that the games are so manipulative as to "resemble sleight-of-hand trickery such as three-card monte", which conclusory statement the Court is not required to take as true[148]). Taking the facts pleaded by the plaintiffs with respect to VLT games as true (and assuming that it would be possible to play three-card monte on a computer screen):

(a) the games are not played with cards or things;

(b) they do not call on the player to bet on the position of a particular card or thing (or even an on-screen icon); and

(c) they do not involve a series of manipulations (whether real or virtual) which are designed, by sleight-of-hand or quickness of movement, to induce the player to bet on the wrong card or thing.

124. Accordingly, it cannot be said that such games are "similar" to the game "commonly known as three-card monte" and, as a result, the plaintiffs' claim that the VLT games constitute a violation of the *Code*'s prohibition on the offering of "three-card monte" should be struck without leave to amend.

(v) Given that VLT Games Cannot Possibly Fall within the Definition of Three-Card Monte, the Plaintiffs' Unjust Enrichment Claim Necessarily Fails

125. Given that the plaintiffs have no reasonable prospect of succeeding in their allegation that the VLT games fall within the *Criminal Code*'s prohibition against three-card monte, they necessarily have no reasonable prospect of succeeding in their claim for unjust enrichment.[149]

126. In order to establish a claim in unjust enrichment, the plaintiffs must prove that no juristic reason for the enrichment from an established category exists. The established categories, of

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[148] Statement of Claim, para. 26, JAR, Vol. II, Tab 8, p. 96; *Admassu v. John*, 2009 CanLII 40557 at paras. 37-39 (S.C.J.); aff'd 2010 ONCA 189; *Canada v. John Doe*, 2016 FCA 191 at para. 23

[149] Statement of Claim, para. 60-61, JAR, Vol. II, Tab 8, pp. 103-104

course, include a contract.[150] Here, the plaintiffs have alleged a contract under which they paid to play the VLT games. That contract, even if breached,[151] provides the juristic reason for any transfer of wealth, which necessarily defeats the claim in unjust enrichment.[152]

D. Conclusion

127. For all of the reasons discussed above, the plaintiffs have no tenable claim in negligence, nor can they establish a right to a disgorgement remedy under the rubric of "waiver of tort" or "restitution for wrongdoing". The plaintiffs' claim for disgorgement of profits for breach of contract is also doomed to failure. And, finally, the plaintiffs cannot possibly establish that the VLT line games at issue fall within the scope of the *Criminal Code*'s definition of "three-card monte", which necessarily defeats the plaintiffs' claim in unjust enrichment *simpliciter*.

IV. PART IV – SUBMISSIONS ON COSTS

128. ALC submits that each party should bear its own costs in respect of this appeal.[153]

V. PART V – ORDER SOUGHT

129. It is respectfully requested that the appeal be allowed, that the Certification Order be set aside and that the Statement of Claim be struck out in its entirety, without leave to amend, with each party to bear its own costs.

August 19, 2019

All of which is respectfully submitted

Aileen Bauman on behalf of

Julie Rosenthal / Daniel Simmons /
Mike Eizenga

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[150] *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 44

[151] *RWDI Air Inc. v. N-SCI Technologies Inc.*, 2015 ONSC 1577 at para. 7, aff'd 2015 ONCA 817 at para. 14; *Georgian (St. Lawrence) Lofts Inc. v. Market Lofts Inc.*, 2007 CanLII 294 (S.C.J.) at para. 44

[152] *Re* Collections Inc. v. Toronto Dominion Bank*, 2010 ONSC 6560 at para. 144

[153] *Class Actions Act*, SNL 2001, c. C-18.1, s. 37

VI. PART VI – SUBMISSIONS ON CONFIDENTIALITY

The Appellants advise that there is no sealing or confidentiality order, nor is there any publication ban on any information in the file or any classification of information in the file as confidential under legislation or restriction on public access to information in the file that could impact on the Court's reasons in the appeal.

VII. PART VII – TABLE OF AUTHORITIES

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