SCC File No. 38521

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

B E T W E E N :

ATLANTIC LOTTERY CORPORATION INC.

APPELLANT
(Appellant)

- and -

DOUGLAS BABSTOCK AND FRED SMALL

RESPONDENTS
(Respondent)

- and –

BALLY GAMING CANADA LTD. AND BALLY GAMING INC.

INTERVENORS
(Intervenors)

A N D B E T W E E N :

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

APPELLANTS
(Respondents)

- and -

DOUGLAS BABSTOCK AND FRED SMALL

RESPONDENTS
(Respondent)

- and -

BALLY GAMING CANADA LTD. AND BALLY GAMING INC.

INTERVENERS
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PART I - OVERVIEW & STATEMENT OF THE FACTS

OVERVIEW

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

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

2. There is no dispute that the Atlantic Lottery Corporation Inc. (hereinafter "**ALC Appellant**") is permitted by the provincial *Lotteries Act* and *Video Lottery Regulations* to operate its lottery scheme. This action might founder if the allegations at issue were solely in relation to gambling *per se*. They are not. The allegations in this action turn on deceitful gambling practices, the very mischief sought to be remedied by legislatures and Parliament since time immemorial. The essence of this action turns on whether the Appellant presented and operated games which were inherently deceptive and whether it concealed the deceptive nature of those game from users.

3. The "new" cause of action theory advanced by the Appellants is simply not borne out by the extensive analysis of the Court of Appeal for Newfoundland and Labrador. Rather, the Court below was obliged to permit claims with a possibility of success to proceed, regardless of their novelty or uniqueness. While the theory of the Respondents' case may not represent the most well-trodden ground, it nevertheless finds its anchor in traditional concepts of restitution, settled principles of damages and academic consideration.

4. In fact, no party to this appeal can dispute that all courts agree that the threshold finding for waiver of tort to apply is predicate wrongdoing. That itself is a straightforward concept and revealed in the very detailed pleadings considered below. The Court of Appeal for

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

Newfoundland and Labrador did not disturb that principle. Rather, it provided helpful guidelines to lower courts in the area of restitution law to shape their determinations of the exceptional circumstances in which such a remedy might be properly available.

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

6. The claims asserted in this action were aptly described below as ones with a common theme: causes of action based on unjust enrichment gained by the commission of a wrong that could lead to restitutionary remedies or disgorgement.[4] In this way, the causes of action are 'gain-based' and not 'compensation-based' or best understood as claims "rooted in a claim for disgorgement as a remedy based on unjust enrichment gained by commissions of a wrong without reference to loss, injury, damage or deprivation to or of the claimants."[5]

7. This reality is lost in the Appellants' submissions. Instead, they ignore all of the jurisprudence and academic consideration concerning restitutionary remedies and hyperbolically argue that this is somehow a "new type of claim" effecting a "radical change in the law", "profound" and "far-reaching" alteration of the common law, an "extraordinary leap into

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[2] *Aronowicz et al. v. Emtwo Properties Inc. et al.* (2010), 98 O.R. (3d) 641 (C.A.) at para. 81; P.D, Maddaugh & J.D. McCamus, *The Law of Restitution*, loose-leaf (Aurora: Canada Law Book, 2018) at p. 24-1 [Respondents' Book of Authorities, ("RBA"), Tab 3].

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

[4] *Atlantic Lottery Corporation Inc.-Société des loteries de l'Atlantique v Babstock*, 2018 NLCA 71 at paras. 102–103, ("*Atlantic*"), Appellants' Joint Record ("AJR"), Tab 5.

[5] *Atlantic*, at para. 104, AJR, Tab 5.

uncharted territory", striking "at the very foundation of negligence law".[6] There is a certain degree of irony arising from this argument, given that these purported "radical changes" find their very foundation in very old and traditional concepts of restitution.

8. The Court of Appeal for Newfoundland and Labrador found this "leap into uncharted territory" descriptor as an overstatement, reminding the parties that:

> "There is much in the caselaw of the past decade or so and in the academic writing in the area that provides a foundation for describing a cause of action based on fundamental principles rather than on the facts of individual cases. This involves, in my view, incremental development that recognizes and reorganizes the developing jurisprudence on the basis of underlying principle with a view to defining the parameters of the recognized cause of action by reference to that principle rather than by reference only to outdated and terminologically inappropriate historical precedent."[7]

STATEMENT OF FACTS

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

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

> VLTs are a form of continuous electronic gaming which differs from lotteries in that they are electronically programmed to create cognitive distortions of the perception of winning, which cognitive distortions are intended to keep the consumer engaged and losing money. VLTs are inherently deceptive, inherently addictive and inherently dangerous when used as intended.[9]

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[6] ALC Appellant's Memorandum of Fact & Law, at paras. 3, 4, 34, 36.

[7] *Atlantic*, at para. 179, AJR, Tab 5.

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

[9] Statement of Claim, at para. 12, AJR, Tab 8.

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

12. The pleadings assert that the VLT games conceal and misrepresent the following key aspects: (a) randomness; (b) the number of symbols; (c) the weighting of symbols per reel; and (d) the probability of winning each combination. Further, the games contain animated spinning reels that do not represent the actual video reels stored inside the computer.

13. They encourage a maximum bet of up to 45 times the minimum bet (thereby encouraging 45 times the increased losses). They display asymmetric reels to create near misses in the form of disproportionately high numbers of jackpot symbols in non-winning combinations. VLT games frequently show a win when in reality, the win is really just a disguised loss.

14. If the Appellants are ultimately found liable, the Respondents seek restitutionary damages in the form of disgorgement of profits, not personal injury or compensatory damages. The Appellants have exhaustive records of the spending on each game that it operates and so determining these amounts will not be complex.

15. By agreement of the parties, the certification application was heard by the Trial Division in two parts: (a) cause of action questions; and then (b) the balance of the certification test in the *Class Actions Act*.[10] By reasons dated October 1, 2014 and December 30, 2016, the court refused to, respectively, strike any of the claims and certified the action as a class proceeding.

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

17. Leave to appeal was sought by the Appellants and granted by this Court on May 23, 2019.

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

PART II - STATEMENT OF THE QUESTIONS IN ISSUE

18. The Appellants have framed the issues on this appeal in the following manner:

(a) should this Court recognize a cause of action (waiver of tort or restitution for wrongdoing) that would provide for a disgorgement remedy upon proof of a breach of duty of care without any proof of loss or harm?

(b) should the plaintiff's claim for breach of contract be permitted to proceed, notwithstanding the lack of causal link between the breach of contract and the disgorgement remedy sought?

(c) is there any reasonable prospect of the plaintiff succeeding in his claim that the VLT games offered by the Applicant fall within the *Criminal Code's* prohibition regarding "three-card monte"?

(d) should certification have been granted pursuant to the Newfoundland & Labrador *Class Actions Act*?[11]

19. The Respondents respectfully submit that each of these four (4) questions ought to be answered affirmatively.

PART III - STATEMENT OF ARGUMENT

A. Preliminary Issue – The Lens Through Which The Legal Argument & Analysis Ought to be Examined

20. Before undertaking any substantive analysis of the decisions below and the arguments of the parties presented on this appeal, it is imperative to bear in mind that the core legal issue presented is whether the claims asserted in the pleading are doomed to fail. The asserted causes of action come to this Court from an application to strike the pleading, not a merits determination.[12]

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

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[11] ALC Appellant's Memorandum of Fact & Law, at para. 28; VLC et al Appellants' Memorandum of Fact & Law, at para. 17.

[12] *Atlantic*, at paras. 96, 97, AJR, Tab 5.

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

22. The prevailing principles surrounding Rule 14.24[14] applications (or section 5(1)(a) in a class action context) have settled an incredibly stringent test in order to strike a claim:

> "…if there is any possible basis whatsoever on which a plaintiff might successfully argue entitlement at law, it is inappropriate to anticipate any defence a defendant may plead, even though it may be a very strong one, and, on the basis of evaluating that defence, strike the Statement of Claim as having no chance of success. That issue can only be determined at trial after hearing all of the evidence relevant to the matters pleaded by all parties, and the legal arguments of the parties. On an application under rule 14.24, it is not appropriate to make a preliminary determination of the success of any defence the defendant might plead."[15] [emphasis added]

23. *A fortiori* in a case such as this where the Appellants have not even plead, have not delivered Statements of Defence,[16] have not joined issue and have not particularized their defences, the test for striking the Plaintiff's claims applies with fullest force. Even if they had taken these steps, this Court has made it expressly clear that the potential to present a strong defence shall not prevent a plaintiff with proceeding with an action. Nor is the novelty of a claim a basis for striking it. Rather, the novelty of the claim itself might be a critical factor militating **in favour** of hearing the case on its merits so that new claims, duties or law can be delineated.[17]

24. This is precisely what the Court of Appeal decided, i.e. that the action deserves a chance to be heard on its own merits relying on the principle, repeatedly expressed by this Court, that "courts ought to be cautious in striking out claims, particularly novel ones that may not yet be

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

[14] *Rules of the Supreme Court*, SNL 1986, c. 42, Schedule D, Rule 14.24.

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

[16] *Babstock v. Atlantic Lottery Corporation Inc.*, 2016 NLTD(G) 216 at para. 20, AJR, Tab 3.

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

embedded in existing legal rules, lest it stunt the growth of the law".[18] Moreover, the *Imperial Tobacco* line of authority on motions to strike also emphasizes an access to justice theme.[19]

25. With these principles firmly in mind, the courts below correctly held:

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

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

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

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

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

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

(g) the question is whether there is a reasonable possibility that the existing law may be uncertain and may develop or change when confronted with the actual evidence.[20]

26. The seminal case governing motions to strike a pleading remains this Court's holding in *Hunt v. Carey*,[21] applied, adopted and confirmed by the recent decision in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company.*[22] The Court of Appeal for Newfoundland and

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[18] *Levy v. British Columbia (Crime Victim Assistance Program),* 2018 BCCA 36 at para. 32.

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

[20] *Babstock v. Atlantic Lottery Corporation Inc.- Société des loteries de l'Atlantique*, 2014 NLTD(G) 114 at paras. (respectively) 12, 14, 16, 8, 57, 109, 113, 150, AJR, Tab 1; *Atlantic*, at paras. 96–97 AJR, Tab 5.

[21] *Hunt v. Carey*, [1990] 2 S.C.R. 959.

[22] *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 31.

Labrador specifically identified this as the prevailing, controlling and appropriate test below,[23] mindful of the fact that the novelty of the cause of action militates in favour of a full hearing and that the pleading must be read as generously as possible.[24]

B. No "New" Cause of Action Was Approved Below

27. The Appellants have attempted to paint a picture that as soon as a claim for individualized damages has been disavowed by a plaintiff, there can never be a "complete" tort, unjust enrichment or breach of contract. By so doing, the Appellants ignore all well-settled appellate jurisprudence that has repeatedly confirmed that restitutionary (instead of compensatory) damages are sufficient to anchor a claim for breach of contract.[25] Alternatively, the very act of tortious or criminal conduct *may* entitle a plaintiff to a remedy.[26] While these types of claims may be rarer than the traditional tort claim, they nevertheless maintain firm grounding in Canadian common law.

28. The Appellant ALC itself specifically concedes that: "[i]t 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".[27] In the same vein, the Appellant provides well-known examples of torts for which it has long been accepted that liability can attract gains-based or restitutionary damages, such as breach of fiduciary duty, trespass and conversion.[28] These authorities and concessions, on their own, rebut the Appellant's contention that the Court of

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[23] *Atlantic*, at para. 97, AJR, Tab 5.

[24] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25; *Hunt v. Carey*, [1990] 2 S.C.R. 959 at pp. 978–979, 989; *Temilini v. Ontario Provincial Police (Commissioner)*, [1990] O.J. No. 860 (C.A.) at para. 8, leave to appeal to S.C.C. ref'd [1990] S.C.C.A. No. 364.

[25] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 59, leave to appeal to the S.C.C. ref'd [2007] S.C.C.A. No. 346; *Cassano v. The Toronto-Dominion Bank*, 2007 ONCA 781 at para. 27, leave to appeal to S.C.C. ref'd [2008] S.C.C.A. No. 15.

[26] *Heward et al. v. Eli Lilly & Co. et al.* (2008), 91 O.R. (3d) 691 (Div. Ct.) at paras. 21, 26, 32, 36, *Serhan Estate v. Johnson & Johnson*, [2006] O.J. No. 2421 (Div. Ct.) at para. 49, leave to appeal ref'd C.A., leave to appeal to S.C.C. ref'd [2006] S.C.C.A. No. 494.

[27] ALC Appellant's Memorandum of Fact & Law, at para. 32.

[28] ALC Appellant's Memorandum of Fact & Law, at para. 32.

Appeal for Newfoundland and Labrador somehow fashioned a brand new "*avant garde*" cause of action unknown to Canadian law.

29. Despite a breadth of authoritative jurisprudence and academic commentary, the premise underpinning much of the Appellants' argument is that somehow a "new" cause of action was recognized on a pleadings motion below. This Court ought to reject that underlying assumption as there is no doubt whatsoever at law that, simply put, "waiver of tort allows a plaintiff to claim disgorgement damages based on the tortfeasor's gain or benefit instead of compensatory damages based on the loss suffered".[29] That proposition is a very old one.

30. This principle has recently been affirmed by this Court: "[a]n action in waiver of tort is considered by some to offer the plaintiff an advantage in that it may relieve them of the need to prove loss in tort, or in fact at all."[30] In that same decision, this Court found that a pleadings appeal is not the proper place to resolve the particular circumstances in which waiver of tort can be pleaded, presumably because of the lack of a complete evidentiary record.[31] There is no principled reason for a different result to occur here: "I cannot say that it is plain and obvious that a cause of action in waiver of tort would not succeed."[32]

31. The Court of Appeal for Newfoundland and Labrador provided robust and meaningful guidelines for when such a claim may be sustainable, clarifying the circumstances which could give rise to such a tenable claim.[33] In this way, that court did precisely what the Appellants urges with respect to the development of the common law: "incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society".[34] At the

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[29] *2105582 Ontario Ltd. (Performance Plus Golf Academy) v. 375445 Ontario Ltd. (Hydeaway Golf Club)*, 2017 ONCA 980 at para. 63.

[30] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 93; P.D. Maddaugh & J.D.McCamus, *The Law of Restitution*. Toronto: Canada Law Book, Volume II (loose-leaf June 2018) at 24-4 [RBA, Tab 3].

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

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

[33] *Atlantic*, para. 170, AJR, Tab 5.

[34] Appellant's Memorandum of Fact & Law, at para. 76, relying on *R. v. Salituro*, [1991] 3 S.C.R. 654 at 670

same time, the Court of Appeal for Newfoundland and Labrador specifically acknowledged that not all breaches of duty would justify a disgorgement remedy. It also stated that compensatory damages are the typical remedy and that disgorgement may be considered the 'exceptional' remedy.[35] The Appellants concedes these holdings.[36]

32. Assessed against these factors, the key question at trial (or summary judgment) will be: were the Appellants actions in marketing VLT games lawful if the Appellants also knew those games were deceptive and defective? If the answer to that core issue is "yes", unlawfulness may be determined on the basis of a breach of duty, breach of contract, breach of the *Code*, unjust enrichment or any combination thereof. The trier of fact would then proceed to assess the criteria outlined below to determine whether restitutionary on disgorgement damages ought to be available.

33. The availability of such damages will turn entirely on whether the Appellants were enriched "unjustly", having regard to the social utility of the conduct, the degree of risk it posed and the intentional nature of the wrong.[37] Should the trier of fact find that the conduct was socially useful as regulated by the Province, posed little risk and was unintentionally risky (or not risky at all), then no such damages would flow or the damages would be nominal. Conversely, damages would flow if the breaches were deemed calculated to make a profit at the expense of exposing individuals to risk with no social value. There is nothing offensive to public policy or tort law about such a proposition.

34. However, none of these eventualities can possibly be determined now. Instead, they must wait for the crucible of a full merits determination,[38] "where evidence concerning the facts can be lead and where arguments about the merits of a plaintiff's case can be made."[39]

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[35] *Atlantic*, at paras. 120 – 123, 162, 166 AJR, Tab 5.

[36] Appellant's Memorandum of Fact & Law, at paras. 20, 22.

[37] *Atlantic*, para. 170, AJR, Tab 5.

[38] *Atlantic*, at para. 229, AJR, Tab 5.

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

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

35. The Court of Appeal for Newfoundland and Labrador went to great lengths to explain the principles and jurisprudential treatment underpinning the following distinction: (a) restitution of benefits conferred on someone who has been unjustly enriched at the claimant's expense – **restitution for unjust enrichment** – or (b) restitution or disgorgement of benefits acquired as a result of the commission of a wrong – **restitution for wrongdoing**.[40] Neither the decisions below nor this appeal can be properly considered without first appreciating this distinction. As eminent academics and the Courts below acknowledged, this distinction in the law of restitution is "fundamental".[41]

36. There is no doubt that the first category, restitution for unjust enrichment, "has been the traditional focus of the study of restitution and has occupied the greater part of most texts on the subject".[42] In this category, the remedy is the return of the benefit: "the cause of action is the unjust enrichment and the remedy is restitution. *Liability does not depend on the defendant's fault*. All that is required, once a benefit and a deprivation have been established, is a lack of a juristic reason for the defendant's enrichment."[43]

37. The second category – restitution for wrongdoing, squarely at issue here – has admittedly "not been as well-developed conceptually as the first category".[44] This category of case tends to be analyzed using the terminology of "waiver of tort", which is nothing more than "archaic language for the simple idea that some forms of wrongdoing exceptionally allow the successful

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[40] *Atlantic*, at para. 83, AJR, Tab 5.

[41] *Atlantic*, at para. 84, AJR, Tab 5, A. Burrows, *The Law of Restitution*, 3rd Ed. (Oxford: Oxford University Press, 2011) at 9 [RBA, Tab 2]; *321665 Alberta Ltd. v. Mobil Oil Canada Ltd*., 2010 ABQB 522 at para. 10.

[42] *Atlanti*c, at para. 85, AJR, Tab 5.

[43] *Atlanti*c, at para. 85 [emphasis added], AJR, Tab 5.

[44] *Atlantic*, at para. 88, AJR, Tab 5.

plaintiff to demand disgorgement of the defendant's gain as an alternative to compensation for loss."[45]

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

> "The cause of action supporting the second category is not the unjust enrichment itself but the existence of a wrong (such as a tort, breach of contract, breach of fiduciary duty or perhaps even a crime) against the claimant which has the result of enabling the defendant to acquire a gain (sometimes described as an unjust enrichment), not necessarily from the claimant, that justifies the court in ordering the disgorgement of the wrongdoer's gains. … **recovery by the plaintiff does not necessarily depend on the plaintiff having suffered any loss or deprivation**, although such a loss or deprivation may have occurred. Instead, **the focus is not on repairing an injury to the claimant but on stripping away the gains acquired by the defendant as a result of the wrong he or she has committed** so as to vindicate the notion that a wrongdoer should not profit from his or her wrong."[46] [emphasis added]

39. Restitution for unjust enrichment is merely another way of saying compensation for damages while restitution for wrongdoing is really more properly described as a reversal of benefits.[47] Simply put, the distinction is:

> "Within the law of civil wrongdoing, and especially tort, 'restitution' may refer to a remedy that requires the defendant to repair the losses that the plaintiff suffered as a result of the breach. That measure of relief aims to restore the plaintiff's *status quo ante*. Still within the law of civil wrongdoing, 'restitution' alternatively may refer to a remedy that requires the defendant to give up every enrichment received – from either the plaintiff or a third party – by virtue of having breached an obligation owed to the plaintiff. That measure of relief aims to restore the defendant's *status quo ante*."[48]

40. Once these doctrines of restitution are properly untangled, the decisions below reflect nothing more that authorization to proceed to seek such remedies following a merits determination. Ultimately, the merits of the action will turn on whether restitution is available for

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[45] *Atlantic*, at para. 88, AJR, Tab 5; M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham, ON; LexisNexis Canada Inc., 2014) at 9 [RBA, Tab 4].

[46] *Atlantic*, at para. 86, AJR, Tab 5.

[47] *Atlantic*, at para. 90, AJR, Tab 5.

[48] *Atlantic*, at para. 90, relying upon M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham, ON; LexisNexis Canada Inc., 2014) at 10 – 11 [RBA, Tab 4].

the commission of wrongful acts *per se*. To the extent that the Appellants have grossly mischaracterized the matters at issue, this Court ought to take a hard look at precisely what the courts below decided – simply put, permission to proceed with the claim as it could not safely be deemed doomed to fail.

ii. Disgorgement Remedy Potentially Available Upon Proof of Breach Alone

41. The Court of Appeal for Newfoundland and Labrador recognized that when it comes to the principles relating to restitution and unjust enrichment, "there is no universal agreement as to how these two terms should be employed"[49] and that the notion of restitution for wrongdoing "has not been as well-developed conceptually".[50] This is consistent with academic authority that has found no category of tortious conduct can be automatically excluded for resolving disgorgement claims.[51]

42. This proposition arises from the uncontentious principle that the very essence of waiver of tort or disgorgement is simply to provide a disincentive or deterrent effect to wrongful conduct, a socially valuable proposition:

> " … disgorgement for tort should be available in any case where the awarding of such relief is appropriate in light of the underlying rationale of deterring wrongful conduct by imposing the common law sanction of disgorgement with respect to profits secured by the wrongful act. … In particular, there appears to be no reason to preclude disgorgement in the context of negligent conduct **where the conduct in question falls so significantly below a reasonable standard of care that the misconduct merits condemnation in the form of an award of disgorgement relief**."[52] [emphasis added]

43. The Appellants' submissions ignore this possibility all together, that restitutionary damages may flow upon proof of breach alone. Instead, its arguments are premised entirely on the more traditional approach to damages – compensatory and compensatory alone. However, at

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[49] *Atlantic*, at para. 83, AJR, Tab 5.

[50] *Atlantic*, at para. 88, AJR, Tab 5.

[51] *Atlantic*, at para. 166, relying on John D. McCamus, "Waiver of Tort: Is There a Limiting Principle?" (2014) 55:3 Can. Bus. L.J. 333 at p.352, AJR, Tab 5.

[52] *Atlantic*, at paras. 162, 163, relying on John D. McCamus, "Waiver of Tort: Is There a Limiting Principle?" (2014) 55:3 Can. Bus. L.J. 333 at p.350, 352, AJR, Tab 5.

the same time, the Appellants fail to identify the prevailing policy reason *why* restitutionary remedies should be not be available for any type of tort.

44. As McCamus has postulated, "there is simply no reason in principle why the rules for compensatory damages need to be identical to the rules for disgorgement" as they serve different purposes and need not always be available in the same fact situations.[53]

45. The logical conclusion of the Appellants' argument is that restitutionary damages are **never** available, regardless of wrongdoing or *per se* breaches, in any case, for all time. Academic commentary has specifically rejected such an approach:

> "The law takes neither extreme position. … whether or not one first insists on compensatory damages being inadequate (and there has been no such requirement in the tort cases) any development in the law should centre on the two ideas of first, protecting proprietary rights and, secondly, deterring cynical wrongdoing."[54]

46. Accordingly, the Appellants' urgings were already (properly) rejected below as a result of their misplaced insistence on characterizing the claims as compensatory and their failure to accept that there is no principled reason for such an 'all or nothing' approach:

> "**it is not open to the appellant [Applicant] to argue the appeal on the basis that something other than disgorgement based on wrongful acquisition** (namely a claim for compensation) was the essence of the claims being made. To do so would in effect be to set up a straw man for the purpose of knocking it down without advancing any substantive argument with respect to the real issues in dispute."[55] [emphasis added]

47. Since no category of tortious conduct can ever be reasonably excluded from the possibility of restitutionary damages, the Court of Appeal for Newfoundland and Labrador adopted a principled approach to providing clarification on what precise indicia would lead to the potential for a disgorgement remedy. The first step in the analysis at the pleadings stage is to determine whether there is a pleading of: (a) facts supporting tortious wrongful conduct; (b)

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[53] *Atlantic*, at para. 168, relying on John D. McCamus, "Waiver of Tort: Is There a Limiting Principle?" (2014) 55:3 Can. Bus. L.J. 333 at p.357 – 358, AJR, Tab 5.

[54] Burrows, *The Law of Restitution*, 3d ed. at 662 [RBA, Tab 2]; *Atlantic*, at para. 159, AJR, Tab 5.

[55] *Atlantic*, at para. 108, AJR, Tab 5.

enrichment acquired as a result of the wrong; and (c) surrounding circumstantial facts which establish a deterrence rationale for disgorgement.

48. The next step is to apply the set of principled criteria established by the Court of Appeal for Newfoundland and Labrador which could permit for the disgorgement of profits acquired through the commission of a tortious wrong:

> (a) the defendant has committed a tortious wrong;
>
> (b) the wrong need not be limited to a particular class of torts but the key question is the effect of the commission of the tort on the ability of the defendant to acquire a benefit;
>
> (c) the defendant acquired a financial benefit that he or she would not have otherwise acquired but for the commission of the wrong;
>
> (d) the benefit need not have been as a result of a loss to the plaintiff so long as it was derived from the commission of the tortious wrong against the plaintiff;
>
> (e) considering all of the circumstances, including the principle that a wrongdoer should not generally be allowed to profit from his wrongdoing, the enrichment is determined to be unjust or unjustifiable; and
>
> (f) whether the enrichment is unjust will depend on the particular facts of the cases, factors affecting this determination will include: (i) special policy considerations affecting the particular tort; (ii) whether the commission of the tort was intentional or calculated to make a profit at others' expense; (iii) whether disgorgement would deter a socially useful activity; and (iv) whether the wrong exposed persons to serious risk of physical, mental or emotional harm or loss.[56]

49. By definition and necessity, this will require a contextual analysis based on a full evidentiary record.

50. As discussed above, the distinction between compensatory and restitutionary damages for wrongdoing underpins the entirety of the decisions below and ought not be lost on this appeal. While restitutionary damages for wrongdoing may be more unusual than seeking relief for "old

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[56] *Atlantic*, at para. 170, AJR, Tab 5.

fashioned" compensatory damages, that is not the same thing as saying there is no cause of action, which is the assertion of the Appellants.

51. As the courts below determined, since the purpose of this claim is not to "vindicate the right to compensation for loss but to vindicate the idea that a wrongdoer should not profit from his wrongdoing", the necessity of proving loss falls away.[57] This possibility has been affirmed by this Court and other appellate courts across Canada:

(a) claim for compensatory damages not necessary to ground breach of contract if relief sought was disgorgement of benefits received from the breach;[58]

(b) damages available for contractual breach without proof of loss;[59]

(c) remedy available for benefits acquired by a contract-breaker rather than for losses suffered by the innocent party.[60]

52. This approach conforms with public policy because it satisfies twin goals of the common law: (a) it protects persons exposed to harm as a result of a breach of a duty or otherwise tortious act; and (b) it ensures that wrongdoers do not benefit financially from the commission of a tort, criminal activity or simply at the expense of another. While the Appellants have raised numerous *in terrorem* arguments about how the decision below vitiates tort law as Canada knows it, the decisions simply explain and clarify the old adage that parties ought not be permitted to keep the profits resulting from their crimes or breaches.

53. Fashioning disgorgement in this manner merely breathes modern life back into a doctrine that the common law has attempted to honour since time immemorial: if a defendant has acted wrongfully by failing to comply with the standard of behaviour that is required of him or her,

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[57] *Atlantic*, at para. 173 AJR, Tab 5.

[58] *Cassano v. The Toronto-Dominion Bank*, 2007 ONCA 781; *Markson v. MBNA Canada Bank*, 2007 ONCA 334.

[59] *French v. Paris*, [1928] S.J. No. 36 (C.A.); *Whiten v. Pilot Insurance Co.*, 2002 SCC 18.

[60] *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43; *Attorney General v. Blake and Another*, [2000] UKHL 45.

exposed others to the risk of harm, and acquired financial benefit to which it would not otherwise have been able to acquire but for the breach, there is a remedy at law.[61]

54. As set out by the Court of Appeal for Newfoundland and Labrador below:[62]

> "The claimants [Respondents] have also pleaded that they have been wronged not only by tortious conduct but also by criminal conduct. All of the foregoing circumstances, together with the proposition that the claimants have a legitimate expectation that the contract not be performed in a manner that would knowingly be harmful to them **could, assuming proof, bring the case within the 'exceptional circumstances' notion expressed in *Blake***."[63] [emphasis added]

55. The notion put forth by the Appellants that these claims are simply unknown to law and accordingly must be struck by this Court as matter of public policy is simply not borne out by the breadth of authority. At very least, the factual indicia giving rise to the potential for disgorgement are "best hammered out on the anvil of concrete cases,"[64] not preliminary motions without evidence.

56. For example, if the trier of fact eventually determines on the evidence that the Appellants committed a tort or breached the *Criminal Code*, and benefitted financially therefrom, why does it offend notions of public policy to order the disgorgement of the resulting profits? In such a case, applying the criteria of the Court of Appeal for Newfoundland and Labrador, the trier of fact would have to determine:

(a) The defendant has committed a tortious wrong;

Answer: On the merits, the Appellant may be deemed to have breached the *Code*, committed the tort of deceit or breached a contract.

(b) The wrong need not be limited to a particular class of torts but the key question is the effect of the commission of the tort on the ability of the defendant to acquire a benefit;

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[61] *Atlantic*, at para. 173, AJR, Tab 5.

[62] *Maddaugh & McCamus*, at 25-20, 25-19 [RBA, Tab 3]; *Atlantic*, at para. 129, AJR, Tab 5.

[63] *Atlantic*, at para. 131, AJR, Tab 5.

[64] *Attorney General v. Blake and Another*, [2000] UKHL 45; *The Reid-Newfoundland Company v The Anglo-American Telegraph Company Limited (Newfoundland)*, [1912] UKPC 29 at 291 E.

Answer: The breach permitted the Appellant to profit financially.

(c) The defendant acquired a financial benefit that he or she would not have otherwise acquired but for the commission of the wrong;

Answer: The profits derived can be traced and connected to the operation of certain deceitful games.

(d) The benefit need not have been as a result of a loss to the plaintiff so long as it was derived from the commission of the tortious wrong against the plaintiff;

Answer: The Respondents plead no individual loss but rather the commission of a tort, breach of contract or unjust enrichment, which then permitted the Appellant to profit.

(e) Considering all of the circumstances, including the principle that a wrongdoer should not generally be allowed to profit from his wrongdoing, the enrichment is determined to be unjust or unjustifiable;

Answer: Depending on what the trier of fact finds, if the Code was breached and/or deceit perpetrated, it could also find that the Appellant's enrichment as a result of same is unjust in all of the circumstances, based on the evidence before the court at the merits stage.

(f). Whether the enrichment is unjust will depend on the particular facts of the case, factors affecting this determination will include: (i) special policy considerations affecting the particular tort; (ii) whether the commission of the tort was intentional or calculated to make a profit at others' expense; (iii) whether disgorgement would deter a socially useful activity; and (iv) whether the wrong exposed persons to serious risk of physical, mental or emotional harm or loss.[65]

Answer: The trier of fact will have all of the facts salient to determine whether the breaches were intentional, whether disgorgement would deter certain activities of other regulators and whether the Respondents were exposed to risk by virtue of the deceptive games, which only an expert can give evidence upon.

57. While the Appellants argue at great length that the Decision below would wreak irreparable harm on tort law going forward, they also fail to explain why the analysis outlined above would be unfair to defendants or offend public policy. The Appellants also refuse to acknowledge that the test described below simply builds on existing and well-established principles of restitution.

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[65] *Atlantic*, at para. 170, AJR, Tab 5.

58. As courts and authors have opined on this issue, a defendant who is compelled to disgorge his profits should be entitled to know two things:

> (1) what wrongful behaviour makes the enrichment unjust in the defendant's hands? and
>
> (2) what behaviour of the defendant, with respect to this plaintiff, makes the enrichment unjust?[66]

59. For example, if a defendant obtains some advantage through an intentional or deliberate misrepresentation or deceit, but causes no direct pecuniary loss to a plaintiff, technically no tort has been committed. But:

> "Nevertheless, the defendant will have reaped a benefit directly as a result of his or her wrongful conduct. In our view, such a defendant ought to be liable in an action in restitution to disgorge what we would characterize as unjust enrichment."[67]

60. If there is no wrongful behaviour (i.e. no breach of the *Code*, no tort, no deceit, no breach of contract) then there is no remedy available. This is the essence of the analysis below but a concept devoid from the Appellants' submissions as a condition precedent to any remedy. This condition ensures fairness to both parties – no remedy is triggered and no profits may ever be disgorged without wrongful conduct as a threshold issue. With this in mind, it can hardly be said that the Decision below fundamentally alters or shakes the very foundations of tort law as we know it in Canada.

61. The remedy permitted to be sought by the Court of Appeal may be rare but that does not also make it *ipso facto* unprincipled. Rather, it finds its roots in traditional restitutionary doctrines and is contained in scope by the exceptionality of its conditions outlined in the Decision, building on *Blake*. No "radical change" in the law would occur should this claim be permitted to proceed for a merits determination.

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[66] *Federal Sugar Refining Co. v. United States Sugar Equalization Board, Inc.* (1920), 268 F. 575 (S.D.N.Y.).

[67] P.D. Maddaugh & J.D.McCamus, *The Law of Restitution*. Toronto: Canada Law Book, Volume II (loose-leaf June 2018) at 24 – 24 [RBA, Tab 3].

C. The Claim for Breach of Contract Is Not Doomed To Fail

62. The Appellants make two primary arguments respecting the sustainability of the breach of implied contract pleadings:

(i) given the Appellant ALC's position as regulator, there is no basis upon which to imply a contract as between the parties;[68] and

(ii) in any event, any disgorgement of profits remedy is not available in these circumstances, citing the failure to establish a causal link between any breach of contract and harm.[69]

i. The Basis To Imply Contractual Terms Between the Parties

63. The Respondents' plea in this respect is straightforward: (a) a contract arose between the parties as a result of their conduct or relationship; and (b) that contract obliged the Appellants to operate safe, fit and merchantable games, as a matter of both necessity and the legislative scheme under which the Appellants functions.[70] All of the descriptions of the "necessary" or obvious implied terms are pleaded in the Statement of Claim: safe, fit, and merchantable are just different ways of saying that the Appellants were required to operate fair games. That is the only term the Respondents seek to imply as between the parties – the provision of a fair game.

64. The ALC Appellant's position as regulator does not, and cannot, operate to vitiate such an obvious implied term. As this Court has determined, a regulated actor is required to conduct itself on the basis of an implied term that it maintain a certain minimum standard of care as those "who enter a regulated field are in the best position to control the harm which may result".[71] Justice Cory stated in *Wholesale Travel,* regulators subject to statutory schemes are nevertheless also subject to certain basic implied responsibilities:

> "As a result of choosing to enter a field of activity known to be regulated, the regulated actor is taken to be aware of and **to have accepted the imposition of a**

[68] VLC et al Appellants' Memorandum of Fact & Law, at paras. 112 – 114

[69] ALC Appellant's Memorandum of Fact & Law, at paras. 82 – 88; VLC et al Appellants' Memorandum of Fact & Law, at paras. 116 - 118

[70] Statement of Claim, paras. 46 to 52, AJR, Tab 8.

[71] *R. v. Wholesale Travel Group Inc.,* [1991] 3 S.C.R. 154 at p. 229.

> **certain objective standard of conduct** as a pre-condition to being allowed to engage in regulated activity."[72] [emphasis added]

65. The Appellants concede a "player's contractual rights" but argue that the terms of that contract was "simply to play a VLT approved by ALC as regulator",[73] whether or not the game was 'fair'. In this regard, the Appellants go so far as to say that primary reason a term of 'fair play' cannot be implied is because a "court cannot second guess ALC's decision through contractual implied terms".[74] However, as found below, the Appellants "cannot hide behind the regulations and say that every decision it makes is a policy one protected by its regulatory status".[75] While the ALC Appellants may assert a defence on the basis of regulatory authority at trial, based on the jurisprudence, it is far from plain and obvious that such a defence would succeed if the VLT games were found to be deceptive. At the pleadings stage a potential defence is no basis to strike a claim.

66. The courts below confronted this characterization head on and affirmed that the implied contract claim is properly understood as one which ensures the games are free from deceit or otherwise, "safe":

> "[**The Plaintiff] has alleged that in the operationalization of its regulatory role, it [the Defendant] has failed to provide a service which is safe and free from deception.** … the Plaintiffs accept that by statute and regulation, the Defendant has a monopoly on the provision of VLTs in the Province, and is also the regulator of such activities within the Province. But they argue further that as a consequence, members of the public reasonably expect that their interests will be protected, in particular if this is found to be an inherently dangerous form of gambling."[76] [emphasis added]

67. Once the Appellants' characterization of the implied term non-deceptive games[77] is rejected, it cannot be seriously debated that for the fair functioning of the agreement between

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[72] *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at p. 239 – 240.

[73] VLC et al Appellants' Memorandum of Fact & Law, at para. 112.

[74] VLC et al Appellants' Memorandum of Fact & Law, at para. 114.

[75] October 1, 2014 decision of motions judge Faour, at para. 113, AJR, Tab 1.

[76] Reasons for Decision, October 1, 2014, at paras. 109 – 110, AJR, Tab 1.

[77] ALC Appellant's Memorandum of Fact & Law, at para. 87

these parties, it is "necessary" to imply a provision that games be fair and free from deception. While the Appellants claim that players "received exactly what they expected to get: the opportunity to play a game and a chance to win,"[78] they stop short of saying the "opportunity to play a **fair** game", which is all the Respondents seek to imply as a term of the contract of play.

68. The Appellants claim that any implied terms to the contract of play cannot "restrict ALC's ability to regulate VLT gaming" as such would constitute an "illegal or inappropriate fetter on its powers".[79] However, the Respondents seek no such interference with ALC's regulatory regime. All the Respondents seek is the imposition of a term of "fair play". This begs the following question, which none of the Appellants have addressed, let alone answered: how would requiring the ALC to offer only "fair" games in any way interfere with its regulatory powers?

69. The Court of Appeal for Newfoundland and Labrador found that it would neither fetter nor interfere with the regulatory scheme or powers thereunder: "[t]here is room, within the regulatory scheme, for the argument that the regulator is not authorized to engage in deception and duping of its customers."[80]

70. This Court has described an implied term of "fairness" as a notion with a "certain degree of obviousness to it", characteristic of a contractual term that *requires* its implication.[81] On this basis alone, this action is distinguishable from the only authority relied upon by the Appellants to suggest that no terms may be implied upon a regulator empowered by a comprehensive statutory scheme.[82]

71. The Appellants rely on the Superior Court decision in *Allarco Entertainment* to suggest that terms can never be imposed upon a regulator as a matter of public policy. However, the case does not stand for such a proposition. In *Allarco*, the court declined to imply terms between the

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[78] VLC et al Appellants' Memorandum of Fact & Law, at para. 117.

[79] VLC et al Appellants' Memo of Fact & Law, at para. 113.

[80] *Atlantic*, at para. 130, AJR, Tab 5.

[81] *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 at para. 29,

[82] *Allarco Entertainment 2008 Inc. v. Rogers Communications Inc.*, 2011 ONSC 5623

parties because the terms sought to be imposed went far beyond the "obvious", using the parlance of this Court from *M. J. B. Enterprises*.[83]

72. Instead, the applicant in *Allarco* asked the court to imply terms prohibiting Rogers from giving undue preference to competitors, requiring Rogers to provide reasonable terms of carriage, packaging and retailing and ordering Rogers to offer certain distribution terms.[84] These fundamental terms went far beyond what was "necessary" or "obvious" and conflicted with the express language of the parties' Affiliation Agreement. As such, there is no similarity between the terms sought to be implied here and those which were rejected in *Allarco*.

73. Canadian law is clear that a warranty of fitness may be an implied term of a contract for services. Where an implied term is one of fitness, it attracts a strict liability obligation.[85] "Fitness" may include an "accurate" or "truthful" service. For example, in *Allan v. Bushnell*, the court implied a term in a contract for the provision of a news services that the broadcast be "accurate".[86] The Respondents' plea here is similar and simply alleges that having entered into a contract with consumers for the provision of a gambling service, it was an implied term of that contract that the Appellants operate games which were "fit" or not deceptive.

74. The circumstances in which a court will imply the term of "fitness" are inextricably tied to the unique facts of any given case, making it a highly fact-dependent inquiry. It requires a full evidentiary record "to assess whether it was the intention of the parties that such a warranty be implied."[87] As a result, breaches of implied terms of unwritten contracts (or offers to the public) have been repeatedly certified, as disclosing reasonable causes of action.[88]

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[83] *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 at para. 29,

[84] *Allarco Entertainment 2008 Inc. v. Rogers Communications Inc*., 2011 ONSC 5623, at para. 64.

[85] *Ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 at para. 73.

[86] *Allan v. Bushnell* (1969), 1 O.R. (3d) 107-123 (H.C.) at paras. 19–23, 31.

[87] *Ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 at paras. 81, 83.

[88] *Doucette v. Eastern Regional Integrated Health Authority*, 2007 NLTD 138; *Rideout v. Health Labrador Corp.*, [2005] N.J. No. 228 (S.C.) [RBA, Tab 1]; *Griffin v. Dell Canada Inc*., [2009] O.J. No. 418 (S.C.) , leave to appeal to S.C.C. ref'd [2010] S.C.C.A. No. 75; *Allan v. Bushnell* (1969), 1 O.R. (3d) 107 (H.C.).

75. There is also a presumption in favour of implying warranties of fitness into service contracts. They ought to be implied, "unless the circumstances of a particular case are sufficient to specifically exclude it".[89] In this case, the contract was to supply "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".[90] A necessarily corollary to providing a safe and fair game is that the game not deceive its players.

76. Given that the Appellants also enjoy a statutory monopoly over the provision of games, the case for implying this minimal term of fitness is an even stronger one. At very least, the claim cannot be said to be "doomed to failure". Whether or not these alleged breaches of contract asserted by the Respondents can ultimately be established[91] depends upon a factual examination of what was actually bargained for and, most importantly, what was ultimately delivered.[92] The operational decisions of the ALC regulator are not immune from the imposition of "obvious" implied terms.

ii. Causation Not Required For Restitutionary Remedy

77. The Appellants also assert that even if terms could be implied between the parties, disgorgement is nevertheless unavailable as a remedy to the Respondents.[93] The Appellants argue that the lack of causal link between the alleged breach of contract and profits derived by ALC is a full answer to the sustainability of this pleaded remedy.

78. This argument suffers from the same flaws as the Appellants' arguments respecting the availability of restitutionary damages at all, essentially insisting throughout their submissions that only compensatory damages are available. While admittedly less common, the possible remedy for disgorgement of benefits received from a contractual breach is very much alive in Canadian law.

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[89] *G. Ford Homes Ltd. v. Draft Masonry (York) Co.*, [1983] O.J. No. 3181 (C.A.), at para. 11.

[90] Statement of Claim, at para. 46, AJR Tab 8.

[91] Statement of Claim, at paras. 46 – 52, AJR, Tab 8.

[92] *Star Line Inc. v. Hydro-Mac Inc.*, 2008 NLTD 73 at para. 9.

[93] ALC Appellant's Memorandum of Fact & Law, at paras. 80 – 90; VLC et al Appellants' Memorandum of Fact & Law, at paras. 116 – 119.

79. The Ontario Court of Appeal has consistently affirmed the possibility of restitutionary damages for breach of contract. While there is no doubt that "damages" must be found to establish a breach of contract, the law is also clear that restitutionary damages are sufficient to anchor such a claim.[94] As Chief Justice Winkler stated:

> "Compensatory damages are the normal remedy in breach of contract cases and reflect the amount required to put the plaintiff, so far as money can do it, in the same situation as if the contract had been performed. In contrast, **restitutionary damages are a discretionary remedy intended to disgorge the defendant of benefits received from his or her breach of contract.** Restitutionary damages, which are measured by the defendant's gain, may be awarded in a case where the plaintiff has suffered no loss, or where the plaintiff's loss is less than the defendant's gain."[95] [emphasis added]

80. The only authority relied upon by the Appellants for the proposition that "a plaintiff does not have the right to choose disgorgement of benefits or profits instead of compensatory damages",[96] is the English case, *Morris-Garner & Or. v. One Step (Support) Ltd*.[97] The Appellants' own reference to that decision expressly admits exceptions to this rule:

> "Common law damages for breach of contract cannot be awarded merely for the purpose of depriving the defendant of profits made as a result of the breach, **other than in exceptional circumstances, following *Attorney General v. Blake*.**"[98] [emphasis added]

81. Of course, *Blake* is precisely the precedent relied upon by the Court of Appeal for Newfoundland and Labrador below. After specifically acknowledging that the typical remedial response to breach of contract is to return the plaintiff to its original position by way of compensatory damages, the Court of Appeal for Newfoundland and Labrador correctly identified

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[94] *Markson v. MBNA Canada Bank,* 2007 ONCA 334 at para. 59, leave to appeal to S.C.C. ref'd [2007] S.C.C.A. No. 346,

[95] *Cassano v. Toronto-Dominion Bank,* 2007 ONCA 781, at para. 27, leave to appeal to S.C.C. ref'd [2008] S.C.C.A. No. 15,

[96] VLC et al Appellants' Memorandum of Fact & Law, at para. 116.

[97] [2018] UKSC 20 at paras. 81, 95.

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

the jurisprudential exceptions to this principle where remedies for disgorgement of profits have been ordered for contractual breach:

> "In *Attorney General v. Blake*, [citation omitted], four of five Law Lords in the House of Lords recognized that in certain exceptional cases an innocent party facing a breach of contract may be entitled to a restitutionary remedy in the form of an order for accounting for and disgorgement of profits. … Lord Nicholls expressed his conclusion this way at 284H-285A:
>
> > My conclusion is that there seems to be no reason, in principle, why the court must in all circumstances rule out an account of profits as a remedy for breach of contract. When exceptionally a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract.[99] [emphasis added]

82. The *Blake* Court, relied upon by the Appellants' own lone authority in this respect,[100] goes on to opine that "no fixed rules can be prescribed" to determine when such a remedy may be appropriate. It also stated that these exceptions to the general compensatory rule are really "best hammered out on the anvil of concrete cases".[101] In other words, on their merits. This is precisely what the Court of Appeal for Newfoundland and Labrador said below, correctly, based upon the well-known test to strike a claim.

83. Affirming that the parameters of this particular remedy remain uncertain, pursuant to *Blake* and academic commentary, the Court of Appeal for Newfoundland and Labrador provided some general guidelines for future cases, namely where the conduct of the contract-breaker is sufficiently similar to a breach of fiduciary obligation, breach of confidence, tort or crime.[102]

84. Can the current case be said to potentially fall within these *Blake* types of parameters?

> "Assuming the claimants can establish the pleaded facts, it is at least arguable, notwithstanding the fact that the appellant is a statutory regulator, that the contract in issue was subject to a term that promised, at the least, that the VLT games would not be deceptive. That would be a necessary corollary of an obligation to

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[99] *Atlantic*, at paras. 121, 124, AJR, Tab 5.

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

[101] *Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.) at 284 H, 285 A, 285 H, 291 E.

[102] *Atlantic*, at para. 129, AJR, Tab 5.

> provide a safe and fair game. … The claimants have also pleaded that they have been wronged not only by tortious conduct but also by criminal conduct. All of the foregoing circumstances, together with the proposition that the claimants have a legitimate expectation that the contract not be performed in a manner that would knowingly be harmful to them could, assuming proof, bring the case within the 'exceptional circumstances' notion expressed in *Blake*."[103]

85. Academic commentary has supported precisely the same possibility as that identified by the Court of Appeal, building on the foundation established by the House of Lords in *Blake*:

> "… the decision in *Attorney General v. Blake* clearly demonstrates that a restitutionary remedy is available to strip a criminal of the profits gained through the commission of a crime. The claim is analogous to one of waiver of tort or, as in the case itself, waiver of breach of contract. While it is true that their Lordships indicted that such a restitutionary remedy should be available only in 'exceptional circumstances', **surely the presence of criminal activity suffices to satisfy that test** … Given the public policy against permitting a wrongdoer to profit from wrongdoing, there is ample justification for the application of that policy in situations like *Blake*."[104] [emphasis added]

86. All the court below did was determine that the *Code* pleading was potentially within the parameters of *Blake*, to be determined one way or another on a full evidentiary record on its merits.

D. There is Reasonable Possibility That the Appellants'' VLT Games Are "Similar" To "Three-Card Monte"

i. Overview of Criminal Code Arguments

87. There is no dispute that the Appellants are permitted by the *Lotteries Act* and *Video Lottery Regulations* to operate a lottery scheme pursuant to section 207(1) of the *Criminal Code*. However, that statute goes on to expressly carve out games or schemes which are "similar" to three-card monte, plainly prohibiting same, whether operated by a province or not. Therefore, if the Appellants' VLT line games are "similar" to three-card monte, they are prohibited pursuant to

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[103] *Atlantic*, at paras. 130 – 131, AJR, Tab 5.

[104] P.D. Maddaugh & J.D.McCamus, *The Law of Restitution*. Toronto: Canada Law Book, Volume II (loose-leaf June 2018), at 23-40 [full cite of text in CA decision, at para.222], AJR, Tab 5.

subsections 207(4) and 206(2) of the *Criminal Code*. The statement of claim contains many allegations that the VLT games share similar characteristics with three-card monte.[105]

88. The Appellants raise three primary assertions in support of their allegations that the VLT games cannot constitute "three-card monte" as defined in the *Criminal Code*:

(a) the principles of statutory interpretation lead to the conclusion that the VLT games do not constitute a game "similar to" three-card monte pursuant to subsection 206(2) of the *Criminal Code* because Parliament's intent was not to prohibit deceptive games;[106]

(b) the "three-card monte" exception in subsection 207(4) of the *Criminal Code* should be narrowly interpreted against a conclusion of criminality;[107] and

(c) the Court of Appeal's holding that the ultimate disposition of whether or not VLT games constitute a game "similar to three-card monte" was a question for expert evidence, renders criminal law impermissibly uncertain.[108]

89. While the Appellants describe the Court of Appeal's refusal to strike the *Code* alleged contraventions as having a profound impact on lottery operations in all provinces in which VLTs operate,[109] the Court of Appeal for Newfoundland and Labrador did not make any such determination. All the Court of Appeal for Newfoundland and Labrador found was that it was not in a position, without evidence, to find whether these particular VLTs games might constitute prohibited games, entirely unconnected to either chance or skill. Such games are the very mischief Parliament has long attempted to prevent.

90. The Court of Appeal for Newfoundland and Labrador merely found that it might be possible for these VLTs games to be sufficiently "similar" to three-card monte and thus fall within the prohibition of the *Code*. Expert evidence on the nature, effect and operation of VLTs will obviously be required before any court can make a final determination on the issue. For

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[105] Statement of Claim, at paras. 12, 14, 16, 26, 38, AJR, Tab 8.

[106] ALC Appellant's Factum at para. 110.

[107] VLC et al Appellants' Factum, at para. 109

[108] ALC Appellant's Factum, at para. 117.

[109] Memorandum of Argument of the Applicant on LTA, at para. 65.

example, are there hidden odds? How are VLTs programmed to give impressions of the odds? What are the prize structures? How volatile are the games? Are the games deceptive? Other questions may also need to be answered.

(a) *The Statutory Scheme Governing Lottery Games and Three-Card Monte*

91. The Appellants urge upon this Court a highly technical approach to statutory interpretation which is fundamentally inconsistent with any modern (or common sense) approach. The Appellants' statutory interpretation argument was aptly summarized below as the following:

> (i) the "appellant acknowledges that section 207 of the *Code* which sets out certain exemptions to the offences listed in section 206 (and thereby allows provincial governments to license lottery schemes) does not, in section 207(4)(a) extend to 'three-card monte'";
>
> (ii) "three-card monte cannot be licensed provincially";
>
> (iii) but the Appellant asserts that "the reference in section 207 does not go on to refer to three-card monte 'and any other game that is similar to it' as contained in the definition in section 206"; and
>
> (iv) the Appellant emphasizes that the definition in section 206 is restricted only to that particular section which does not inform the three-card monte exception in the next provision which is section 207.[110]

92. In essence, the Appellants ask this Court to disregard the section 206 definition of "three-card monte" as having no application or effect on the interpretation of the same term in subsection 207(4)(a). If the Appellants' argument is rejected, the Appellants' appeal regarding the claim regarding the *Criminal Code* pleading necessarily fails.

93. In other words, the Appellants' only path to success on striking the claim regarding the *Criminal Code* is to convince this Court that the definition of "three-card monte" in section 206(2) does not also apply to section 207. In support of this proposition, the Appellants argue that there is no indication either in section 207 or anywhere else in the *Criminal Code* that the "extended" definition of "three-card monte" that is found in subsection 206(2) is intended to

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[110] *Atlantic*, at para. 215, AJR, Tab 5.

apply to the meaning "three-card monte" as used in section 207. Rather, the Appellants suggest there is no direction or assistance to guide the interpretation of "three-card monte" in section 207 by reference to any other parts or sections of the *Criminal Code*, not even the provision immediately preceding it.

94. However, to adopt such reasoning would defy all rules of statutory interpretation, including the most basic notions of harmoniousness and consistency of terminology within a statute. This principle of internal statutory coherence is a basic presumption in Canadian jurisprudence. The principle is that a statute is internally coherent and consistent as between **all** of its provisions:

> "It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework. … **The presumption of coherence is virtually irrebuttable.**"[111] [emphasis added]

95. This interpretive presumption is so strong that this Court has even applied it as between related (but different) statutes dealing with the same subject matter.[112] Accordingly, the presumption of coherence applies with even greater force to provisions contained within the very same statute on the very same page.[113]

96. The better question for the Appellants is this: why would the same definition of "three-card monte" **not** apply throughout the entire *Criminal Code*? After all, this Court has consistently found that the prevailing modern approach to statutory interpretation in Canada requires that "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".[114]

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[111] R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) at 176 [RBA, Tab 6].

[112] *R. v. Ulybel Enterprises*, [2001] 2 S.C.R. 867 at paras. 30, 52,

[113] *Charlebois v. The City of Saint John*, 2004 NBCA 49 at para. 44

[114] *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21 [emphasis added], citing E.A. Driedger, *The Constructions of Statutes*, 2nd ed. (Toronto:Butterworks, 1983) at 87

97. The Court of Appeal for Newfoundland and Labrador properly rejected the Appellants' argument based on these very fundamental and settled precepts of statutory interpretation, holding that:

> "… it is more likely that Parliament would be presumed to use the term [three-card monte] consistently throughout the legislation unless there is a clear indication to the contrary. Indeed, the language used in section 207(4), which carves out three-card monte from permitted provincially-authorised lottery schemes, refers to the various games 'described in any of paragraphs 206(1)(a) to (g)', which includes three-card monte, and which, as noted, is defined in extended terms in that section. **The extended definition in section 206 can therefore be said to have been incorporated by reference into section 207 in any event**."[115] [emphasis added]

98. The *Criminal Code's* section 206 broadly prohibits lotteries, gambling, gaming, slot machines and video devices used for gambling, making it an offence for any person who:

> 206 (1)(g) induces any person to stake or hazard any money or other valuable property or thing on the result of any dice game, three-care monte, punch board, coin table or on the operation of a wheel of fortune.
>
> ….
>
> 206 (2) In this section, "three-card monte" means the game commonly known as three-care monte and includes any other game that is similar to it, whether or not the game is played with cards and notwithstanding the number of cards or other things that are used for the purpose of playing.[116] [emphasis added]

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

> 207(1) Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful,
>
> (a) for the government of a province, either alone or in conjunction with the government of another province, to conduct and manage a lottery scheme in that province, in that and the other province, in accordance with any law enacted by the legislature of that province;
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> …

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[115] *Atlantic*, at para. 216, AJR, Tab 5.

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

> 207(4) In this section, "lottery scheme" means a game or any proposal, scheme, plan, means, device, contrivance or operation described in any of paragraphs 206(1)(a) to (g), whether or not it involves betting, pool selling or a pool system or betting other than.
>
> (a) three-card monte, punch board or coin table. [emphasis added]

100. Accordingly, even if the Appellants are the lawful delegate of the Province for the purposes of section 207(1), it is nevertheless still prohibited from operating or managing games involving three-card monte, including any other game that is similar to it. This is the case whether or not the game is played with cards, as stated in the section 206(2) statutory definition of "three-card monte".

101. Once the Appellants' argument urging a narrower definition of "three-card monte" in subsection 207(4) than in subsection 206(2) is rejected, the only question remaining is whether VLT games are sufficiently "similar" to three-card monte and therefore fall within the prohibition. That is a question of fact to be determined on a full record.

102. Sufficient factual similarity has been pleaded in order to pass the reasonable cause of action threshold. The actual merits are to be determined on that question mainly by expert evidence. Whether the Appellants contravened the *Criminal Code* will eventually turn entirely on whether or not video lottery terminals are "similar" to three-card monte, a pure question of fact and one that has been properly and fulsomely pleaded in this case.[117]

103. As a matter of law, the jurisprudence confirms that under section 206(1)(g) of the *Criminal Code*, a game need not be identical in order to fall within the prohibition: it is sufficient if a game shares some of the same fundamental characteristics or "bears some resemblance" to one of the named prohibited games.[118] This approach, adopted below, is also consistent with fundamental principles of statutory interpretation.

104. The definition of "three-card monte" in the *Criminal Code* is decidedly broad and indicates an intention to take into account advances in technology and games which are

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[117] Statement of Claim, at para. 38, AJR, Tab 8.

[118] *R. v. Andrews*, [1975] S.J. No. 406 (C.A.) at paras. 12–13.

"similar", whether or not they include a deck of cards. In fact, the provision expressly states that "three-card monte" includes similar such games, "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".[119] Any other interpretation would frustrate the legislative intent as it is clear the mischief to be prevented is not restricted to actual, physical card games.

105. The Statement of Claim pleads, with sufficient particularity, how VLTs are "similar" or "bear some resemblance" to three-card monte. That is all the Respondents are obliged to do as this stage of the proceeding. The statement of claim includes, amongst other things, the following allegations:

> 12. VLTs are a form of continuous electronic gaming which differs from lotteries in that they are electronically programmed to create cognitive distortions of the perception of winning, which cognitive distortions are intended to keep the consumer engaged and losing money. […]
>
> 14. Unlike other regulated gambling games, such as lotteries, where the odds of winning any and every prize are disclosed or easily determined, VLTs have hidden odds of the games, and players are left guessing about their chances of winning any and all prizes, whether video poker VLT games or line games. Line VLTs exploit hidden odds, in that VLTs have asymmetric virtual reels that are programmed to weight the distribution of symbols across the reels differently so that the visual reels that the player interacts with give a false impression of the odds of winning. Both poker and line VLTs are deceptive in that both the rules of the game and the odds of winning are hidden. […]
>
> 16. The difficulty of figuring out the odds is augmented by the variable prize structures used by VLTs and the resulting volatility of the games. The experience of this volatility and changing odds from non-linear payables makes it impossible for the player to determine, with any accuracy, the true odds of winning during any given play session. […]
>
> 26. VLTs are so programmed, fixed and manipulative that they do not fit any reasonable definition of "slot machine", "fair game of chance" or the definition of "lottery scheme" in s. 207(4) of the *Criminal Code of Canada.* They more closely resemble sleight-of-hand trickery such as three-card monte, outlawed by the *Criminal Code*. […]
>
> 38. The Plaintiffs also plead that VLTs are not lotteries or games of chance within the meaning of the *Criminal Code*. Rather, they are so unconnected with

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

> chance or skill and so manipulatives and deceptive as to fall within the prohibition against "three-card monte", and any other game of trickery and sleight-of-hand that is similar to it, contained in s. 206(1) (g) of the *Code*. Consequently, the Defendant's conduct and management of VLTs is not a permitted lottery pursuant to s. 207(1) of the *Criminal Code*, and is not authorized by the *Code*.[120]

ii. Principle On Ambiguity That "Tie Goes to Accused" Does Not Apply On Pleadings Motions

106. The Appellants also argue that the definition of "three-card monte" ought to be interpreted as narrowly as possible in keeping with the principle that "ambiguity is to be interpreted against a conclusion of criminality".[121] In the context of this appeal, that interpretive principle ought to be disregarded as having no bearing on a motion to strike in a civil proceeding.

107. There is no doubt in law that if there are two equal competing interpretations of a criminal provision which affect the liberty of a subject, the one more favourable to the accused ought to be adopted.[122] But that proposition applies to the merits or trial of a criminally accused, where his liberty is at stake.[123] For the purposes of this appeal, the opposite rule applies: if there are two reasonable interpretations, and the plaintiff *might possibly* succeed on one of those interpretations, the claim cannot be struck at the pleadings stage.

108. The Court of Appeal for Newfoundland and Labrador agreed with the Respondents' position on this point, finding:

> "Whatever may be the merit of construing a criminal provision strictly in a criminal trial to protect the liberty of the subject, that approach is not apposite here. The issue on this application to strike or to certify a class action is whether, assuming the allegations to be true, it can be said there is no realistic possibility of succeeding in the claim. **That involves, at this stage, giving the benefit of the doubt to the claimants unless it is clear that the claim is doomed to fail**."[124] [emphasis added]

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[120] Statement of Claim, at paras. 12, 14, 16, 26, 38, AJR, Tab 8.

[121] VLC et al Appellants' Memorandum of Fact & Law, at para. 109.

[122] *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 31.

[123] *Marcotte v. Canada (Deputy Attorney General)*, [1976] 1 S.C.R. 108 at p. 115, as cited in *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 29.

[124] *Atlantic*, at para. 204, AJR, Tab 5.

109. This approach makes sense in a case such as this. The Respondents do not suggest that a breach of the *Criminal Code* gives them a right to a cause of action *per se* but that such a breach could be relied upon as 'some evidence' to establish a cause of action in unjust enrichment.[125] Accordingly, the mischief to be avoided by the rule that any statutory ambiguities are to be interpreted in favour of the criminally accused to ensure the liberty of innocent individuals does not arise here.

iii. Expert Evidence Perfectly Appropriate To Establish A Question of Fact

110. The Appellants rely on the unassailable proposition that "there can be no crime or punishment except in accordance with law that is certain and unambiguous"[126] to argue that the Court of Appeal for Newfoundland and Labrador erred in holding that in order to determine whether the VLT games are sufficiently "similar" to three-card monte, it required expert evidence on the games' fundamental characteristics.

111. The principle of *nullum crimen sine lege, nulla poena sine lege* is certainly well-established but has no application here despite the Appellants' urgings. Nor is that principle inconsistent with this Court's holding that many elements of the *Criminal Code's* various offences rely on expert evidence to determine whether an offence was actually committed:[127] expert evidence "has an essential role to play in the criminal courts"[128] and may "help the court determine whether the elements are made out on the facts of a particular charge".[129] That is not disputed. That is precisely why a trial is required.

112. *A fortiori* in a case like the present where the elements of the offence turn entirely on determining whether one game is "similar" to another. As defined by the *Oxford Dictionary*,

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[125] *Atlantic*, at para. 225, AJR, Tab 5.

[126] ALC Appellant's Memorandum of Fact & Law, at para. 117.

[127] *R. v. Levkovic,* [2013] 2 S.C.R. 204 at para. 72

[128] *R. v. J.-L. J.*, [2000] 2 S.C.R. 600 at para. 25.

[129] *R. v. Levkovic,* [2013] 2 S.C.R. 204 at para. 73

"similar" is "of the same nature or kind; alike."[130] They need not be identical. Even if is there are physical differences, the VLT games at issue may still be considered "similar".

113. Reliance on dictionary or antiquated definitions of three-card monte from a century ago, as urged by the Appellants,[131] would be insufficient here because that approach:

> "… unnecessarily de-emphasizes the fact that the definition in the *Code* includes games 'similar' to three-card monte and pre-determines that similarity has to mean physical similarity, **not similarity in effect, without taking into consideration any advances in technology**."[132] [emphasis added]

114. Therefore, the courts below had no other legal conclusion available to them under these circumstances but to hold that:

> "In this case, the *Code* contains a definition of 'three-card monte', and in so doing, it uses the words 'or any other game that is similar to it, whether or not the game is played with cards…'. This is a broad definition, and invites evidence as to the characteristics of the impugned games as set out on the VLTs to determine whether they are, in fact, similar to 'three-card monte'. … The fact that one is electronic and the other uses physical cards is not sufficient to determine the question."[133] [emphasis added]

> "What is unclear is whether the similarity must be in relation to the methodology, including the ostensible rules of play and implements used or in relation only to the 'essence' of the game, ie. the mischief (a certain type of fraud or deception) to which the crime is directed. This is a matter of interpretation which should only be done against the backdrop of evidence as to what is commonly known as three-card monte and what the essential characteristics of the game can be considered to be. It is only then that one would be able to determine whether the pleaded facts (assuming proof at trial) of deception and false representations of fairness and legitimacy in the operation of VLTS fit a properly-interpreted extended definition of three-card monte."[134] [emphasis added]

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[130] *Canadian Oxford Dictionary*, 2nd Ed. (Don Mills: Oxford University Press, 2004) at p. 1449 [RBA, Tab 5].

[131] ALC Appellant's Memorandum of Fact & Law, at paras. 110 – 113.

[132] *Atlantic*, at para. 214, AJR, Tab 5.

[133] Reasons for Decision, dated October 1, 2014, at paras. 30 - 31, AJR, Tab 1.

[134] *Atlantic*, at para. 211, AJR, Tab 5.

115. This is entirely consistent with the use of expert evidence by courts across the country who are confronted with interpreting *Code* provisions, for example:

(i) the Supreme Court of Canada relied on expert evidence to determine whether accused's perceptions and actions were "reasonable";[135]

(ii) the Ontario Court of Appeal relied on expert evidence to determine meaning of "reasonable expectation" and "reasonable possibility";[136]

(iii) the Alberta Court of Appeal relied on expert evidence to determine whether a certain weapon was a "firearm";[137] and

(iv) the courts of first instance across Canada regularly rely on expert evidence to determine whether or not an individual has consumed in excess of the legal limit of alcohol to make out impaired driving offences, or similar medical evidence to determine whether an individual's conduct caused a victim's death in order to convict for homicide.[138]

116. As such, it was appropriate for the two courts below to hold that these alleged pleaded factual similarities were sufficient to *prima facie* meet the *Criminal Code's* requirement of "any other game similar to" as the statute purposefully does not require physical cards in order to meet the test of similarity.[139]

117. The threshold question of "similarity" can only be determined on a full evidentiary record. This is a far cry from any impermissible reliance on expert evidence for the purposes of statutory interpretation:

> "Expert evidence as to what is commonly known as, and the nature or essence of, three-card monte and what common characteristics exist that would make it similar to other games would be relevant to making the factual determinations of similarity."[140]

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[135] *R. v. Lavallee*, [1990] 1 S.C.R. 852

[136] *R. v. Lewis*, 2012 ONCA 78

[137] *R. v. Osiowy*, 1997 ABCA 50

[138] *R. v. Levkovic*, [2013] 2 S.C.R. 204 at para. 72

[139] *Babstock v. Atlantic Lottery Corporation Inc.- Société des loteries de l'Atlantique*, 2014 NLTD(G) 114 at para. 32, AJR, Tab 1.

[140] *Atlantic*, at para. 206, AJR, Tab 5.

118. The Appellants' reliance on judicial definitions of "three-card monte" from 1912 and 1920 respectively[141] do not assist in determining "similarities" of either effect, spirit or intention as between the games because they did not (and could not have) contemplated the vast technological advances over the last century in electronic video games. If only by virtue of their age, those decisions do not conclude the debate about what constitutes a game "similar" to three-card monte in the year 2019. Without evidence on the facts it is impossible to determine that it was plain and obvious that the Appellants were not operating a game "similar" to three-card monte, contrary to the statutory prohibition and the mischief it was aimed at preventing: deceptive games.

iv. Connection Between Code Breaches & Cause of Action In Unjust Enrichment

119. Contrary to the Appellants' assertions,[142] the Respondents do not advance a cause of action for *per se* breach of the *Code*, but rely upon the alleged breach in support of their claim for unjust enrichment.[143] The applications court judge recognized this and found that there was well-settled authority in support of such a plea:

> "The Plaintiffs say they have not pled breaches of the *Code* in order to seek relief on that ground alone. They argue that it is not breach of the *Code* itself which raises the private right. They allege that establishing that a breach exists may give rise to a private right based in contract or tort. For example, one of the causes of action is for unjust enrichment. They argue that restitutionary relief is available to strip an entity of profits gained through illegal activity."[144]

120. Similarly, the Court of Appeal for Newfoundland and Labrador rejected the Appellants' *Saskatchewan Wheat Pool* arguments (that breach of a statute does not give rise to a civil cause of action) and correctly appreciated the essential nature of the statement of claim:

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[141] Appellant ALC Factum at para. 116, relying on *The King v. The Governor of Brixton Prison,* [1912] 3 K.B. 568 at 570, Appellant's BOA, Tab 13 and *The King v. Rosen and Lavoie* (1920), 61 D.L.R. 500 (Que. C.A.) at 502 – 503.

[142] VLC et al Appellants' Memorandum of Fact & Law, at para. 110.

[143] Statement of Claim, at para. 60, AJR, Tab 8.

[144] Reasons for Decision, dated October 1, 2014, at para. 36, AJR, Tab 1.

> "The claimants are not advancing a cause of action based on a breach of the *Criminal Code per se*. Instead, they are relying on the existence of a crime to establish a wrong for which a potential disgorgement of profits may be available within the rules respecting unjust enrichment by wrongdoing. The cause of action is not solely the breach of statute (as it would be in a tortious claim of statutory breach, if such a claim had been allowed in *Saskatchewan Wheat Pool*), but on enrichment of the appellant as a direct result of the commissions of a wrong (in this case a crime)."[145]

121. There is ample appellate authority for the legal proposition that breaches of the *Code* may establish an entitlement to a restitutionary remedy like disgorgement by virtue of an unjust enrichment: *Bodnar v. The Cash Store Inc.,*[146] *Markson v. MBNA Canada Bank*[147] and *Garland v. Consumers' Gas Co.*[148] These authorities form the precedent for basing claims for restitutionary remedies on breaches of the criminal law, at least in circumstances where the enrichment has occurred as a result of a crime-induced financial deprivation of a plaintiff.[149]

122. The parties do not disagree on the prevailing legal test governing a cause of action for unjust enrichment:

> As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant, (2) a corresponding deprivation of the plaintiff, and (3) and absence of juristic reason for the enrichment.[150]

123. The Respondents have expressly pleaded each of the three (3) constituent elements.[151] The Appellants do not dispute that the first two components of the test have been properly pleaded.[152] They assert that the claim is certain to fail on the basis that there is a juristic reason

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[145] *Atlantic*, at para. 225, AJR, Tab 5.

[146] *Bodnar v. The Cash Store Inc.,* 2006 BCCA 260.

[147] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 59, leave to appeal to S.C.C. ref'd [2007] S.C.C.A. No. 346.

[148] *Garland v. Consumers' Gas Co.,* 2004 SCC 25 at para. 30.

[149] *Atlantic*, at para. 223, AJR, Tab 5.

[150] *Garland v. Consumers' Gas Co.,* 2004 SCC 25 at para. 30.

[151] Statement of Claim, at paras. 60, 61, AJR, Tab 8.

[152] Reasons for Decision, dated October 1, 2014, at para. 163, AJR, Tab 1:

for the enrichment – the contract under which the Respondents paid to play video lottery games.[153]

124. While a contract in some cases may constitute a juristic reason, here, the Appellants' argument is fatally flawed because if the contract at issue is later found, on the merits, to contravene the *Code*, the regulatory scheme or to be otherwise unenforceable, it cannot present a juristic reason in order to prevent a claim for unjust enrichment.

125. For example, the Court of Appeal for Ontario recently found it was an error of law for a motions judge to "not consider the possibility that the juristic reasons for the enrichment might be vitiated on the ground of unconscionability".[154] The Court of Appeal in this case referred to the same possibility: if a defendant induces a plaintiff to pay monies as the result of the commission of the tort of deceit, the plaintiff could establish a claim for unjust enrichment on the basis of payment under mistake, vitiating any purported juristic reason.[155]

126. The court at first instance reviewed the Supreme Court of Canada jurisprudence in *Garland*[156] and *Pacific National Investments*[157] and correctly held that "assuming the Plaintiffs prevail on these tests for juristic reason, if elements of unconscionability are present, this may

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> "There is no real disagreement in this case that money passed from the Plaintiffs to the Defendant. It is simply the price charges for playing the games. The Defendant raised a fine point that in paragraphs 60 and 61 of the Statement of Claim, there is no allegation of what the Plaintiffs have been deprived. However, the entire lottery scheme is predicated on the payment of a fee to play the games offered by the Defendant. Even if this is a gap in the Plaintiffs' claim, it can easily be resolved by the provision of particulars. In this case, I accept that the Plaintiffs have made out the first two steps of the inquiry – that of an enrichment and a corresponding deprivation. This is made out by the established tariff set by the Defendant and paid by the Plaintiffs to participate in games of chance, in this case, the VLTs, offered by the Defendant".

[153] VLC et al Appellants' Memorandum of Fact & Law, at paras. 122 – 123; ALC Appellant's Memorandum of Fact & Law, at para. 126.

[154] *Paton Estate v. Ontario Lottery & Gaming Corporation*, 2016 ONCA 458 at para. 23.

[155] *Atlantic*, at para. 233, AJR, Tab 5.

[156] *Garland v. Consumers' Gas Co.*, 2004 SCC 25.

[157] *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75 at paras. 23–25.

aid them in establishing their entitlement".[158] The elements of unconscionability have been properly particularized and pleaded in the Statement of Claim.[159] If a trier of fact were to determine that the Appellants acted unconscionably with respect to the Respondents, it is not plain and obvious that the claim in unjust enrichment would fail.

(a) *In This Case, The Contract Or Regulatory Regime Is Not, Ipso Facto, A Juristic Reason*

127. As a general principle, the existence of a legislative scheme purporting to govern the rights between the parties will not, *per se*, prevent a party from accessing remedies afforded by the doctrine of unjust enrichment.[160]

128. This Court has expressly held that "the question of whether the statutory framework can serve as a juristic reason depends on whether the provision is held to be inoperative".[161] Therefore, if the regime and implied contract under which the parties functioned is deemed to be invalid by virtue of unconscionability, fundamental breach or inoperative to the extent that the *Code* has been breached, there will be no juristic reason barring recovery. That can only be determined on a full evidentiary record.

129. In this way, the causes of action are inextricably connected and success on some for the Respondents could also mean success in unjust enrichment as a result. The courts below were properly alive to this possibility and explicitly addressed such an outcome:

> "…the Plaintiffs have alleged that the Defendant's regulated activity has been carried out in such a way as to offend a variety of legal requirements. They have alleged breaches of the *Code*, the federal *Competition Act*, that the Defendant has run afoul of *Queen Anne's Act, 1710*, and in addition, have alleged breach of contract and tortious activity, including unconscionability in the selection and provision of games provided on the VLTs. At the stage of a striking application, the Defendant must show that the Plaintiffs cannot prevail on any of these aspects of their cause of action. I am unable to make that determination, since they have

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[158] Reasons for Decision, dated October 1, 2014, at para. 171, AJR, Tab 1.

[159] Statement of Claim, paras. 48, 49, 50, 51, 55, 69, AJR, Tab 8.

[160] *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70.

[161] *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 51.

> alleged activity which, if proven, would likely not be protected by the provisions of the regulatory scheme."[162]

130. It was therefore correct to find that it is too early to definitively hold that the claim for unjust enrichment is impossible to make out on its face at this stage of the action. Rather, the ultimate success of this claim is best determined against a specific evidentiary mix following trial to "bring into focus whether the particular enrichment of the criminal could be considered, in all of the circumstances, unjust."[163]

(b) *Having Shown It Is Possible To Find No Juristic Reason, Burden Shifts To Appellants To Establish Valid Reason To Justify The Enrichment*

131. The applications court judge correctly followed the two-step analysis with respect to establishing a juristic reason enumerated by this Court in *Pacific National Investments*.[164] Having first considered that it would be **possible** for the Respondents to show a lack of juristic reason for the enrichment, Justice Faour directed himself to the proper question: "the Defendant is now required to convince me that there is another valid reason which can justify enrichment. It has cited the "regulated industries" defence as its main argument."[165]

132. The applications judge relied heavily on *Garland v. Consumers' Gas* for the proposition that it is possible for the Appellants to avail itself of the "regulated industries defence" to bar recovery in restitution but "in order to exempt acts taken pursuant to a provincial regulatory body from the reach of the criminal law, Parliament must unequivocally express this intention in the legislative provision in issue".[166]

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[162] Reasons for Decision, dated October 1, 2014, at para. 182, AJR, Tab 1; Atlantic, at paras. 230 – 232, AJR, Tab 5.

[163] *Atlantic*, at para. 229, AJR, Tab 5.

[164] Reasons for Decision, dated October 1, 2014, at paras. 170 – 181, AJR, Tab 1.

[165] Reasons for Decision, dated October 1, 2014, at para. 178, AJR, Tab 1.

[166] *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 78, Reasons for Decision, dated October 1, 2014, at para. 180, AJR, Tab 1.

133. Turning his mind to this finer point, the applications judge ultimately found that: "while the Defendant is authorized to provide games of chance through VLTs, there is no authorization to either intentionally or negligently provide games that are harmful".[167]

134. As such, this defence *might* be available if the Appellants are found, on a full evidentiary record, not to have intentionally or negligently provided harmful or deceitful games. The "regulated industries defence" is only available once a trial judge makes findings of fact on the other allegations. It is only then that a court can determine, as a matter of law, whether or not the conduct fell within the purview of the regulatory scheme.

135. Lastly, this Court ought to remain mindful of the public policy considerations that it has previously embedded into claims for unjust enrichment:

> "…the overriding public policy consideration in this case is the fact that the LPPS were collected in contravention of the *Criminal Code*. As a matter of public policy, a criminal should not be permitted to keep the proceeds of his crime. … Where a defendant has obtained the enrichment through some wrongdoing on his own, he cannot then assert that it would be unjust to return the enrichment to the plaintiff."[168] [emphasis added]

136. The holding below on unjust enrichment is consistent with this admonition.

E. Certification As A Class Proceeding Was Properly Granted

(a) Appellants Have Not Identified Any Error Of Principle On Certification & Mischaracterize the Nature of the Certified Claim

137. Only the VLC Appellants have addressed the issue of certification on this appeal.[169] Essentially they argue that certification ought to have been denied because: (a) there is no way to identify the players; (b) the class members are not identical; (c) the question of whether a person

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[167] Reasons for Decision, dated October 1, 2014, at para. 182, AJR, Tab 1.

[168] *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at paras. 57, 65.

[169] VLC et al Appellants' Memorandum of Fact & Law, at paras. 133 – 138.

became a problem gambler requires individual determination; and (d) the amount of each player's loss would require individual determinations.[170]

138. Not only does this approach fundamentally misapprehend the claim at issue, nowhere in the Appellants' submissions is an error of principle identified. The starting point for any review of a certification order is to identify the correct standard of review. Certification is, in essence, an inquiry into whether there is "some basis in fact" to satisfy the remaining statutory components beyond a reasonable cause of action.[171] These are, by definition, questions of mixed fact and law that cannot be reversed or disturbed unless the court below made a palpable and overriding error in the exercise of its discretion.[172] No such error was made here.

139. There is no dispute in law that the applicable standard of review of a certification order (but for the cause of action component) is one of considerable deference:

> "They [certification judges] cannot be reversed absent a palpable and overriding error, unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of a legal standard or its application, in which case the error may amount to an error in law and the applicable standard of review is correctness."[173] [emphasis added]

140. The Appellants have failed to satisfy this threshold issue which would warrant further appellate review of the certification order. Instead of identifying any alleged error in principle, the Appellants simply re-argue their same primary objection to certification (for the fifth time) by claiming that the action is just too complicated to be prosecuted in common. This is assuredly not the role of this Court to determine.

141. However, this same approach was rejected by both the court at first instance and the Court of Appeal for Newfoundland and Labrador, which described the Appellants' position on certification as a failure to appreciate the true nature of this claim:

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[170] VLC et al Appellants' Memorandum of Fact & Law, at paras. 134, 135 & 137.

[171] *Class Actions Act*, S.N.L. 2001, c. C-18.1, s. 5(1).

[172] *Dow Chemical Company v. Ring, Sr*, 2010 NLCA 20 at paras. 7–8, leave to appeal to S.C.C. ref'd [2010] S.C.C.A. No. 187.

[173] *Canada (Attorney General) v. Anderson*, 2011 NLCA 82 at para. 38.

> "…the objections of the Defendant and the Third Parties **do not address the action as framed**. They have responded on the assumption that the Plaintiffs are claiming damages for injury or harm. They are not, so individual actions would not serve the goals of the Act. … In the absence of a claim for harm, the Plaintiffs only have to prove there was deception, either deliberate or inadvertent…"[174]

142. The deliberate denial of the action as currently framed by the Respondents is woven throughout the Appellants' submissions: that there is no duty of care to protect persons from gambling losses or to prevent compulsive gambling, their claim that certification is unworkable because only a small percentage of people become problem gamblers.[175] None of these claims are made by the Respondents. The Appellants have set up a "straw man action" by describing the claim in this fashion, only to tear it down by saying such a case is unsuitable for certification.

143. Like the Court of Appeal, this Court ought to reject such misleading characterizations of the nature of the claim and insist that the Appellants identify an error of principle in the certification analysis below. The following applies with equal force on this appeal:

> "The argument of the appellant on these aspects of the appeal [certification] amount in essence to an attempt to reargue the factual and discretionary issues decided by the applications judge. No palpable or overriding error, nor any error in principle, has been demonstrated. I am not persuaded that the judge erred in reaching his conclusions; **given the characterization of the claims in this case** as ones for disgorgement of unjust enrichment gained from wrongdoing. **As framed, the common issues are not specific to any one alleged victim but to a class of victims as a group**."[176] [emphasis added]

144. This is a sound finding given that the heart of the common inquiry at trial would turn entirely on whether or not the Appellants engaged in deception. This determination will apply to all members of the class.[177] As the statutory criteria for certification are conditions which require the court at first instance to exercise "substantial discretion in making a determination, there is an enhanced level of deference in the context of an appeal".[178]

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[174] Faour J. decision, at para. 131, AJR, Tab 3.

[175] VLC et al Appellants' Memorandum of Fact & Law, at paras. 94 – 107, 135 – 137.

[176] *Atlantic*, at para. 253, AJR, Tab 5.

[177] Faour J. Decision at first instance, at para. 134, AJR, Tab 3.

[178] *Davis v. Canada (Attorney General)*, 2008 NLCA 49 at para. 23.

(b) *In Any Event, The Certification Decision Is Consistent With This Court's Jurisprudence*

145. ***Section 5(1) (b) Identifiable Class***. The applications judge properly certified this class definition because it (a) identifies members of the proposed class by objective criteria; and (b) is not dependent on the outcome of the litigation.[179] There is certainly no statutory or judicial requirement that every class member be named or known at this stage. In fact, the *Newfoundland and Labrador Class Actions Act* says the opposite. Given that the class definition here is a "pay to play" definition, there is some basis in fact to support this objective definition.[180]

146. While the Appellants criticize the class definition on the basis that it is "indeterminate" as there is "no conceivable way to verify who the class members are",[181] this objection is entirely misplaced for two reasons. Firstly, the reliance on *Imperial Tobacco* for the assertion that "indeterminate" class definitions are prohibited is incorrect.[182] *Imperial Tobacco* stands for the proposition that no private law duty of care can said to be owed to an indeterminate class of persons in an *Anns* duty of care analysis. That holding has nothing to do with the appropriate parameters of a class definition on certification pursuant to provincial class actions legislation.

147. Secondly, the notion that the identifiable class requirement can only be satisfied by a class definition which lends itself to verifying the identity of every single class members is wrong in law. Section 8(d) of the *Class Actions Act* specifically states that a court shall not refuse

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[179] *Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534 at para. 38.

[180] Affidavit of Dr. Harrigan, sworn August 16, 2012, at para. 13 [Record of Respondent ("RR"; Tab 2];Affidavit of D. Babstock, sworn August 27, 2012, at paras. 3, 4 [RR, Tab 3]; Affidavit of F. Small, sworn September 7, at paras. 3, 4 [RR, Tab 4].

Moreover, the 'numerosity' requirement urged by the Appellant enjoys no statutory or judicial authority. This type of requirement has been rejected as applicable to the 'identifiable class' requirement on the basis that it would be "problematic [for] for the court to vigorously impose numerosity as a precondition to the certification of a class action, [as] one can anticipate that plaintiffs and defendants will, practically speaking, conduct campaigns for supporters or opponents to certification": *Magill v. Expedia Inc.*, 2013 ONSC 683 at para. 133.

[181] VLC et al Appellants' Memorandum of Fact & Law, at para. 134.

[182] VLC et al Appellants' Memorandum of Fact & Law, at footnote 122, pg. 38.

to certify a class proceeding on the basis that "the number of class members or the identity of each class member is not determined or may not be determined".[183]

148. The class definition certified below[184] properly bears a rational connection to the common issues as all class members claim breach of the *Code*, breach of contract, tortious acts and that the Appellants were unjustly enriched as a result. There is no principled reason to interfere with the application judge's findings in this respect. The Appellants have identified no error in principle.

149. ***Section 5(1) (c) Commonality***. The applications judge certified nine common issues below.[185] Section 5(1) (c) of the *Class Actions Act* requires that the action raise common issues of either fact or law. Those "common" issues need not be wholly determinative of liability nor even form the dominant issues in the litigation. Rather, the common issues criteria "focuses on what is rather than on what is left or what should be. Simply put, are there one or more common issues, the resolution of which would be the same for each class members' claim?"[186]

150. The Appellants insist, without more, that any "common issue are negligible in relation to the individual issues" and would inevitably "break down into an individualistic determination", searching for the reasons behind a class member's gambling addiction.[187] This *in terrorem* prediction would only be correct if personal injury damages were being sought or if the action turned on how individual class members were induced into playing the VLTs. That is not the claim in this action.

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[183] section 8(d), *Class Actions Act*, SNL 2001 Chap. C-18.1.

[184] Order of Justice Faour, dated February 1, 2017 [RR, Tab 1]:

> "Natural persons and their estate, resident in Newfoundland and Labrador, who, during the Class Period, paid the Defendant to gamble on VLT games, excluding video poker games and keno games, in Newfoundland and Labrador.
>
> The Class Period is the period from six years before the bringing on this action, up to the opt-out date set by the Court in this Action."

[185] Order of Justice Faour, dated February 1, 2017 [RR, Tab 1].

[186] *Canada (Attorney General) v. Anderson,* 2011 NLCA 82 at para. 111.

[187] VLC et al Appellants' Memorandum of Fact & Law, at para. 137; *Atlantic*, at para. 249, AJR, Tab 5.

151. As described *supra*, the Appellants are simply describing the action in any fashion they wish instead of meeting the case before them. A "core of commonality either exists on the record or it does not. The common issues are derived from the facts and from the issues of law arising from the causes of action asserted by class members and not the other way around."[188]

152. As this case turns solely on whether or not the Appellants breached certain duties and statutes by marketing, offering and profiting from deceptive games, none of the individual issues raised by the Appellants will come into play. While the Appellants argued the same aspects of commonality at the appeal, the Court of Appeal for Newfoundland and Labrador examined the decision at first instance and confirmed that commonality existed on the record. Noting that common issues do not have to be the 'dominant' or 'prevailing' issues, these common issues:

> "are framed with sufficient specificity; some are framed in broad terms, but it is the nature of this litigation, where the Plaintiffs seek an aggregate remedy and do not claim individual injury, that the questions will of necessity be broad. In my view, these questions are not so general that addressing them will not cause the action to break down into individual proceedings."[189]

153. Because the certified common issues all relate to whether (a) the Appellants breached a duty or the *Code*; (b) VLTs are similar to "three card monte"; or (c) questions of law such as the availability of aggregate damages, each of these issues' determination affect all class members. There can be no dispute that the common issues respecting the Appellants' legal obligations, duties and any concomitant breach are far from negligible when viewed in the context of the case as a whole.[190]

154. ***Section 5(1) (d) Preferable Procedure***. This Court has confirmed that the preferability analysis is a decidedly comparative exercise with the ultimate question being "whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals".[191] From a legislative policy perspective, the preferability analysis ought to be reviewed by this Honourable Court with the following in mind, articulated by the Court of

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[188] *McCracken v. Canadian National Railway*, 2012 ONCA 445, at para. 132.

[189] *Atlantic*, at para. 250, relying on Faour J. Decision, at para. 122, AJR, Tab 3.

[190] *Gay v. Regional Health Authority*, 2014 NBCA 10 at para. 114.

[191] *AIC Limited v. Fischer*, 2013 SCC 69 at para. 23.

Appeal for Ontario as part of its preferability determination in *Markson*: "the concern should be whether the defendant is acting in accordance with the law".[192] This aspect of the certification test has also been judicially recognized as the most discretionary component of the certification test, attracting "special deference because it involves the weighing and balancing of a number of factors".[193]

155. A class proceeding was deemed the preferred means by which to advance these claims because:

> "Given the absence of a need for evidence on an individual basis, and the ability to assess damages on an aggregate restitutionary basis using statistical evidence, it is submitted that the action is ideally suited to the class actions' regime. … If the allegations in the Statement of Claim are made out, it seems to me that the only practical manner to have these issues adjudicated is by a class action. If there is merit in the claim, then there is no better way to achieve the objectives of deterrence and behaviour modification than by having the issues raised properly adjudicated through this procedure."[194] [emphasis added]

156. Many of the identical arguments against preferability made by the Appellants in this case were already rejected by the Court of Appeal for Ontario in *Markson v. MBNA Canada Bank.*[195] *Markson* also involved thousands of unknown class members, alleged breaches of the *Code* and a common issue for aggregate damages on a restitutionary or disgorgement basis. Despite all of the same assertions to defeat a preferability finding there, the Court of Appeal for Ontario determined that:

> "The only significant result of refusing to allow this action to go forward as a class proceeding but permitting the plaintiff to pursue his individual action is that the defendant, even if found to have violated the *Criminal Code* and breached its contract with its customers, will not be required to disgorge the illegal profit. In the result, customers will not only lose the options referred to by the motion

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[192] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 59, leave to appeal to S.C.C. ref'd [2007] S.C.C.A. No. 346.

[193] *AIC Limited v. Fischer*, 2013 SCC 69 at para. 65.

[194] Reasons for Decision, dated December 30, 2016, at paras. 128, 130, AJR, Tab 3.

[195] *Markson v. MBNA Canada Bank*, 2007 ONCA 334, leave to appeal to S.C.C. ref'd [2007] S.C.C.A. No. 346.

> judge, but they will also receive no recompense for past illegal acts by the defendant. In my view, this is not a reasonable result."[196] [emphasis added]

157. As such, the Court of Appeal's highly discretionary finding regarding preferability in this case reveals no error of principle. As the Supreme Court of Canada found in *Pro-Sys*, "if the class action does not proceed, the objectives of deterrence and behaviour modification will not be addressed at all … the class action is not only the preferable procedure but the only procedure available".[197]

158. In fact, this Court ought to ask itself, if not for a class proceeding, how would these issues of law ever be determined to ensure that the Appellants, if acting wrongfully, are not permitted to retain its ill-gotten gains? Like *Markson*, without a class proceeding, the Appellants would not be required to disgorge its illegal profits, yielding an unconscionable result.

F. Conclusion: There's Nothing New Under the Sun

159. The essence of this case is simple: the Court of Appeal decided that the Respondents' action deserves a chance to be heard on its merits. The Appellants may disagree, but they have failed to identify any error of principle in the decision to certify this matter. Moreover, the Court of Appeal's decision is consistent with this Honourable Court's jurisprudence respecting class certification.

160. Notwithstanding their assertions, the Respondents' claim for breach of contract is not doomed to failure – moreover, on the appropriate applicable analysis (i.e. whether the matter should proceed to determination of the issues on the merits) – the Respondent has amply satisfied the test.

161. There is, in fact, a reasonable possibility that the Appellants' games are similar to "three-card monte". As such, this Honourable Court should dismiss the Appellants' appeal.

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[196] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 68, leave to appeal to S.C.C. ref'd [2007] S.C.C.A. No. 346.

[197] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 141.

162. No “new” cause of action was approved by the Court of Appeal below. The analysis follows from well-established legal principles which are (and should be) available to Courts in these circumstances and certification in this case was properly granted. It should now be permitted to proceed to adjudication on its merits.

163. With respect, the Appellants’ position defies this Honourable Court’s commitment to the principle of access to justice in the Canadian legal system. It must be remembered that, at its core, the underlying action turns on

(a) whether the Appellants (while presumably engaged on behalf of the public interest) presented and operated VLC games which were inherently deceptive; and

(b) whether it concealed the deceptive nature of those game from Canadians.

164. The Respondents’ assert that the Appellants were unjustly enriched, that they gained by the commission of a wrong against the Canadian public, and that, following a trial on the merits, this can and should lead to restitutionary remedies or disgorgement.

165. While the theory of the Respondents’ case may be uncommon, it is submitted that these are uncommon circumstances. Respectfully, the law should be capable of adapting so as to ensure justice is done in every justiciable scenario. In this case, however, such adaptation is hardly needed. The Respondents’ position is anchored in traditional concepts of restitution, settled principles of damages, and voluminous academic consideration on the point.

166. The Court below was obliged to permit claims with a possibility of success to proceed, regardless of any perception of novelty or uniqueness. While it may be that restitutionary damages for wrongdoing are infrequently utilized as compared to "old fashioned" compensatory damages, this Honourable Court should affirm that this is not the same thing as saying there is no cause of action.

PART IV - SUBMISSIONS IN SUPPORT OF COSTS

167. The Respondents requests their costs of this appeal.

PART V - ORDER SOUGHT

168. The Respondents respectfully requests that this appeal be dismissed, with costs of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 11th day of October 2019

Kirk Baert
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PART VI - SUBMISSIONS ON CASE SENSITIVITY

169. Not Applicable

PART VII - TABLE OF AUTHORITIES

CASES **AT PARAGRAPH(S)**

Other

LEGISLATION