IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Atlantic Lottery Corporation Inc.-Société des loteries de l'Atlantique v. Babstock*, 2018 NLCA 71
Date: December 10, 2018
Docket Numbers: 201401H0081, 201701H0007, 201701H0013 & 201701H0021

BETWEEN:

ATLANTIC LOTTERY CORPORATION INC.
- SOCIÉTÉ DES LOTERIES DE L'ATLANTIQUE APPELLANT

AND:

DOUGLAS BABSTOCK AND FRED SMALL
FIRST RESPONDENTS

AND:

VLC, INC. SECOND RESPONDENT

AND:

IGT-CANADA INC. THIRD RESPONDENT

AND:

INTERNATIONAL GAME TECHNOLOGY
FOURTH RESPONDENT

AND:

SPIELO INTERNATIONAL CANADA ULC
FIFTH RESPONDENT

AND:

GTECH CORPORATION SIXTH RESPONDENT

AND:

TECH LINK INTERNATIONAL ENTERTAINMENT LIMITED
SEVENTH RESPONDENT

AND:

HI-TECH GAMING.COM LTD. EIGHTH RESPONDENT

AND:

BALLY GAMING CANADA LTD. AND BALLY GAMING INC. NINTH RESPONDENTS/ CROSS-APPELLANTS

Coram: Green C.J.N.L.*, Welsh and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201201G2257
(2014 NLTD(G) 114 & 2016 NLTD(G) 216)

Appeal Heard: October 23, 24 and 25, 2017
Judgment Rendered: December 10, 2018

Dissenting in Part and in the Result: Welsh J.A.
Reasons for Judgment by: Green J.A.
Concurred in by: Harrington J.A.

Corrected decision: The style of cause and the title pages of the original judgment were corrected on January 22, 2019. A description of the correction is appended.

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*** Following the hearing of this appeal, Green C.J.N.L. resigned as Chief Justice on December 1, 2017 but continues to sit as a supernumerary judge.**

Welsh J.A. (Dissenting in Part and in the Result):

[1] Certification as a class action was granted to applicants who, as a class, are seeking civil remedies based on claims that video lottery terminals ("VLT") authorized by the Atlantic Lottery Corporation Inc. are inherently deceptive, that they breach the *Criminal Code*, the *Competition Act* and the *Statute of Anne (Gaming Act) 1710*, and that they constitute a breach of contract and tortious misconduct with resulting unjust enrichment.

[2] The Lottery Corporation applies for leave to appeal and, if granted, appeals the order certifying the class action. An earlier interlocutory decision by the applications judge dismissing the Lottery Corporation's application to strike all or portions of the statement of claim is also considered in the appeal.

BACKGROUND

[3] The certification order made on February 1, 2017, pursuant to section 25 of the *Class Actions Act*, SNL 2001, c. C-18.1, defines the class members, the class period, the nature of the claims, the nature of the relief sought, and the common issues:

> 2. The Class is hereby defined as:
>
> Natural persons and their estates, resident in Newfoundland and Labrador, who, during the Class Period, paid the [Lottery Corporation] to gamble on VLT games, excluding video poker games and keno games, in Newfoundland and Labrador, excluding directors, officers and employees of the [Lottery Corporation].

3. The Class Period is hereby defined as the period … from April 26, 2006, up to the opt-out date to be set by the Court.

4. The nature of the claims asserted by the [class members] is:

(a) The [class members] claim that video lottery line games offered by the [Lottery Corporation] in Newfoundland and Labrador during the class period are inherently deceptive,

(b) The [class members] allege breaches of the *Criminal Code*, the *Competition Act* and the *Statute of Anne (Gaming Act) 1710*; unjust enrichment; and breaches of duty owed in either contract or tort,

(c) The [class members] claim entitlement to a restitutionary remedy for the class without proof of reliance or individual harm. The [class members] do not claim individual damages.

5. The nature of relief sought by the class is:

(a) an order declaring that the [Lottery Corporation's] conduct or management of VLT's is not a permitted lottery and is not authorized pursuant to s. 207(1) of the *Criminal Code*;

(b) an order for an aggregate monetary award pursuant to s. 29 of the *Class Actions Act*;

(c) an accounting for and disgorgement of profits or revenues, or a constructive trust over same;

(d) damages equal to the total unlawful gain obtained by the [Lottery Corporation] from class members;

(e) an order directing the [Lottery Corporation] to pay an amount equal to the loss or damage proved to have been suffered because of the breach of the *Competition Act* plus an amount equal to the full cost of any investigation of the matter and of proceedings under s. 36;

(f) exemplary or punitive damages;

(g) treble the loss or damage pursuant to the *Statute of Anne*;

(h) a declaration or injunction restraining the [Lottery Corporation] from continuing the unconstitutional act or practice; and

(i) a declaration or injunction restraining the [Lottery Corporation] from conduct contrary to s. 52(1) of the *Competition Act*.

> 5. The common issues are hereby defined as:
>
> (a) Does the *Criminal Code* authorize the operation of video lotteries by siteholders, in view of s. 206(1)(g) which prohibits games similar to "three card monte"?
>
> (b) Does the *Criminal Code* authorize the operation of video lotteries by siteholders, in view of s. 201, which prohibits keeping a common gaming house?
>
> (c) Has the [Lottery Corporation] been unjustly enriched?
>
> (d) Has the [Lottery Corporation] breached s. 52 of the *Competition Act*?
>
> (e) Has the [Lottery Corporation] breached a duty owed in contract or tort?
>
> (f) Can monetary relief be measured on an aggregate, class-wide basis and, if so, what is the amount of aggregate monetary relief?
>
> (g) If the answer to issue (f) is no, can loss or damage be measured by the gain to the [Lottery Corporation], and if so, what is the appropriate restitutionary remedy and in what amount?
>
> (h) Has the [Lottery Corporation] breached provisions of the *Statute of Anne*, and should the remedy of treble damages be granted, and if so, what is the appropriate amount?
>
> (i) Should punitive or exemplary damages be awarded against the [Lottery Corporation] and, if so, in what amount?
>
> Common issues (f), (g), (h) and (i) are to be determined only if a finding has been made that the [Lottery Corporation] is liable to the [class members].

[4] Prior to the certification order being granted, the applications judge dismissed an application by the Lottery Corporation to strike all or portions of the statement of claim. That order may be appealed without leave of the Court (rule 35 of the *Court of Appeal Rules*, NLR 38/16).

ISSUES

[5] Upon a determination that leave to appeal should be granted, the issues raised by the appeal relate to whether the pleadings disclose a cause of action as required under the *Class Actions Act*. Common issues under consideration are: (1) whether the VLT games are prohibited by the *Criminal Code* based on (a) the prohibition against three-card monte games, or (b) the creation of common gaming houses; (2) application of the *Statute of Anne*; (3) application of the

Competition Act; (4) breach of contract or an action in tort; (5) unjust enrichment; and (6) the application of waiver of tort.

ANALYSIS

The Legislation

[6] The requirements for certification of a class action are set out in section 5 of the *Class Actions Act*:

> (1) On an application made under section 3 or 4, the court shall certify an action as a class action where
>
> > (a) the pleadings disclose a cause of action;
> >
> > (b) there is an identifiable class of 2 or more persons;
> >
> > (c) the claims of the class members raise a common issue, whether or not the common issue is the dominant issue;
> >
> > (d) a class action is the preferable procedure to resolve the common issues of the class; and
> >
> > (e) there is a person who
> >
> > > (i) is able to fairly and adequately represent the interests of the class,
> > >
> > > (ii) has produced a plan for the action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action, and
> > >
> > > (iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.
>
> (2) In determining whether a class action would be the preferable procedure for the fair and efficient resolution of the common issues, the court may consider all relevant matters including whether
>
> > (a) questions of fact or law common to the members of the class predominate over questions affecting only individual members;
> >
> > (b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
> >
> > (c) the class action would involve claims that are or have been the subject of another action;

> (d) other means of resolving the claims are less practical or less efficient; and
>
> (f) the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other means.
>
> (Emphasis added.)

Leave to Appeal

[7] An order certifying an action as a class action may be appealed only with leave of the Court (section 36(3) of the *Class Actions Act*). Leave is sought by way of an application which may be heard at the same time as the appeal, as was done in this case (rule 33 of the *Court of Appeal Rules*).

[8] Factors to be considered in analyzing an application for leave to appeal are discussed in *Thorne v. College of the North Atlantic*, 2017 NLCA 30, at paragraphs 11 to 21. The following factors provide a "starting place, though not a rigid template":

> [13] …
>
> (a) there is a conflicting decision by another judge or court upon a question involved in the proposed appeal and, in the opinion of the Court, it is desirable that leave to appeal be granted,
>
> (b) the Court doubts the correctness of the order in question,
>
> (c) the Court considers that the appeal involved matters of such importance that leave to appeal should be granted,
>
> (d) the Court considers that the nature of the issue is such that any appeal on that issue following final judgment would be of no practical effect, or
>
> (e) the Court is of the view that the interests of justice require that leave be granted.
>
> [14] The relevance of paragraph (d) is discussed in *Davis* [*v. Canada (Attorney General)*, 2008 NLCA 49, 279 Nfld. & P.E.I.R. 1]:
>
> > [18] The nature of an application for certification as a class action will colour the assessment of the factors … . For example, either the granting or refusal of certification will generally result in an issue on appeal having no practical effect following final judgment … . Therefore, while paragraph (d) is a relevant factor, it should be assessed in light of other relevant considerations.

> [15] Regarding the importance of the issues and the interests of justice under paragraphs (c) and (e) …, considerations such as the novelty of the issue would be relevant. …
>
> [16] The issues of conflicting decisions or the correctness of the decision under paragraphs (a) and (b) …, may be engaged, for example, where there is a question as to the application of a relevant principle of law, or where clarification of the law or a principle is desirable.

[9] Additional relevant criteria include "prejudice to a party, the effect of delay, inconvenience, efficient use of judicial resources, or other good reason" (*Thorne*, at paragraph 20).

[10] In general, where a class action has been certified, there may be some reticence to grant leave because "the ability [under the *Act*] to adjust the certification order to take account of a change or need to clarify the order may obviate the need to bring a challenge on appeal which would interfere with the efficient progression of the action through the court" (*Thorne*, at paragraph 19).

[11] In this case, the Lottery Corporation submits that leave should be granted on two bases: that the interests of justice require that leave be granted, and that there is good reason to doubt the correctness of the certification order. Regarding the first, counsel points out that the appeals of the certification order and the application to strike the statement of claim are intertwined. In particular, it is submitted that, to be certified as a class action, the pleadings must disclose a cause of action, and the same consideration applies in determining whether all or a portion of the statement of claim may be struck. Because leave to appeal is not required in respect of the application to strike, it follows that efficient use of judicial resources would be achieved, and the potential for conflict avoided, by granting leave to hear all the issues at the same time.

[12] Further, the Lottery Corporation submits, striking even a portion of the statement of claim would potentially affect definitions of the common issues and the class, and whether a class action is the preferable procedure.

[13] In light of the above considerations, I am satisfied that to grant leave to appeal the certification order would be in the interests of justice. To separate the issues relating to striking the statement of claim from the same issues relevant to the certification order would be an inefficient use of judicial resources. Further, for the reasons that follow, I am satisfied that the pleadings-related issues invite clarification of the law in the context of the certification of class actions.

[14] Accordingly, I would grant leave to appeal the certification order.

Whether the Pleadings Disclose a Cause of Action

[15] The test for striking out pleadings, and its application, are discussed in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paragraphs 17 to 26. McLachlin C.J.C., for the Court explained:

> [17] … A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action … . Another way of putting the test is that the claim has no reasonable prospect of success. …
>
> [22] … It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. … The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. …
>
> [25] … The question is whether, considered in *the context of the law and the litigation process*, the claim has no reasonable chance of succeeding. [Italics in the original.]

[16] Similarly, in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, in the context of certification of a class action, Rothstein J., for the Court, wrote:

> [63] The first certification requirement requires that the pleadings disclose a cause of action. In *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 ("*Alberta Elders*"), this Court explained that this requirement is assessed on the same standard of proof that applies to a motion to dismiss, as set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. That is, a plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed (*Alberta Elders*, at para. 20; …).

[17] In this case, the pleadings must be considered in the context of their intended purpose of grounding a class action.

Breach of the Criminal Code

[18] Two issues related to the *Criminal Code* are defined as common issues in the certification order:

> (a) Does the *Criminal Code* authorize the operation of video lotteries by siteholders, in view of s. 206(1)(g) which prohibits games similar to "three card monte"?

> (b) Does the *Criminal Code* authorize the operation of video lotteries by siteholders, in view of s. 201, which prohibits keeping a common gaming house?

A "siteholder" is defined in the *Video Lottery Regulations*, NLR 760/96, section 2, to mean "an occupant of a site". "Site" is defined to mean "premises which are accessed or used by a person playing a video lottery terminal".

(a) The Game of Three-card Monte

[19] Regarding the first issue, the statement of claim pleads:

> 38. The Plaintiffs also plead that VLTs are not lotteries or games of chance within the meaning of the *Criminal Code*. Rather, they are so unconnected with chance or skill and so manipulative 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 [Lottery Corporation'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*.

[20] Under section 206(1)(g) of the *Criminal Code*, three-card monte is prohibited:

> Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years who
>
> …
>
> (g) induces any person to stake or hazard any money or other valuable property or thing on the result of any dice game, three-card monte, punch board, coin table or on the operation of a wheel of fortune;

[21] Three-card monte is defined in section 206(2) of the *Criminal Code*:

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

[22] Section 207 of the *Code* specifies exceptions to the offences prescribed in section 206. In particular, it is lawful for the provincial government to conduct and manage a lottery scheme in accordance with law enacted by the legislature. However, this authority specifically excludes three-card monte, which remains a prohibited game. This follows from the definition of "lottery scheme" in section 207(4):

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

[23] In the case on appeal, the class members have not pleaded any facts to support the proposition that a game played on a VLT amounts to three-card monte or a game similar to it. The definition of three-card monte in section 206(2) as "the game commonly known as three-card monte" provides little assistance. In *Random House Webster's Unabridged Dictionary* (New York: Random House) second edition, 2001, three-card monte is defined to mean "a gambling game in which the players are shown three cards and bet that they can identify one particular card of the three, as stipulated by the dealer, after the cards have been moved around face down by the dealer". (See also definitions in the *Canadian Oxford Dictionary* (Don Mills: Oxford University Press) second edition, 2004; and in the *Microsoft Encarta College Dictionary* (New York: St. Martin's Press, 2001.)

[24] In *The King v. Rosen and Lavoie* (1920), 61 D.L.R. 500 (Que. C.A.), the defendants had been convicted of conspiracy to defraud the public by playing three-card monte. In assessing the appeal, the Court discussed what three-card monte is and how it is played. Martin J., for the majority, explained, at pages 502 to 503:

> The special character of the crime charged was that they played with the prosecutor what is commonly known as the "Three-card Monte" game, a game played with three cards, say, two black ones and a red one, shuffled or manipulated by the dealer and placed face down and the opponent backs his ability to spot the position of a particular card. By sleight of hand or quickness of movement, the dealer endeavours to induce the person backing his opinion to put his hand on the wrong card.
>
> …
>
> The act of determining the location of the red card, always assuming that no fraudulent substitution has been made, depends upon the exercise of judgment, observation and mental effort. … The operation of manipulating cards calls for judgment, skill and adroitness. The other player attentively follows the movement of the cards and imagines he can designate the required card out of the three. …

[25] Paragraphs 10 to 33 of the statement of claim are directed to the manner in which VLTs form the basis for the class action. They deal generally with alleged addictive and deceptive qualities of the games. These statements clearly distinguish games played on VLTs from three-card monte. For example:

> 17. VLTs mimic on screen the mechanical reel slot machine, and have asymmetric virtual reels that are programmed to give a near miss effect by which the consumer is manipulated into believing that he or she almost won or is getting closer to a win. VLTs have variable price structures that result in potent variable reinforcements that further reinforce this effect.
>
> 18. Like loaded dice, VLTs combine randomness with concealed asymmetry to cheat the player. The virtual reel mapping is programmed to generate both vertical and horizontal randomized near misses.
>
> 20. The outcome of play is in fact the result of a random number generator, and is predetermined upon commencement of play, and is totally unconnected with what is happening on the video screen.
>
> 21. The presence of a "stop" button reinforces the illusion of a connection between the reels and the outcome of play by creating a greater illusion of control. The "stop" button is deceitful in that it provides no control over the outcome of play. …

[26] Assuming these pleadings could be proven, it is clear, from the above definitions of three-card monte and the relevant provisions of the *Criminal Code*, that the pleadings do not provide a basis for determining that games played on VLTs are precluded by virtue of section 207(4), which authorizes the Province to conduct or manage a lottery scheme, other than three-card monte. The pleadings do not state that VLT games involve manipulations of cards or objects or sleight-of-hand that invite the player to identify and bet on the location of a particular item. That is the essence of three-card monte.

[27] I am satisfied that, considered in the context of the law and the litigation process, it is plain and obvious that the claim that the games played on VLTs amount, or are similar, to the game of three-card monte has no reasonable chance of succeeding.

(b) Common Gaming House

[28] In paragraphs 39 and 40 of the statement of claim, the class members plead that the location of VLTs in bars, clubs and lounges "has created a vast system of common gaming houses" prohibited by section 201(1) of the *Criminal Code*.

[29] Section 207(1) of the *Code*, which authorizes the Province to legislate so as to permit certain gaming and betting, provides an exception to that prohibition:

> 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, or in that and the other province, in accordance with any law enacted by the legislature of that province;

[30] The authority of a province to "conduct and manage" a lottery scheme is broad in scope and subject only to the exceptions and requirements specified in Part VII of the *Code*. Under the *Lotteries Act*, SNL 1991, c. 53, sections 2 and 3, the Minister of Finance, with the approval of the Lieutenant-Governor in Council, is authorized to "develop, organize, undertake, conduct and manage lottery schemes" that are "permitted by virtue of the *Criminal Code*". A licensing requirement for electronic or mechanical amusement devices is set out in section 4 of the *Act*.

[31] The *Regulations* under the *Act* set parameters regarding the use of VLTs. Section 3 of the *Regulations* provides:

> (1) A person shall not operate a video lottery in the province unless it has been approved by the [Atlantic Lottery Corporation].
>
> (2) In determining whether to approve a video lottery, the corporation may assess the suitability of the siteholder, taking into account the following factors:
>
> > (a) business associations;
> >
> > (b) reputation in the community;
> >
> > (c) financial statements;
> >
> > (d) relationship to other siteholders;
> >
> > (e) previous or existing participation in a video lottery;
> >
> > (f) residency; and
> >
> > (g) another matter considered appropriate by the corporation.

[32] Under section 5 of the *Regulations*, a site must be approved by the Atlantic Lottery Corporation. Factors that may be considered in the approval process are enumerated in section 5(2):

> In considering whether to approve a site for the operation of a video lottery, the corporation may consider the following factors:
>
> (a) the nature of the business;
>
> (b) the hours of operation;
>
> (c) security;
>
> (d) geographic location and physical location;
>
> (e) the estimated revenues from the proposed video lottery operation on the proposed site; and
>
> (f) those other factors as the corporation may feel is (*sic*) relevant or the commission may direct.

[33] As evidenced by the *Lotteries Act* and *Regulations*, the Province has enacted law to conduct and manage a VLT lottery scheme, as authorized under section 207(1) of the *Criminal Code*. It follows that it is plain and obvious that the class members' claim that the Province has created a vast system of common gaming houses in contravention of the *Criminal Code* has no reasonable chance of succeeding.

Summary

[34] In summary, it is plain and obvious that the pleadings related to breaches of the *Criminal Code* do not disclose a cause of action as required under section 5(1)(a) of the *Class Actions Act*. Accordingly, there is no basis on which the class action could proceed with respect to common issues (a) and (b) set out in the certification order.

Statute of Anne, 1710

[35] The certification order defines as a common issue:

> (h) Has the [Lottery Corporation] breached provisions of the *Statute of Anne*, and should the remedy of treble damages be granted, and if so, what is the appropriate amount?

[36] In the statement of claim, the class members plead the *Statute of Anne*, which they state "was received into the law of this jurisdiction in 1832 and has not been repealed" (paragraph 53 of the statement of claim). And further:

> 54. This provision permits any person who has lost money on gaming to sue for and recover the money so lost by action of debt founded on the Act, without setting forth the special matter, and to recover treble the value thereof.

[37] There is no basis on which the class members could succeed on this common issue. Assuming the *Statute of Anne* was received into the law of this Province and has not been directly repealed, the provisions of the *Statute* would be rendered inoperative to the extent that they conflict with provisions of the *Criminal Code* and the *Lotteries Act* and *Regulations*. Insofar as the lottery scheme authorized by the Province results in money being lost by the player, that money could not be recovered by application of the *Statute of Anne*. The law, in fact, permits a person to pay money to play a game on a VLT with the result that the player may lose that money. It is a form of gaming and betting authorized by law.

[38] In the result, there is no basis on which the class action could proceed with respect to common issue (h) set out in the certification order regarding the *Statute of Anne*.

The Competition Act

[39] The certification order defines as a common issue:

> (d) Has the [Lottery Corporation] breached s. 52 of the *Competition Act*?

[40] The relevant pleadings state:

> 44. The [class members] state that the [Lottery Corporation's] conduct in promoting, directly or indirectly, the supply or use of VLTs or its business interest, and in knowingly or recklessly making representations to the public that were false or misleading in material respects, is contrary to s. 52(1) and (1.1) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended, and the [class members] have a statutory cause of action pursuant to s. 36 of the *Competition Act* to recover an amount equal to the loss or damage proved to have been suffered, together with the full cost of investigation and of proceedings under s. 36.
>
> 45. The [class members] also rely on s. 52(1.1) of the *Competition Act* and plead that it is unnecessary to show actual reliance on the misleading representations of the [Lottery Corporation] for the purpose of establishing a breach of s. 52(1) of the Act.

It is apparent from these pleadings and the provisions of the *Competition Act* discussed below that the common issue would more clearly have been stated in terms of section 36 of the *Act* in conjunction with section 52.

[41] Part VI of the *Competition Act*, R.S.C. 1985, c. C-34, provides for offences under the *Act*. Section 52(5) makes it an offence to contravene section 52(1), which provides:

> No person shall, for the propose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

Pursuant to section 52(1.1), for purposes of proving an offence, it is not necessary to prove that any person was deceived or misled.

[42] Section 36(1), in Part IV, of the *Act*, "Special Remedies", provides:

> Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, …
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct … an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.
>
> (Emphasis added.)

[43] Finally, section 2.1 of the *Competition Act* provides:

> This Act is binding on and applies to an agent of Her Majesty in right of Canada or a province that is a corporation, in respect of commercial activities engaged in by the corporation in competition, whether actual or potential, with other persons to the extent that it would apply if the agent were not an agent of Her Majesty.
>
> (Emphasis added.)

Application of the Competition Act – Section 2.1

[44] The Lottery Corporation is comprised of four shares, one held by each of the provincial governments in Atlantic Canada, that is, Newfoundland and Labrador, Nova Scotia, New Brunswick and Prince Edward Island. Such a

cooperative venture is authorized by section 207(1) of the *Criminal Code*. However, pursuant to that provision, it is lawful only for the provincial government, alone or with the government of another province, "to conduct and manage a lottery scheme". It follows that, in carrying out its functions under the *Lotteries Act* and *Regulations*, the Lottery Corporation is acting as an agent of Her Majesty in Right of the Province. This characterization is not challenged by the class members.

[45] Further, the class members do not plead that the Lottery Corporation is in competition with other persons. In fact, the opposite is pleaded in paragraph 6 of the statement of claim:

> Pursuant to s. 5 of the *Lotteries Act*, the Lieutenant-Governor in Council promulgated regulations known as the Video Lottery Regulations. The Regulations grant extensive monopolistic powers to the [Lottery Corporation] to approve who is permitted to operate a video lottery terminal (VLT), and the site on which it is operated. VLTs are installed directly by the defendant, and must have affixed to them the official decal of the [Lottery Corporation]. No VLT siteholder may remove or replace a VLT without prior consent of the [Lottery Corporation]. No person may manufacture or supply a VLT in the province unless approval has been given by the [Lottery Corporation].
>
> (Emphasis added.)

(See also, paragraphs 8, 52 and 55 of the statement of claim referring to the "monopolistic" nature of the VLT lottery scheme; and *Regulations* under the *Lotteries Act*, paragraphs 30 to 33, above.)

[46] A monopoly is inconsistent with competition. The class members do not plead actual or potential competition with another person within or outside the Province. In the result, based on the pleadings and section 2.1 of the *Act*, it is plain and obvious that the Lottery Corporation is not bound by the *Competition Act*.

Remedy for Loss or Damage

[47] Further, section 36(1) of the *Competition Act*, which provides for a civil remedy in respect of conduct prohibited by the offence under section 52(1), requires proof of consequential loss or damage by the claimant (*Pro-Sys*, at paragraphs 65, 66, 69 and 70).

[48] The underlying rationale for the proposition that section 36(1) is limited to recovery of loss or damage suffered by the plaintiff is discussed in the analysis in *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Santé Inc.*,

2014 BCCA 36 (leave to appeal refused [2014] 2 S.C.R. *x*). Newbury J.A., for the Court, concluded:

> [90] Section 36 clearly limits recovery for pecuniary loss to "the loss or damage proved to have been suffered" by the plaintiff, together with possible investigatory costs incurred by the plaintiff. I see nothing in the *Competition Act* to indicate that Parliament intended that the statutory right of action should be augmented by a general right of consumers to sue in tort or to seek restitutionary remedies on the basis of breaches of Part VI. …

See also *Watson v. Bank of America Corp.*, 2015 BCCA 362, at paragraph 24.

[49] In the pleadings, the class members have specifically disclaimed consequential loss or damage. Indeed, the applications judge found as a fact in the certification decision (2016 NLTD(G) 216):

> [111] I note here that the [class members] have stated repeatedly that they are not alleging injury or harm. … They seek restitutionary damages on behalf of the class, so an individual assessment may not be necessary. …
>
> …
>
> [147] … The [class members], on the other hand, have asserted a claim which is not based on individual proof or individual harm. In fact, they have denied any individual injury or harm as a basis for the claim. They rest on allegations of misrepresentation and deception in the offering of games which they say may cause harm. …

[50] Similarly, in the decision on the application to strike all or portions of the statement of claim, the applications judge found (2014 NLTD(G) 114):

> [58] … The [class members] have not claimed they have suffered loss. They seek alternate remedies, such as restitutionary damages for unjust enrichment, and injunctive relief.

See also paragraph 4(c) of the certification order. (Restitutionary damages for unjust enrichment are discussed below.)

[51] In this case, the pleadings do not lay the necessary foundation to satisfy the requirement for proof of "loss or damage proved to have been suffered by [the claimant]" under section 36(1) of the *Competition Act*.

[52] In summary, it is plain and obvious that the *Competition Act* does not apply to the Lottery Corporation, and, in any event, based on the pleadings,

section 36(1) could not be engaged. It follows that there is no basis on which the class could succeed on this common issue.

Breach of Contract or Tort

[53] The certification order defines as a common issue:

> (e) Has the [Lottery Corporation] breached a duty owed in contract or tort?

[54] Breach of contract by the Lottery Corporation is pleaded in paragraphs 46 to 52 of the statement of claim. Regarding the nature of the contract:

> 46. The contract between the parties was to provide a safe, interactive and entertaining way to play games of chance with the opportunity to win small cash prizes in exchange for small frequent cash bets.

[55] The remaining paragraphs are directed to pleading the inherent dangerousness of VLT use on the basis that it leads to dependency and addiction. For example,

> 47. … The [Lottery Corporation] breached the warranty [that "the VLTs were of merchantable quality and fit for use"] … by designing, testing, researching, formulating, developing, manufacturing or altering, producing, labeling, advertising, promoting, distributing and/or selling VLTs which were inherently dangerous to users and which the [Lottery Corporation] knew or ought to have known would lead to dependency and addiction.
>
> (Emphasis added.)

[56] In order to establish a claim for breach of contract, some loss or damage, which may include the right to restitutionary damages, must be pleaded. In *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, Major J., for the Court, explained:

> [25] Contract damages are determined in one of two ways. Expectation damages, the usual measure of contract damages, focus on the value which the plaintiff would have received if the contract had been performed. Restitution damages, which are infrequently employed, focus on the advantage gained by the defendant as a result of his or her breach of contract.

[57] After discussing expectation damages, Major J. turned to restitution damages:

> [30] The other side of the coin is to examine the effect of the breach on the defendant. In contract, restitution damages can be invoked when a defendant has, as a result of his or her own breach, profited in excess of his or her expected profit had the contract been performed but the plaintiff's loss is less than the defendant's gain. So the plaintiff can be fully paid his damages with a surplus left in the hands of the defendant. This occurs with what has been described as an efficient breach of contract. In some but not all cases, the defendant may be required to pay such profits to the plaintiff as restitution damages (Waddams, [*The Law of Damages*, 3rd edition (Aurora, Ontario: Canada Law Book, 1997], at p. 474).
>
> [31] Courts generally avoid this measure of damages so as not to discourage efficient breach (i.e., where the plaintiff is fully compensated and the defendant is better off than if he or she had performed the contract.) (Waddams, *supra*, at p. 473).
> …
>
> [46] … Contract law is not the enemy of parties to an agreement but, rather, their servant. It should not frustrate their mutually agreed intentions but, instead, absent overriding policy concerns, should permit those parties to obtain the benefit of their intended agreement.

[58] The discussion under section 36 of the *Competition Act* would apply by analogy to the breach of contract common issue. That is, as determined by the applications judge, the class members have specifically disclaimed consequential loss or damage. In the result, the pleadings and alleged contract do not provide a basis on which to conclude that the Lottery Corporation has profited by a surplus in comparison to loss or damages by the class members, which are specifically not claimed.

[59] Similarly, a claim in tort requires demonstration of a loss, which has specifically been disclaimed by the class members.

[60] In the result, subject to the discussions below regarding unjust enrichment and waiver of tort, it follows that there is no basis on which the class could succeed on this common issue.

Unjust Enrichment

[61] The certification order defines as a common issue:

> (c) Has the [Lottery Corporation] been unjustly enriched?

[62] The relevant pleadings state:

> 60. The Plaintiffs state that there has been a deprivation of the Plaintiffs and the plaintiff class and a corresponding enrichment of the [Lottery Corporation], by reason of the breaches of the *Criminal Code of Canada*, the *Statute of Anne*, the *Competition Act*, tortious misconduct and breaches of contract described herein. This deprivation and corresponding enrichment is without juridical reason.
>
> 61. The [class members] claim a remedy in restitution on the basis that the interest of the [class members] in the safety of VLT gaming makes it just and equitable that the [Lottery Corporation] should retain no benefit from the breaches pleaded.

[63] The elements of a claim in unjust enrichment are summarized in *Pro-Sys*:

> [85] The well-known elements required to establish an unjust enrichment are (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason (such as a contract) for the enrichment (see *Alberta Elders*, at para. 82; …).

[64] Restitution for unjust enrichment in the realm of public law is discussed in *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575. Binnie J., for the Court, explained:

> [13] The doctrine of unjust enrichment provides an equitable cause of action that retains a large measure of remedial flexibility to deal with different circumstances according to principles rooted in fairness and good conscience. This is not to say that it is a form of "'palm tree' justice … that varies with the temperament of the sitting judges." On the contrary, as the Court recently reaffirmed in *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25, a court is to follow an established approach to unjust enrichment predicated on clearly defined principles. …

[65] In addressing the third of the three elements necessary to establish a claim for unjust enrichment, Binnie J. explained:

> [23] The use of the expression "juristic reason" in this connection emphasizes that "unjust" is to be addressed as a matter of law and legal reasoning rather than a free-floating conscience that may risk being overly subjective … . There are now two stages to the juristic reason inquiry. At the first stage, a claimant (here the appellant) must show that there is no juristic reason within the established categories that would deny it recovery. The established categories are the existence of a contract, disposition of law, donative intent, and "other valid common law, equitable or statutory obligatio[n]" (*Garland*, at para. 44). The categories may be added to over time (para. 46). On proving that none of these limited categorical reasons exist to deny recovery, the plaintiff (here the appellant) will have made out a *prima facie* case of unjust enrichment. It will have demonstrated "a positive reason for reversing the defendant's enrichment" (Smith, *supra*, at p. 244).

…

> [25] At the second stage, the onus shifts to the defendant (here the respondent City), who must rebut the *prima facie* case by showing that there is some other valid reason to deny recovery. … According to *Garland*, it is at this stage that the court should have regard to the reasonable expectation of the parties and public policy considerations. …
>
> (Emphasis added.)

See also *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, at paragraph 36.

[66] In this case, the juristic reason is within the established categories. Regarding disposition of law, as authorized by the *Criminal Code* in conjunction with the *Lotteries Act* and *Regulations*, a player may choose to pay money in order to play a game on a VLT with the chance of winning a cash prize. Regarding contract and tort, as discussed above, the common law juristic reason applies. The representatives of the class do not plead that they became dependent on or addicted to playing games on VLTs. They claim no loss or damages.

[67] There is nothing in the pleadings laying a foundation on which to rebut the juristic reasons, legislated authority and valid common law, on which the Lottery Corporation relies. In the result, unjust enrichment could not be established as pleaded.

Unjust Enrichment by Wrongdoing - Waiver of Tort

[68] The class claims unjust enrichment by wrongdoing *per se*, a form of claim that has been referred to as "waiver of tort". That is, a claim for unjust enrichment is made without reliance on proof of loss or damages to class members, but on the basis of wrongdoing by the Lottery Corporation which has been unjustly enriched by operating VLTs that are "unsafe" because the gaming is deceptive and leads to addiction and dependency by players.

[69] "Waiver of tort", which is not descriptive of the potential claim, is discussed in Klar, Linden, Cherniak and Kryworuk, *Remedies in Tort* (Canada: Thomson Reuters, 2017):

> 190.1 The law relating to waiver of tort is still developing and is unsettled in at least two respects. First, there is disagreement as to whether waiver of tort is simply a form of remedy or is an independent cause of action. This in turn raises questions

> concerning the need for proof of loss and whether the underlying tort must be established in order to sustain the action. Second, there is uncertainty as to whether a plaintiff must establish all the elements of unjust enrichment before being entitled to waive a claim for damages and seek payment of the defendant's benefit. A related issue is the tortious circumstances or wrongful conduct that will support a claim of waiver of tort.

[70] In Osborne, *The Law of Torts*, fifth edition (Toronto: Irwin Law Co., 2015), at page 459, the phrase is described in broad terms:

> … The broadest view is that waiver of tort is an independent cause of action that is available wherever a defendant has benefitted from his wrongdoing. That wrongdoing includes not only tortious wrongs (whether or not all the constituent elements of liability are established) but also breaches of contract, equitable wrongs, and some statutory breaches. … This view would clearly allow waiver of tort to operate where the defendant has committed a negligent act that has caused no harm to the plaintiff but has benefitted the defendant. It would, in essence, create a "super-compensatory" regime, allowing plaintiffs to recover compensation in the absence of loss (or in excess of their losses) in contradiction of the general principle that a negligent actor is only liable for the harm caused by his negligence.

[71] In this case, it is unnecessary to determine the nature, scope or appropriate terminology in respect of waiver of tort. This is because the class members have not pleaded facts necessary to support wrongdoing by the Lottery Corporation. As discussed above, the claims for breach of the *Criminal Code*, the *Statute of Anne*, and the *Competition Act* have no reasonable chance of succeeding. The same result applies with respect to the claims based on tortious misconduct and breach of contract.

[72] Indeed, no facts are pleaded which would support a cause of action based on wrongdoing by the Lottery Corporation. The representatives of the class do not plead that they became addicted to or dependent upon VLTs as a result of playing games. They do not plead that they were misled by any representations made by the Lottery Corporation in respect of the VLTs. Simple allegations of misrepresentation, or that players may become addicted to or dependent on gaming, without supporting facts in the pleadings, are insufficient to meet the requirement in section 5(1) of the *Class Actions Act* that the pleadings must disclose a cause of action.

[73] In the absence of pleadings to support wrongdoing by the Lottery Corporation, there is no basis on which waiver of tort could be engaged. Accordingly, it is unnecessary to address the legal issues arising from what has been described as a developing and unsettled area of the law.

[74] In conclusion, I would note that gaming and betting by their very nature may result in addiction or dependency by some individuals. However, the use of VLTs is authorized by law following a policy decision by government. Activities endorsed by law will not result in an actionable claim except where activity inconsistent or non-compliant with the law can be established.

Remaining Common Issues

[75] The remaining common issues relate to the assessment of damages. Where no cause of action to ground the class action has been pleaded in the statement of claim, it is unnecessary to address these issues.

SUMMARY

[76] In summary, the applications judge erred in concluding that the common issues defined in the certification order satisfy the requirement that the pleadings disclose a cause of action. Accordingly, I would set aside the certification order and strike the statement of claim without leave to amend.

[77] I would apply section 37 of the *Class Actions Act* which provides that the Court of Appeal shall not award costs on an application for certification as a class action or on an appeal arising from a class action. Because the issues relating to the appeal of the certification order and the application to strike the statement of claim are intertwined, I would not award costs in respect of the latter.

[78] In the result, I would grant leave to appeal and allow the appeal.

_____

B. G. Welsh J.A.

Green J.A.:

[79] I cannot agree with my colleague, Welsh J.A. that this appeal should be allowed in its entirety, or that the certification order should be set aside, or that the statement of claim should be struck out without leave to amend. While I can agree with some of the conclusions reached by my colleague and the reasons given by her, there are many other parts of her analysis with which I disagree. The result is that, to the extent itemized in these reasons, most of the

certification order should stand and the case ought to be allowed to proceed to trial.

[80] I agree with my colleague's views with respect to: (i) the granting of leave to appeal; (ii) the inapplicability of the *Statute of Anne*, 1710, 9 Ann. c.14 and (iii) the inapplicability of the *Competition Act*, RSC 1985, c. C-34. I hold a different view of the remaining issues.

[81] The analysis of these issues, especially in relation to the topics of restitution, unjust enrichment, waiver of tort and restitution by wrongdoing is in some respects affected by terminological and conceptual confusion and inconsistency, not only in the pleadings and in the arguments that have been presented, but also in the case law and academic writings in the area.

[82] It is therefore necessary, first, to attempt to identify where the issues engaged in this case fit in the broad spectrum of what is variously described as the law of restitution or the law of unjust enrichment and, secondly, to address some issues of terminology. Thirdly, I will attempt to define, from a review and interpretation of the statement of claim and the certification order, the nature of the claims being made and which the applications judge allowed to proceed as a class action. Fourthly, within the identified framework, I will address each of the specific claims (other than those relating to the *Statute of Anne* and the *Competition Act*) to determine whether the applications judge erred in allowing them to proceed to trial. Finally, in light of my conclusions on whether the pleadings disclose a cause of action, it will be necessary to address whether the applications judge erred in his conclusion that the remaining criteria for class action certification had been satisfied.

1. Restitution for Unjust Enrichment and Restitution as a Result of Wrongdoing

[83] The principles relating to restitution and unjust enrichment (there is no universal agreement as to how these two terms should be employed) have been sub-categorized in recent years into two broad fields: (i) the restitution of benefits conferred on someone who has been unjustly enriched at the claimant's expense (restitution for unjust enrichment); and (ii) the restitution or disgorgement of benefits acquired as a result of the commission of a wrong (restitution or disgorgement for wrongdoing). See Peter Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1985) at 43; Lionel D. Smith, "Disgorgement of the Profits of Breach of Contract: Property, Contract and 'Efficient Breach'" (1994) 24 Can Bus. L.J. 121 at 121-122.

[84] Andrew Burrows in his treatise *The Law of Restitution,* 3d ed. (Oxford: Oxford University Press, 2011) at 9 calls this distinction "fundamental". The distinction is clearly recognized in *321665 Alberta Ltd. v. Mobil Oil Canada Ltd.,* 2010 ABQB 522, 35 Alta L.R. (5th) 222 per Ross J. at para. 10.

[85] The first category (which I will call "unjust enrichment *simpliciter*") has been the traditional focus of the study of restitution and has occupied the greater part of most texts on the subject. The cause of action on which the claim is based consists of the existence of an "unjust" enrichment. It attracts the familiar three-part analysis that requires answers to the questions: (i) has the claimant conferred a benefit on the defendant? (ii) has there been a corresponding deprivation to the claimant? and (iii) is there any juristic reason which would justify retention of the benefit? (*Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 at para. 30, *Moore v. Sweet* 2018 SCC 52 at para. 37). Its focus is the reversal of an unjustified transfer of a tangible benefit from claimant to defendant. The remedy is generally a giving-back of the benefit. In this category, 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 (subject to some potential defences) a lack of a juristic reason for the defendant's enrichment.

[86] 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. The gains can be regarded as an unjust enrichment of the defendant but the right of the claimant to them depends not only on the unjustified nature of the enrichment but on the existence of a separate wrong. Further, recovery by the plaintiff does not necessarily depend on the plaintiff having suffered any loss or deprivation, although such 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. This is so even if the claimant may, as a result, benefit from a windfall. The remedy may involve the re-transfer of a benefit of which the claimant had been deprived by virtue of the wrong but it may also involve the stripping away of ill-gotten gains even if those gains were not acquired from the claimant.

[87] There are, therefore, effectively, two sub-categories of claims based on an unjust enrichment gained from wrongdoing: (i) cases where, as a result of the wrong, the plaintiff has been deprived of wealth which has been transferred to and which benefits the defendant for which the remedy is restoration of the benefit to the plaintiff (restitution); and (ii) cases where as a result of the wrong, the defendant acquires a benefit which does not originate from the plaintiff and for which the remedy is the giving up of the benefit to the plaintiff even though he or she has suffered no deprivation or loss (disgorgement).

[88] The category of restitution or disgorgement of benefits gained by wrongdoing has not been as well-developed conceptually as the first category. The notion of stripping away an unjust enrichment in the form of ill-gotten gains, while appearing to underpin a number of disparate types of claims recognized by the law, such as waiver of tort and breach of fiduciary duty, has not as yet been fully used in the cases as a unifying principle around which all individual cases of "restitution for wrongdoing" have been collected. For example, Mitchell McInnes in *The Canadian Law of Unjust Enrichment and Restitution* (Markham, ON: LexisNexis Canada Inc., 2014) points out that cases continue to be analyzed using the terminology of "waiver of tort", which is "archaic language for the simple idea that some forms of wrongdoing exceptionally allow the successful plaintiff to demand disgorgement of the defendant's gain as an alternative to compensation for loss" (9 at n 39).

[89] In fact, there is no general agreement as to whether disgorgement for wrongs should even be dealt with in treatises on the law of unjust enrichment. Some have argued that it should, instead, be dealt with as part of discussion of remedies in connection with individual wrongs (Peter Birks, *Unjust Enrichment*, 2d ed. (Oxford: Clarendon Press, 2005)). McInnes, while carefully drawing the distinction between the two separate causes of action and remedial responses thereto, ultimately decided not to include a comprehensive discussion of disgorgement for wrongdoing in his 1689-page text (at 16).

2. Terminology: Different Senses of the Terms "Restitution," "Unjust Enrichment" and "Damages"

[90] The term "restitution" has been used inconsistently. It has been used to describe the category of law which encompasses unjust enrichment-based claims as opposed to limiting it to describing the remedy for such claims. It has also been used to describe both unjust enrichment-based claims as well as wrongful acquisition-based claims. It is also sometimes used to describe the type of remedy given for wrongful acquisition-based claims, instead of the term

"disgorgement". Furthermore, the term also is seen to creep into claims based on other causes of action, such as breach of contract, where a remedy is described as "restitutionary damages" thereby conflating notions of compensation (damages) with reversal of benefits (restitution). McInnes describes the problem this way:

> … Canadian courts frequently use [the term "restitution"] in reference to at least three distinct measures of relief. 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.* And finally, within the law of unjust enrichment, "restitution" refers to a remedy that requires the defendant to give back a benefit acquired from the plaintiff. That measure of relief aims to reverse an unwarranted transfer and thereby restore the *status quo ante* of both parties.
>
> … Cases falling within the first and second categories respectively should be labelled "compensation" and "disgorgement". The term "restitution" should be restricted to the third category.
>
> (*The Canadian Law of Unjust Enrichment and Restitution*, at 10-11; footnotes omitted.)

[91] In like manner, the term "unjust enrichment" has been used inconsistently, leading McInnes to advocate that:

> The phrase "unjust enrichment" should be confined to the strict liability, three-part cause of action of that name. References to "unjust enrichment by wrongdoing" should be abandoned in favour of more transparent language, such as "gain-based relief for wrongdoing". (at 10)

[92] Furthermore, notions of "compensation" which underpin the basic remedial responses to tort and breach of contract never seem far from the discussion when matters of restitution and disgorgement are being analyzed. In reality, however, concepts of compensation for loss have nothing to do with unjust enrichment-based claims or wrongful acquisition based claims, either with respect to the establishment of the cause of action or the remedial responses. Because torts and breach of contract can be considered wrongs forming the basis of a wrongful acquisition-based claim, and their basic focus is compensation for loss, there is a tendency to assume that in order to establish a

right to a restitutionary or disgorgement remedy one must also inquire as to whether there has been any loss suffered by the claimant or face a conclusion that the unjust enrichment claim has not been made out.

[93] Lack of clarity in terminology has led to inconsistency with respect to how claims are presented and described, with resulting confusion in analysis. The problem is well summed-up by McInnes:

> "Restitution" has been applied not only to remedies that reverse transfers, but also to those that strip gains or repair losses. "Disgorgement" has been used to describe both stripped profits and reversed transfers. And "compensation" has been extended beyond its natural meaning to encompass both the reparation of losses and reversal of transfers. The law of unjust enrichment will remain muddled so long as these habits persist.
>
> (at 14; footnotes omitted; emphasis added.)

[94] I generally subscribe to the views expressed by McInnes referred to above. I propose therefore to limit the use of the term *restitution* to situations where the remedy includes the *reversal of a transfer* of wealth from the defendant to the claimant. I will use the term *disgorgement* to describe the remedy that involves the award to the claimant of a benefit acquired by the defendant from a source that does not necessarily include a deprivation to the claimant. The term *unjust enrichment* can describe any enrichment of the defendant, however that enrichment is derived, and which a court determines to be *unjust*, thus justifying either a restitutionary or disgorgement remedy. I will avoid using the terms "compensation" and "damages" so as to confine them to cases where losses suffered by a plaintiff are sought to be repaired, i.e. the traditional remedial response to a tort or a breach of contract.

3. Nature of Claims in Issue

(a) Analysis of Statement of Claim

[95] The claims of the first respondents (the plaintiffs in the court below and hereinafter referred to as the "claimants") are essentially founded on allegations of deceit and failure to warn consumers of danger with respect to the creation, distribution, deployment, advertising and promoting of video lottery terminals in the province. It is alleged that VLTs are inherently deceptive in their operation and as to what one could reasonably expect from their operation, leading to users developing dependency on and addiction to VLT gambling. The statement of claim alleges:

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. VLTs are inherently deceptive, inherently addictive and inherently dangerous when used as intended.

…

18. Like loaded dice, VLTs combine randomness with concealed asymmetry to cheat the player. …

19. VLTs have video displays that utilize subliminal priming to deceive consumers and manipulate them into hyper-focusing and to create a dangerous dissociative mental state, wherein players cannot make rational decisions to continue to play or not, and impaired control is the natural and designed outcome.

20. The outcome of the play is in fact the result of a random number generator, and is predetermined upon commencement of play, and is totally unconnected with what is happening on the video screen.

21. The presence of a "stop" button reinforces the illusion of a connection between the reels and the outcome of play by creating a greater illusion of control. The "stop" button is deceitful in that it provides no control over the outcome of play. …

…

23. … The Defendant does not publish odds. Based on third party calculated odds of 270,000 to 1, a consumer would have to lose $30,000 to win maximum prize of $500. VLTs are enormously lucrative to the Defendant, and the consumer is doomed to financial losses over any consistent term of play.

…

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.

…

30. The Plaintiffs say that the Defendant knows or ought to know VLTs are inherently deceptive, inherently addictive, and inherently dangerous when used as intended …

…

> 41. The Defendant knowingly or recklessly made false and misleading representations to the public. …
>
> 42. The Defendant's Representations were material and affected the decision of the Plaintiffs to play the Defendant's VLTs.
>
> 43. As a result of the Representations of the Defendant, the Plaintiffs suffered loss or damage. The particulars of this loss or damage include financial loss in the form of the consideration paid to play on the Defendant's VLTs.
>
> …
>
> 67. The Plaintiffs plead that the Defendant has acted in such a high-handed, wanton and reckless or deliberate manner, without due regard to public health and safety, as to warrant an award of punitive damages, in accordance with the goals of retribution, denunciation and deterrence.

[96] These allegations, of course, remain to be proven. But for the purpose of an appeal with respect to an application to strike a statement of claim or to certify a class action, the factual allegations in the statement of claim must be accepted as true. The question then becomes whether the assumed factual platform that has been pleaded can disclose a cause of action known to the law or one where there is a reasonable possibility that the existing law may be uncertain and may develop or change when confronted with the actual evidence (*Andrews v. Canada (Attorney General)*, 2014 NLCA 32, 354 Nfld. & P.E.I. R. 42). In *Levy v. British Columbia (Crime Victim Assistance Program)*, 2018 BCCA 36, 7 B.C.L.R. (6th) 84, Savage J.A. stated:

> [32] Courts ought to be cautious in striking out claims, particularly novel ones that may not yet be embedded in existing legal rules, lest it stunt the growth of the law. This does not mean that fanciful claims, or claims based on wishful thinking, should proceed to trial. Where a claim is based on rational argument that involves an extension, development or reasonably arguable restriction or reversal of some existing authority, the situation may be otherwise. …

[97] The test for deciding whether to prevent a claim from proceeding to trial is whether it is plain and obvious that the claim is bound to fail or has no reasonable prospect of success (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 49 B.C.L.R. (2d) 273; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477). Otherwise, the case should be allowed to proceed.

[98] Putting aside the claims based on the *Statute of Anne* and the *Competition Act*, the legal bases upon which the claimants assert they are entitled to relief are that the actions of the appellant amount to:

1. A crime under the *Criminal Code*

2. A breach of contract

3. A breach of a duty to warn in tort (and possibly deceit)

4. An unjust enrichment of the appellant

5. A "cause of action" based on the doctrine of waiver of tort

[99] The claimants seek different forms of monetary remedy, described variously as:

(a) Restitution for unjust enrichment

(b) Disgorgement of profits and accounting on the basis of waiver of tort or a constructive trust over such profits

(c) Damages assessed in an amount equal to the gross revenues earned by the appellant, or the net income received by the appellant or a percent of the proceeds from the sale of VLT gaming (also described as "damages equal to the total unlawful gain obtained by the [appellant]")

(d) Punitive damages on the basis that compensatory damages would be inadequate

[100] It is also to be noted that the claimants alleged, with respect to the claims under the *Competition Act*, that as a result of the appellant's allegedly false and misleading representations to the public, which were knowingly or recklessly made, and which materially affected the decision of the claimants to play the VLTs, the claimants "suffered loss or damage", including financial loss in the form of the consideration paid to play the VLTs. Later, however, they assert that they "do not advance claims for personal injuries." While this does not appear to be a wholesale disclaimer of any loss claimed to be suffered by the claimants, it does reflect the position advanced at the hearing to the effect that the emphasis of the claims was on the remedy of disgorgement of profits allegedly earned unlawfully.

[101] While the language used in the statement of claim is in some cases not as clear as it might be, I note the following:

(i) When the claimants make reference in their pleading to "loss" suffered by the class (e.g. paragraph 72), which is *prima facie* a compensatory measure, they couple it with the allegation that the "unlawful gain obtained by the Defendant from class members", a restitutionary/disgorgement measure, necessarily reflects the total loss suffered by the class.

(ii) When pleading a cause of action based on "unjust enrichment" and asserting the three-part unjust enrichment cause of action test (paragraph 60), they nevertheless additionally assert wrongful behavior in the form of, amongst others, breaches of the *Criminal Code*, tortious misconduct and breaches of contract as a justification for a remedy based on unjust enrichment. Thus, while appearing to conflate the two separate categories of claims discussed earlier (unjust enrichment and wrongful acquisition), it is nevertheless clear that the remedy sought, namely, that "the defendant should retain no benefit from the breaches pleaded"(paragraph 61), is a restitutionary/disgorgement one.

(iii) When pleading waiver of tort "as a cause of action" (paragraph 62), which is based on a form of tortious wrongdoing, they seek only "disgorgement"-type remedies (including accounting and constructive trust) and assert that these remedies can be determined without the involvement of any individual class member, again suggesting that the focus is not on plaintiff loss (and compensation) but on stripping improperly acquired gains from the defendant.

(iv) When pleading a right to elect at or after trial to waive "wrongs attracting a remedy in damages" (a plaintiff-injury based compensation measure) and instead "to have damages assessed in an amount equal to the gross revenues earned by the Defendant" (paragraph 64), this is consistent with a focus on a claim based on wrongful conduct, where the emphasis is on gains acquired by the defendant, thus attracting a potential remedy of disgorgement.

[102] I am therefore satisfied that the claims asserted by the claimants have a common theme: to ground causes of action based on unjust enrichment gained by the commission of a wrong that will lead to remedies of disgorgement., i.e.

they assert various aspects of the second category of what has often been described as "restitution", as described above (in the terminology I have chosen, claims based on wrongful acquisition, the remedial response to which is disgorgement). The analysis of the claims in the context of this class action and the certification order must be undertaken through this lens.

[103] This is the approach which the applications judge essentially took: that the claims were gain-based not compensation-based. While I might quibble with some of the terminology he employed, he emphasized his view of the essence of the case in his reasons in the certification decision (2016 NLTD(G) 216) this way:

> [147] … The Plaintiffs… have asserted a claim which is not based on individual proof or individual harm. In fact, they have denied any individual injury or harm as a basis for the claim. …

[104] Although using the term "restitutionary damages", which, is, as I have said, productive of confusion, it is clear that the judge's approach was to regard the claims as rooted in a claim for disgorgement as a remedy based on unjust enrichment gained by commission of a wrong without reference to loss, injury, damage or deprivation to or of the claimants.

(b) Interpretation of the Certification Order

[105] The certification order made by the judge is also essentially predicated on the same approach though, again, the terminology employed may lead to some confusion. Relevant portions of the order include the following:

> 4. The nature of the claims asserted by the plaintiffs is:
>
> (a) the plaintiffs claim that video lottery line games offered by the defendant in Newfoundland and Labrador during the class period are inherently deceptive.
>
> (b) The plaintiffs allege breaches of the *Criminal Code*, … unjust enrichment; and breaches of duty owed in either contract or tort.
>
> (c) The plaintiffs claim entitlement to a restitutionary remedy for the class without proof of reliance or individual harm. The plaintiffs do not claim individual damages.
>
> 5. The nature of the relief sought by the class is:
>
> …

(c) an accounting for and disgorgement of profits or revenues, or a constructive trust over same;

(d) damages equal to the total unlawful gain obtained by the Defendant from class members;

…

(f) exemplary or punitive damages

6. The common issues are hereby defined as:

(a) Does the *Criminal Code* authorize the operation of video lotteries by siteholders, in view of s. 206(1)(g) which prohibits games similar to "three card monte"?

(b) Does the *Criminal Code* authorize the operation of video lotteries by siteholders in view of s. 201, which prohibits keeping a common gaming house?

(c) Has the Defendant been unjustly enriched?

…

(e) Has the Defendant breached a duty owed in contract or tort?

(f) Can monetary relief be measured on an aggregate, class-wide basis and, if so, what is the amount of aggregate monetary relief?

(g) If the answer to Issue (f) is no, can loss or damage be measured by the gain to the Defendant, and if so, what is the appropriate restitutionary remedy and in what amount?

…

(i) Should punitive or exemplary damages be awarded against the Defendant and, if so, in what amount.

(Emphasis added.)

[106] Although there are references in the order to "damages" (5(d), (f), 6(g), (i)), the clear focus is not on compensation for a claimed loss but on disgorgement of benefits acquired by the appellant. The order specifically states that the claims are based on the commission of certain wrongs by the appellant (4(b) – breaches of the *Criminal Code*, unjust enrichment and breaches of duty

owed in contract or tort) with the remedy being described as “restitutionary” without proof of individual harm (4(c)) and without a claim for “individual damages”. Furthermore, the references to damages in the description of the “nature” of the relief (5(d) and (f)) are tied to the amount of the “total unlawful gain” obtained by the appellant (5(d)) or relate to punitive damages (5(f)), which are not compensatory in nature and are not regarded as a measure of claimants’ losses. The description of the common issues also focuses on alleged wrongs (criminal, tortious or contractual – 6(a), (b) and (e) or unjust enrichment (6(c)). As well, the issue relating to the calculation of monetary relief is limited to determination of an “aggregate” award (6(f)). Measurement of any “loss” by reference to the appellant’s “gain” and the relief claimed is a “restitutionary” remedy.

[107] While the wording of the certification order and the language chosen by the applications judge could perhaps have been clearer, given the lack of consistency of terminological use in this area of the law, I am satisfied that the claims being advanced are in essence claims based on unjust enrichment gained by commission of a wrong and seeking the remedy of disgorgement of the benefits wrongfully acquired.

[108] The applications judge evidently saw the case as one for disgorgement of gains wrongfully acquired and that is how the case was presented by the claimants, who did not seek to appeal the scope of the certification order. In these circumstances it is not open to the appellant 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.

[109] It is now necessary to turn to each of the specific claims being made to determine whether they are countenanced by the law or are of such an embryonic nature with a reasonable chance of success that they should nevertheless be allowed to proceed to trial.

4. Analysis of Specific Claims

(a) General Observations on Unjust Enrichment Gained from Wrongdoing

[110] As a preliminary general comment, I reiterate the observation made earlier that the area of restitution or disgorgement of gains acquired as a result of the commission of a wrong has suffered in terms of its systematic articulation. The main focus in the law relating to restitution has been on the development of coherent theories as to the cause of action based on unjust enrichment *simpliciter* leading to the remedy of restitution.

[111] There are discrete areas of the law, however, where disgorgement of gains has been recognized as a remedial response to specific wrongful conduct. But whether those areas are to be regarded as independent silos or are indicative of the application of a more general principle, leading to further expansion or development, is still open to question. Certainly, some text writers attempt to collect and discuss the individual instances under a general rubric (e.g. Burrows, Part Four: Restitution for Wrongs, and George B. Klippert, *Unjust Enrichment* (Toronto: Butterworths, 1983) at 9) whereas others eschew discussion of it all in their analysis of the law of restitution generally (e.g. McInnes, at 16).

[112] Furthermore, the individual candidates for inclusion within a general category of a claim based on unjust enrichment gained from wrongdoing are not rigidly fixed. They have included certain types of torts and equitable wrongs as well as, in a recent development, some breaches of contract. Graham Virgo, in his text *The Principles of the Law of Restitution*, 2d ed. (Oxford: Oxford University Press, 2006) would also include some crimes (at 538-545). Most of these categories raise their heads in the claims of the claimants in this case. I will now deal with them in turn, noting of course, that a plaintiff is not required, as a matter of pleading, to state the particular cause of action on which he or she relies. The requirement is to plead material facts which, when analyzed, can form the basis of a cause of action recognized, or reasonably capable of being so recognized, by the law.

(b) Breach of Contract

[113] The claimants pleaded that a contractual relationship existed between each VLT user and the appellant and that the contracts included the obligations "to provide a safe, interactive and entertaining way to play games of chance with the opportunity to win small cash prizes in return for small frequent cash bets"

(statement of claim, paragraph 46). They further pleaded that there was a requirement that the VLTs be of merchantable quality and fit for use (paragraph 47), that the appellant would use reasonable care and skill in its provision of VLT gaming (paragraph 48) and that the appellant owed a duty of good faith to consider the interests of the claimants at least equal to its own and "not to offer or supply an inherently dangerous service or product" (paragraph 50).

[114] They also pleaded a breach of contractual obligation by "designing, testing, researching, formulating, developing, manufacturing or altering, producing, labeling, advertising, promoting, distributing and/or selling VLTs which were inherently dangerous to users and which the [appellant] knew or ought to have known would lead to dependency and addiction" (paragraphs 47 and 51) and that the appellant failed in its duty to warn of inherent danger (paragraph 48).

[115] They did not specifically plead that individual members of the class suffered any actual damage in the form of addiction or financial loss except for the consideration paid to play the VLT games. The applications judge rejected the submission of the appellant that a claim for breach of contract could not succeed because proof of damages flowing from the breach is an essential element of the cause of action. He held, relying on *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401 leave to appeal to SCC refused, [2008] 1 S.C.R. xiv, that a claim for compensatory damages was not necessary to ground a breach of contract claim if the relief sought was disgorgement of benefits received from the breach.

[116] My colleague, Welsh J.A., acceding to arguments made on the appeal by the appellant and others, concludes that no cause of action for breach of contract had been pleaded because the claimants had not pleaded any loss or damage suffered by them. She asserts that "in order to establish a claim for breach of contract, some loss or damage, which may include the right to restitutionary damages, must be pleaded" (paragraph 56, above). She relied on *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601 for that proposition. With all due respect, that case does not stand for that proposition. Major J.'s discussion of damages for breach of contract in *Bank of America* was undertaken in the context of determining the degree to which interest should be allowed on a monetary judgment. He discussed two measures of damages, expectation damages and restitution damages. He did not assert that either one or the other was always required for every claim founded on a breach of contract. The cause of action is complete when a contract and its breach have

been established. The issue of damages factors into the remedial response to the breach.

[117] A moment's reflection will show that not all cases of breach of contract require that loss or damage be either proven or pleaded. For example, nominal damages are available for contractual breach without proof of any loss or other measure of damages (*French v. Paris*, [1928] 3 D.L.R. 555 (Sask. C.A.); *Rogers & Rogers Inc. v. Pinehurst Woodworking Company Inc.* (2005), 14 B.L.R. (4th) 142, 144 A.C.W.S. (3d) 654 (Ont. S.C.) per Perell J. at para. 91). Likewise, an award of punitive damages (which focuses "not on the plaintiff's loss but on the defendant's misconduct", per Binnie J. in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 at para. 73) does not necessarily depend on there being any material loss (*Rogers* at para. 91; *Webster v. Thomson* (2008), 167 A.C.W.S. (3d) 286 (Ont. S.C.), rev'd on other grounds 2008 ONCA 730). As well, declaratory relief, specific performance and an injunction may also be available without any actual loss being pleaded or proven.

[118] A distinction must be drawn between the notion of *damage*, in the sense of identifying a *loss* resulting from a breach of contract, and *damage**s*** in the sense of a potential *remedial response* to a proven breach of contract. It is the latter concept that Major J. was describing in the *Bank of America* case. His references to "restitution damages" were to a manner of granting a remedy by focusing on benefits acquired by a contract-breaker rather than losses to the innocent party. While it has been conventional to describe such a remedial response as a form of damages (with all the connotations of loss that that entails) what is really being addressed is effectively a remedy of disgorgement of benefits, not loss. None of the discussion in *Bank of America* therefore can be taken as an assertion that proof of loss is, unlike the situation in respect of some torts (e.g. negligence), a required element of the cause of action for breach of contract.

[119] I would add parenthetically at this point that in any event, the claimants did plead that they were entitled to "damages equal to the total unlawful gain obtained by the [appellant] from class members" (statement of claim at paragraph 73(e)). This is in effect a claim for "restitutionary damages" in traditional parlance. Consequently, even on my colleague's own formulation of the pleading requirement, as quoted above, the plea of damages has been properly made. See *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321 at para. 59, leave to appeal to SCC refused, [2007] 3 S.C.R. xii.

[120] It is true that the normal remedial response to a breach of contract claim is to focus on quantification of loss to the plaintiff (to put the plaintiff in the position he or she would have been in had the contract been performed) and not on the unjust enrichment of the defendant (*Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation et al.*, [1979] 1 S.C.R. 633, 89 D.L.R. (3d) 1, per Estey J. at 645 and 672; *Cassano*, per Winkler C.J.O. at para. 27). Nevertheless, there have been cases in which plaintiffs who can prove no losses calling for compensatory damages have nevertheless been granted remedies for disgorgement of profits made by defendants as a result of the contractual breach.

[121] In *Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.), four of five Law Lords of 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. In *Blake*, the defendant published a book in which, in violation of a term of his employment contract with the British Secret Intelligence Service, he disclosed information obtained by him as an agent of the government. The Crown sought, by way of an account of profits, disgorgement of the profits made on the publication and dissemination of the book. Amongst a number of issues dealt with in the case, the House of Lords addressed the question whether "disgorgement damages" could be awarded for breach of contract. It held that they could.

[122] I would pause here and note that although the disgorgement remedy was described as one of disgorgement *damages*, the remedy was not a compensatory one. In fact Lord Nicholls specifically commented that the term was not altogether apposite; he called it an "unhappy expression" (at 284H). In the terminology I have adopted, the remedy should not be called damages but merely disgorgement of a benefit unjustly acquired as a result of a wrong, a breach of contract.

[123] Lord Nicholls, after referring to the fact that most academic writers in England favoured the view that in some circumstances the innocent party to a breach of contract should be able to compel the defendant to disgorge the profits obtained as a result of the breach (but that there was no consensus on what those circumstances were) stated at 278B:

> The broad proposition that a wrongdoer should not be allowed to profit from his wrong has an obvious attraction. The corollary is that the person wronged may recover the amount of this profit when he has suffered no financially measurable loss. …

[124] 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. In the same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract.
>
> (Emphasis in original.)

[125] In concluding that an accounting for and disgorgement of profits as a remedy for breach of contract would in some circumstances be permissible, Lord Nicholls, supported by two other Law Lords, referred to and relied on a decision of the Judicial Committee of the Privy Council, on appeal from the Newfoundland courts, *Reid-Newfoundland Co. v. Anglo-American Telegraph Co. Ltd.*, [1912] A.C. 555, which the Law Lords effectively reinterpreted as a breach of contract case rather than a case of breach of fiduciary duty. The Court held that a railway company which had contracted with a telegraph company not to use a telegraph wire line to transmit commercial messages except for the benefit of the telegraph company could be required to account for the profits accruing from the use of the wire in breach of the contractual restriction (at 284D-E).

[126] Lord Nicholls asserted that "no fixed rules can be prescribed" for determining when it would be appropriate to award a disgorgement remedy (at 285G). Lord Steyn, who wrote a concurring judgment, also asserted that exceptions to the general principle of no disgorgement are "best hammered out on the anvil of concrete cases" (at 291E). That said, Lord Nicholls offered, as "a useful general guide", but with the caveat that it was "not exhaustive" (at 285H), the test of "whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit" (at 285H). At another place in his judgment, he described this notion of "legitimate interest" as amounting to a legitimate interest in the performance of the contract, on analogy with circumstances where it would be appropriate to grant the remedy of specific performance or an injunction to restrain a breach (at 282E).

[127] Whether the legitimate interest in performance test, with its analogy to specific performance or injunction, encompasses the totality of circumstances

where disgorgement would be allowed is an open question. The Court itself indicated that there should be "no fixed rules." As well, Canadian courts would not necessarily regards themselves as being bound to follow the restrictions of the English approach. Further, depending on how expansively one might regard the idea of legitimate interest in performance there may be other circumstances where one might be prepared to recognize such an interest. For example, where the contract is subject to an obligation, express or implied, of good faith, and/or an obligation to sell a safe product, the breach of which could have serious harmful non-monetary consequences to the innocent party, one might be prepared to say that the innocent party, relying on the protections inherent in the good faith/safe product obligation, might have a legitimate interest in performance, rather than to seek, perhaps uncalculable, damages for breach, which might be an inadequate remedy.

[128] It is true that the traditional idea has been that a contractual party has an option either to perform the contract or pay damages for breach. That underpins the notion of "efficient" breach of contract (*Bank of America*, per Major J. at para. 31), supported by those who analyze the law solely in economic terms. But the notion of efficient breach gives way in some circumstances such as where specific performance or injunctive remedies are available. It is a factor to be considered but not necessarily the driver of the decision in all cases. It may be considered to be overridden in favour of other policy factors, such as whether the contract breaker commits an "opportunistic" breach as opposed to merely an "efficient" breach (See Peter D. Maddaugh and John D. McCamus, *The Law of Restitution*, loose-leaf (Toronto: Thomson Reuters Canada, 2004) at 25-5 to 25-6). On the other hand, other factors may, in a given case, militate against allowing disgorgement, such as where by allowing it would undermine the principles of mitigation of damages (Maddaugh and McCamus, at 25-6 to 25-7).

[129] Clearly, on the state of the law at present, the parameters of the remedy of disgorgement of profits for breach of contract remain uncertain. As already noted, Lord Nicholls in *Blake* emphasized that "no fixed rules can be prescribed." What is clear, however, is that in certain types of cases disgorgement is a potential remedial response to breach of contract. Maddaugh and McCamus express the opinion that, from an analysis of the limited number of Canadian cases that have commented on the issue, it is "likely that Canadian courts will follow the lead of the House of Lords in *Blake* and explicitly recognize the availability of disgorgement relief for breach of contract in exceptional circumstances" (at 25-20). They postulate, however, that its availability may be limited to circumstances where the conduct of the contract-

breaker is "sufficiently similar" to breach of fiduciary obligation, breach of confidence, tort and crime (at 25-19). They also refer to cases where the agreement contained an implied term imposing an obligation of "good faith and fidelity" upon the defendant (*Jostens Canada Ltd. v. Gibsons Studio Ltd.*, [1998] 5 W.W.R. 403, 42 B.C.L.R. (3d) 149) as a justification for a disgorgement remedy (at 25-20 to 25-21).

[130] Can the current case be said to fall within these sorts of parameters? It is to be noted that the claimants have pleaded an implied duty of good faith to consider the interests of the claimants at least equal to the defendant's own interests and not to supply an inherently dangerous service or product. This pleading was correctly characterized by the applications judge as an allegation that the appellant, in the *operationalization* of its regulatory role which entailed an obligation to protect consumers, impliedly agreed to provide a service that was safe and free from deception; in other words, they were offering fair games. I disagree with the appellant's submission that the claimants have not sufficiently pleaded facts which could form the basis for imputation of an implied term. Implication of terms on the basis of necessity depends on whether the terms are "necessary to the fair functioning of the agreement given the nature of the contract under consideration" (*Health Care Developers Inc. v. Newfoundland* (1996), 141 Nfld. & P.E.I.R. 34, 136 D.L.R. (4th) 609 (Nfld. C.A.) at para. 39). 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 provide a safe and fair game. There is room, within the regulatory scheme, for the argument that the regulator is not authorized to engage in deception and duping (assuming deceptive and duping behavior can ultimately be proven) of its customers. I agree with the applications judge's conclusion in this regard.

[131] 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*.

[132] It cannot be said, therefore, that the claim for disgorgement of profits based on breach of contract is doomed to fail. The applications judge was

justified not to strike out the claims that rely on breach of contract as a wrong calling for a disgorgement of profits made as a result of the breach.

(c) Tortious Wrongs

[133] The claimants plead negligence, in the sense of a failure to observe a duty to warn potential users of the risk of VLT use. They plead both a duty of care and a breach of the duty (statement of claim, paragraphs 56-59) but they do not claim any damages. In fact, they specifically assert that they "do not advance claims for personal injuries" (paragraph 72) (but, somewhat inconsistently, nevertheless plead "loss", "damage" and "injury" (paragraphs 43 and 73)). A plea and proof of damage is a necessary element of a cause of action in negligence: *Williams v. Thomas Developments (1989) Corp.*, 2007 NLCA 54, 269 Nfld. & P.E.I.R. 290 at para. 15, leave to appeal to SCC refused, 289 Nfld. & P.E.I.R. 278.

[134] The claimants go on, however, and claim to "waive" the tort of negligence (paragraph 56) in favour of a claim to "a remedy in restitution" so as to ensure that the appellant "should retain no benefit from the breaches pleaded" (see paragraphs 60 and 61). They elaborate on this claim in paragraph 64 of the statement of claim:

> As a result of the Defendant's conduct described herein, the Plaintiffs and Class Members reserve the right to elect at or after the trial of the common issues to waive wrongs attracting a remedy in damages and to have damages assessed in an amount equal to the gross revenues earned by the Defendant, or the net income received by the Defendant or a percent of the proceeds from the sale of VLT gaming as a result of the Defendant's conduct.

[135] In addition to claiming to waive the tort and elect a restitutionary remedy, the claimants also plead waiver of tort as a *separate cause of action* which in itself attracts remedies of constructive trust, disgorgement and accounting (paragraph 62).

[136] There are therefore two bases advanced by the claimants that involve waiver of tort terminology. The first essentially asserts that, based on the historical development of the doctrine, the claimants have *a legally recognized existing right* to elect to waive the tort it hopes to prove and to claim in quasi-contract for restitution of benefits obtained. The second would appear to go further and assert that, considering the trajectory on which the development of the waiver of tort doctrine is progressing, the court *should in any event*

recognize a right to restitution even though it may not fall within the traditional categories that the law has historically recognized as waiver of tort.

[137] My colleague, Welsh J.A., rejects all of these claims insofar as they are based on tort essentially for the reason that the negligence claim requires demonstration of a loss, which, she says, has been disclaimed by the class members (above, paragraph 60). It follows, she concludes, in the absence of a plea of or reliance on loss by the class members there cannot be any tortious wrongdoing by the appellant upon which to base a claim for disgorgement (above, paragraphs 72-74). With respect to my colleague, I believe this is a faulty and incomplete analysis.

[138] Although observing that the claims based on waiver of tort had "an uncertain legal foundation" (2014 NLTD(G) 114 at para. 187), the applications judge nevertheless concluded that it could not be said that a claim based on waiver of tort being either an independent cause of action or "a derivative doctrine" was certain to fail and therefore it should not be struck out. He expressed his conclusion this way:

> [204] … whichever interpretation of waiver of tort is finally determined, the Plaintiffs must allege, and prove at trial, some wrongdoing on the part of the Defendant. If the doctrine is an independent cause of action, then proving wrongful conduct, either by breach of a statute, breach of contract, or failure to act in accordance with a duty of care, is sufficient to give rise to a restitutionary remedy, in the absence of proof of individual damages. If it is, instead, a derivative doctrine, then they would have to prove, in addition to breach of some statutory or common law duty, some individual damage.
>
> [205] At various points in the Statement of Claim, the Plaintiffs have alleged that the games are inherently dangerous, or that the Defendant has negligently provided games which are dangerous, or that there was a breach of a duty to warn of the dangers of playing the games. They allege that a portion of the class becomes problematic gamblers. They submit that the Defendant breached a duty to all class members such as to give rise to a restitutionary remedy. In my view, given the uncertainty in the law, I am unable to determine that the Plaintiffs cannot prevail at trial on this cause of action. It is therefore inappropriate to decide this matter on a striking application. The Defendant's motion on this cause of action must fail.

[139] While I agree with the conclusion reached by the applications judge, I would not express my reasons quite as he has done. I would not dismiss the application simply because the law with respect to waiver of tort is "uncertain". While that is certainly a relevant consideration, I would go further, for the reasons to follow, and say that the law has progressed to the point where it is

reasonable to conclude that, depending on proof at trial, a court could find on the facts as pleaded that a claim for disgorgement is actionable (subject, of course, to possible defences) based on unjust enrichment of the appellant as a result of tortious wrongdoing. In so concluding, I would also assert that such a claim, where it is based on a claim of negligence, does not depend on proof of damage to individual tort victims; it is sufficient to prove a breach of a duty of care, i.e. the "wrong" that forms the basis of the tort. This is because of my conclusion that "waiver of tort" is now a misnomer which is productive of much confusion in current jurisprudence on the subject. It does not depend on an artificial concept of "waiver", i.e. a giving-up of a fully independently-actionable tort in favour of another claim, but on separate wrongful conduct leading not to injury to the claimant but to the unjust acquisition of a benefit.

[140] The appellant, supported by all respondents except the claimants, takes issue with the applications judge's reasoning and conclusions. They assert that waiver of tort is not a separate cause of action and that insofar as the notion is, to use the judge's words, derivative, there has to be a fully-proven tort of negligence, including damage, something that cannot be established given the claimants' concessions on the pleadings and in argument.

[141] It is necessary to consider what the current state of the law is with respect to the concept of waiver of tort. In this jurisdiction, the issue of whether waiver of tort can constitute a separate cause of action or simply involves an election of alternative remedies is still at large. Two decisions, one at the trial level (*Club 7 Ltd. v. E.P.K. Holdings Ltd.* (1993), 115 Nfld. & P.E.I.R. 271, 46 A.C.W.S. (3d) 529 (Nfld. T.D.), per Puddester J. at paras. 203-207) and one in *obiter* in dissent in this Court (*Hurley v. Slate Ventures Inc.* (1998), 167 Nfld. & P.E.I.R. 1, 82 A.C.W.S. (3d) 279 (Nfld. C.A.) per Cameron J.A. at para. 144) suggest that the doctrine simply involves an election of remedies. Neither of these decisions can be said to be controlling.

[142] The doctrine originally developed as a procedural device to enable certain novel claims to be fitted into one of the ancient forms of action known as *assumpsit*. (For a fulsome discussion of the historical development of the doctrine, see J.M. Martin, "Waiver of Tort: An Historical and Practical Survey" (2012) 52 Can. Bus. L.J. 474 at 480-520). Because it was procedurally impossible under the old forms of action to use *assumpsit* (which was based on the notion of an undertaking express or implied) to plead the facts of a tort, the courts developed the idea of allowing the plaintiff to permanently give up or "waive" the tort and pursue a claim on the basis of a fictitious undertaking (a quasi-contact) so as to allow the plaintiff to obtain an account of profits from the

party who failed to observe that fictitious undertaking. Martin explains that from and after the late 17th century, cases were encountered in which actions could properly be called "waiver of tort and action in *assumpsit*":

> … actions wherein the fact that the defendant is a stranger and a tortfeasor could be permanently set aside in order to proceed with the action implying that an agreement was made between the parties. This extended nomenclature, while tedious, demonstrates that from its inception *waiver of tort was not itself a cause of action.* Indeed, "causes of action" were as yet unheard of, as the submission of "forms" of action were the plaintiff's originating process. When the concept of "waiver of tort" first came into use, it existed as an election to forever set aside the potential action in tort in order to bar the defendant's proof of that tort, and to proceed in the well-established action of *assumpsit* instead. The plaintiff's originating process was in *assumpsit*, never in "waiver of tort". (at 492)

(Emphasis in original.)

[143] Originally, there were only a limited number of types of tort cases that were recognized as being capable of being waived in favour of an action in *assumpsit*: usurpation of office; wrongful compulsion to pay money; and conversion, deceit or trespass. Martin summarizes the position at the beginning of the 19th century as follows:

> … at the dawn of the 19th century, waiver of tort was understood as a procedural step unique to proprietary claims in *assumpsit*: a way of permitting full recovery of profits wrongfully derived from one's property, without that action being effectively precluded by the defendant pleading his own tort and rebutting the imputation of a quasi-contractual undertaking to pay those proceeds over. (at 497- 498)

[144] I am satisfied that, viewed from a historical perspective, waiver of tort could not be said to be an independent cause of action; it was permitted as an election of an alternative means of achieving a different remedy in certain limited circumstances. Historically, it was an election of remedies by waiving an underlying tort.

[145] One would have thought that, with the procedural reforms in England in the 19th century, which abolished the necessity of fitting proven facts into a standard form of action or within a legal fiction that made the facts fit the form, and instead required only a plea of actual facts (i.e. facts constituting a recognized cause of action) together with a request for an appropriate remedy, the *notion* of waiver of tort would have had no further use. Instead the focus would be placed on the scope, if any, of a cause of action based on the principles underlying a recognized right to a particular remedy that had been recognized

for centuries. Yet, as academic commentators have pointed out, the terminology continued to be employed. Instead, *assumpsit* came to be regarded as an action in quasi-contract, allowing facts to be pleaded, which could overlap facts supporting a tort claim, but which would lead to a different remedy. Because the law does not contemplate double recovery, a plaintiff proving facts that could lead to a tort remedy (damages) but also to a disgorgement of profits earned as a result of the commission of the tort was required to choose which remedy he or she was seeking. In that sense, waiver was still alive.

[146] The important House of Lords case of *United Australia Ltd. v. Barclays Bank*, [1941] A.C. 1 (H.L.), which scotched the notion of implied contract as the basis of the claim involving waiver of tort, explained it this way:

> … it is now possible to combine in a single writ a claim based on tort with a claim based on assumpsit, and it follows inevitably that the making of the one claim cannot amount to an election which bars the making of the other. …The substance of the matter is that on certain facts he is claiming redress either in the form of compensation, i.e. damages as for a tort, or in the form of restitution of money to which he is entitled, but which the defendant has wrongfully received. The same set of facts entitles the plaintiff to claim either form of redress (at 18-19, per Viscount Simon, L.C.).

[147] The election of remedy could, however, occur at the end of the trial, according to *United Australia*. It was in effect a form of estoppel, preventing the plaintiff from receiving remedial satisfaction that would allow for excess recovery. It is also to be noted that the basis of the remedy of disgorgement is expressed in *United Australia* as a restitutionary one: if the commission of a wrong (i.e. a tort) leads to the enrichment of the wrongdoer, the plaintiff may seek restitution of those benefits. The remedy of disgorgement, instead of compensation, flows from the fact that the commission of the wrong leads to an enrichment of the wrongdoer that is regarded by the court as unjust. It is not the tort that is being waived but the right to recover damages, if any, for the tort.

[148] Martin concludes from his exhaustive historical examination of the development of waiver of tort that it "was never an originating process, before or after the abolition of the forms of action" (at 505). I accept that conclusion. That, however, does not end the matter. The issue today is whether this procedural anomaly should continue to be so regarded as a historical relic with no modern relevance except as an election of remedies in certain limited circumstances or can it, like other areas of quasi-contractual claims, be explained and subsumed under a broader principle justifying a cause of action such as one based on unjust enrichment (by wrongdoing).

[149] The history of the development of quasi-contract law and certain related areas of the law that deal with the acquisition of benefits in circumstances which the law considers unjust has involved the search for some organizing principle that explains their operation in a modern context (*Moore v. Sweet*, para. 38). That organizing principle has generally been the notion of unjust enrichment. See *Morrison and Morrison v. Canadian Surety Co. and Mahon*, [1954] 4 D.L.R. 736, 12 W.W.R. (N.S.) 57 (Man. C.A.) per Coyne J.A. at 753-754. The same is true with the quasi-contractual remedy flowing from waiver of tort. To repeat the observation of McInnes quoted near the beginning of these reasons, waiver of tort is now regarded as "archaic language for the simple idea that some forms of wrongdoing exceptionally allow the successful plaintiff to demand disgorgement of the defendant's gain as an alternative to compensation for loss."

[150] There are those, of course, who object that a new comprehensive principle cannot be constructed out of the ruins of a historical anomaly. It is better, it is said, to declare that no cause of action for disgorgement based on benefits acquired as the result of the commission of a tortious wrong exists in our current law and that none should be recognized. That is essentially the position of the appellant and the fifth respondent. They further say that the court, on an application such as this, should not "punt" the ball of rule-definition to a full trial but should decide the issue once and for all on preliminary application. They say that the applications judge erred in not doing so. They further argue that, in deciding the question, there are a myriad of policy questions and potential defences that could be raised in objection to recognition of such a cause of action and that they militate against recognition of any general principle.

[151] I do not subscribe to that approach. The history of the common law demonstrates its capacity to grow organically, re-inventing itself to respond to new social conditions and new ideas by reassembling disparate concepts and precedents into broader, more recognizable and relevant principles that can better explain and underpin modern application of the old rules. Rather than closing the door on further development, the common law is protean and restructures itself as required. One need only to reflect on the development of the modern law of negligence in *Donoghue v. Stevenson*, [1932] UKHL 100, [1932] A.C. 562 or the modification and restatement of the common law principles of occupier's liability by this Court in *Stacey v. Anglican Churches of Canada* (1999), 182 Nfld. & P.E.I.R. 1, 92 A.C.W.S. (3d) 1116 (Nfld. C.A.) to

see this process in action. There is nothing sinister or inappropriate occurring when a court uses the common law to repurpose outdated rules to fit modern circumstances.

[152] In *United Australia,* Lord Atkin, in discussing the history of quasi-contract with a view to finding a basis in principle for the old rules involving waiver of tort, commented on the old concepts:

> … if a man so wronged was to recover the money in the hands of the wrongdoer, *and it was obviously just that he should be able to do so,* it was necessary to create a fictitious contract. … But the fiction is too transparent. … These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights. *When the ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred.* (at 27-29)

(Emphasis added.)

[153] The response therefore to a plea for holding the line is not to throw up one's hands and turn one's back on further development or to jettison old rules entirely but to proceed on "undeterred" and carefully consider how, if at all, new principles can and should be formulated from and out of what has gone before. Sometimes newly-formulated principles are expressed in such generality that one could legitimately object that more detailed rules are necessary to provide for application in specific cases and to ensure that policies underlying the principles are not undermined. It is, however, in the crucible of specific fact situations – in the context of an actual trial, as it were – where the need for restraint and caution will become apparent and can lead to refinements of and restrictions on any general principle. In *Morrison*, Coyne J.A. responded to such an argument at pages 753-754 as follows:

> [98] Those who support the implied contract, constructive trust or other fictional theory adopt a negative position, a *status quo.* They do not attempt to find a general principle. They object that the test of natural justice, the test of *aequum et bonum*, the standard of the "fair and just man," is too vague for the courts to adopt. But the standard differs but little, if at all, from that of the "reasonable man" which has a firmly established place in Canadian, English and other jurisprudence, or from the standard of what is "just and equitable" or other equivalent expressions, to be found as well in a number of our statutes such as the *Companies Act*, R.S.M. 1940, c. 36, s. 419(c); winding up when "just and convenient" which has been there for many years … and similar statutes and other statutes in this country and in England. The objection is consonant rather with rigid, static ideas of an earlier formal and unprogressive day. If certainty is what the objectors seek – a firm, legal measuring rod rather than the

> "vagueness" of justice – the answer is that neither certainty nor justice resides in the quicksands of fantastic fictions.

[154] While the literature and the statements in the caselaw are by no means uniform, there are those who assert that it is time to restate as a cause of action a principle that rationalizes the notion underlying waiver of tort leading to the restitution or disgorgement of profits acquired as a result of commission of a tortious wrong: provision of a disincentive or deterrence of wrongful conduct which leads to improper profit-making. Maddaugh and McCamus, for example, submit that "once its true nature and scope is fully appreciated, waiver of tort ranks as one of the most useful and innovative tools for achieving the goals of the law of restitution" (at 24-38). They also assert that there is no reason in principle why such claims should be limited to the "proprietary" torts, i.e. ones where the tort involves the plaintiff's property leading to the acquisition of profits from use by the defendant. They argue that it could in principle apply to personal torts such as battery, false imprisonment, negligence and defamation provided the tortious conduct produces a profit (at 24-9). They give as examples:

> Thus, where a "hit man" is hired to inflict physical harm upon an individual for a substantial fee, there is, in our view, no rationale for denying a restitutionary claim by the victim to deprive the wrongdoer of the benefit of the assault and battery. Similarly, where the defendant has, for example, clipped the locks of hair from the head of a well-known personality without permission and sold them to the public at a handsome price, the wrongdoer ought to disgorge the sale proceeds to the plaintiff on the grounds of unjust enrichment (at 24-9 to 24-10).

[155] They also cite *Heward v. Eli Lilly & Co.* (2007), 154 A.C.W.S. (3d) 1020, 47 C.C.L.T (3d) 114 (Ont. Sup. Ct.) aff'd (2008), 91 O.R. (3d) 691, 295 D.L.R. (4th) 175 (Ont. Div. Ct.) in support of the proposition that the tort of negligence could also qualify. Cullity J. was prepared to certify a class action alleging negligence in the distribution of an anti-psychotic drug on the basis that a claim for disgorgement of profits caused by the defendants' wrongdoing was not bound to fail. A sufficient causal connection (on a "but for" basis) between the alleged wrongful conduct and the amount of the wrongful gain could be established if the plaintiffs could prove that the defendants were negligent with respect to the manufacture and distribution of the drug or failure to warn of the associated risks. He stated:

> [46] … With the gradual but increasing recognition of general restitutionary principles by the courts there is inevitably a measure of uncertainty with respect to the existing law and the manner in which it is likely to develop in the future. What does appear to

> be certain is that, as the unifying principles are accepted, some of the limitations that the older cases may have appeared to place on the availability of restitutionary remedies will disappear. An approach that would consider waiver of tort as necessarily restricted to the specific wrongs for which a disgorgement remedy has been granted in the past would be inconsistent with the prevailing approach of the Supreme Court of Canada to the development of the law governing restitutionary remedies in cases such as *Peel (Regional Municipality) v. Canada*, [1993] 3 S.C.R. 762 at pages 788-789 and *Garland v. Consumers Gas Co.*, [2004] 1 S.C.R. 629 at para. 47.

[156] On appeal to the Divisional Court, the appeal was dismissed. Cumming J. wrote:

> [21] … Arguably, waiver of tort is available whenever [tortious] conduct has produced a profit. *There seems to be no principled reason to exclude waiver of tort from negligence actions.*
>
> (Emphasis added.)

[157] Relying on *Serhan Estate v. Johnson & Johnson* (2006), 85 O.R. (3d) 665, 269 D.L.R. (4th) 279 (Ont. Div. Ct.), leave to appeal to C.A. refused, M33963 (October 16, 2016), leave to appeal to SCC refused, [2007] 1 S.C.R. x, and other cases, the Divisional Court affirmed Cullity J.'s conclusion that given the embryonic nature of claims asserted based on waiver of tort, especially in the negligence area, the policy issues that might affect the scope of the restitutionary claim should be addressed in the context of a complete record after a trial rather on a preliminary motion.

[158] Graham Virgo, writing on the state of English law on the subject, acknowledges that, as of the date of his writing, disgorgement will only arise where the defendant's wrongdoing involves interference with the claimant's property in some way. He nevertheless concludes, at page 476 of his text that as a matter of principle, restitutionary remedies should be available in a wide variety of circumstances:

> … But for some other non-proprietary torts the defendant may have obtained a benefit from the commission of the tort and so it might be appropriate to require the defendant to disgorge this benefit to the claimant. This may sometimes be the case with the tort of negligence where, for example, the defendant negligently causes injury to the claimant as a result of economizing on safety precautions. …
>
> … Is there a case for extending the law so that a restitutionary remedy is potentially available for all torts? Goff and Jones [*The Law of Restitution*, (7th ed., 2007) para 36-006] have argued that it should be sufficient that the commission of any type of tort has caused the defendant to gain a benefit which would not have been gained but for

> the commission of the tort. Although it is clear that this view does not yet represent English law, it is a view which should be recognized by the courts. Wherever the defendant has obtained a benefit as the result of the commission of a tort the claimant should be able to elect a restitutionary remedy whereby the defendant is required to disgorge to the claimant any benefit obtained by the commission of the tort. Restitution is justified simply because no wrongdoer should be allowed to benefit from the commission of a wrong and the claimant is the appropriate recipient of the benefit because he or she is the victim of the wrong. *The principle should be of general application regardless of the type of tort which the defendant has committed, since there is no policy reason why restitutionary remedies should not be available in such circumstances.*
>
> (Emphasis added.)

[159] A slightly more cautious approach is advocated by Burrows in *The Law of Restitution*, 3d ed.. Although he submits that restitution for wrongs is more difficult to justify than compensation for wrongs he nevertheless concludes that it should be available in a variety of circumstances where the stripping-of-profits principle can be buttressed by another factor that would justify restitution. He rejects the idea of either restitution being always available or never being available (at 662):

> … The law takes neither extreme position. By accepting that restitution is sometimes available it is recognizing that there is no mechanism within civil law by which gains can be made payable to the State rather than to the claimant and that overcompensating the claimant is a lesser evil than leaving the defendant with ill-gotten gains. On the other hand, its enthusiasm for this departure from the compensatory ideal is lukewarm so that *additional* reasons for restitution over and above simply profiting from wrongdoing are looked for.
>
> Protecting property and deterring cynical wrongdoing therefore appear to be important in providing additional reasons for restitution. It is arguable, therefore, that 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. …
>
> (Emphasis in original.)

[160] I agree that protecting property rights and deterring cynical wrongdoing are factors which, if present, may assist in reaching a conclusion in a particular case that the enrichment of the defendant is unjust and thus deserves a restitutionary or disgorgement remedy. I see no reason, however, to limit such additional factors to the two mentioned; other circumstances might also justify a

conclusion that a particular enrichment is unjust. A broader concept of deterrence might be appropriate especially where as a result of negligent or other conduct persons have been exposed to significant risk of harm.

[161] In an article published in 2014, John D. McCamus advances a more detailed argument than that provided in the text he co-authored with Peter Maddaugh for not limiting the cause of action to particular categories of torts or for limiting it to circumstances, including negligence, where loss on the part of the claimant should be a prerequisite for a disgorgement remedy ("Waiver of Tort: Is There a Limiting Principle?" (2014) 55 Can. Bus. L.J. 333). He rejected limiting the remedy to the proprietary torts or to "anti-enrichment" torts (terminology developed by Birks in *An Introduction to the Law of Restitution* at 328-332, but which has since been rejected in *Heward*) as either illogical in principle or as not being consistent with the position in current Canadian law. He also considered and rejected a limiting principle that places emphasis either on finding a deliberate intention to enrich oneself by committing a wrong against the plaintiff, or on a general distinction between intentional and accidental conduct. In each case he concludes such limitations may be either under- or over- inclusive in a given circumstance and may not thereby capture (or may over-capture) cases where it would be perceived to be just to grant a disgorgement remedy.

[162] Instead, McCamus posits as the true principle underlying the cause of action simply the notion of providing a disincentive or deterrence to wrongful conduct:

> … 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. (at 350)

[163] Applying that principle, McCamus reasons:

> … the answer to the question ["what torts can be waived?"] should be fashioned by considering whether the tortious misconduct in question is of such a nature that the deterrence or disincentive rationale is engaged and disgorgement of the profit secured through the wrongful conduct is an appropriate form of relief. … [I]t does appear that the deterrence rationale can be engaged in circumstances where the conduct may be unintentional in the sense of being merely negligent or careless. This proposition leads to the conclusion *that no category of tortious misconduct ought to be automatically excluded from the provision of disgorgement relief.* 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 awarding of disgorgement relief. (at 352)

(Emphasis added.)

[164] This approach also means that the deterrence/disincentive rationale can define the outer parameters of when a disgorgement remedy will be appropriate. McCamus explains:

> This analysis also suggests, however, that it may be possible to articulate a limiting condition on disgorgement for tort. If the deterrence rationale suggests that no type of profitable tort should be excluded from the possibility of disgorgement, *may it not also suggest that there may be particular fact situations in which, even though profits have been tortiously acquired, the deterrence rationale may not be sufficiently engaged to warrant disgorgement on the particular facts?* A plausible candidate for withholding relief might be a garden variety negligence claim where the awarding of compensation is thought to be a sufficient disincentive or where it is thought that disgorgement might constitute overkill in the sense that it would discourage socially useful activity. … *It seems conceivable that there might be situations where an argument based on the risk of over-deterrence could have some force*. … [T]here may be cases of negligence where the defendant's conduct fell substantially below a reasonable standard of care, and perhaps especially *where risks of personal injury and property damage were created by the negligent act…* (at 352-353)

(Emphasis added.)

[165] I agree with this approach. It provides a principled basis for resolving disgorgement claims based on tortious wrongdoing that is not inconsistent with the trends in current law.

[166] On this approach, given that no category of tortious conduct can, to use McCamus' phraseology, be "automatically excluded", the question, especially in a negligence context, should be approached on a case by case basis focusing on the nature of the wrongful conduct, the degree and seriousness of the breach of duty and the behavior of the defendant with a view to determining whether it is appropriate in the circumstances to vindicate the deterrence/disincentive rationale by calling for a disgorgement remedy. That sort of analysis must, of necessity, take place once all the facts are known and at the point where a determination is being made as to whether the enrichment that occurred is "unjust." At the pleading stage, all that would be necessary, to avoid a "plain and obvious" pre-emptive striking out would be a pleading of facts supporting tortious wrongful conduct, a plea of an enrichment acquired as a result of the wrong together with such surrounding circumstantial facts from which a

plausible submission could be made that the deterrence/disincentive rationale should be applied to achieve disgorgement in favour of the claimant, thereby making the enrichment unjust unless disgorgement were made.

[167] In his article, McCamus also directly addresses the question whether it would be necessary to prove loss to the claimant where such loss is, on compensatory principles an element of the tort, such as in the case of negligence. This addresses the vexed question whether a claim of unjust enrichment by tortious wrongdoing is "parasitic" on proof of all elements of the tort or can be said to be a truly independent cause of action which may not therefore have to insist on all elements being established. McCamus notes that "in class action cases in which the plaintiff is asserting a disgorgement claim for a tort that contains loss as one of its elements, defendants embrace the Birksian parasitic theory and claim that, since the plaintiff cannot (or does not wish to for obvious reasons) establish loss on the part of individual class members, the disgorgement claim should not be certified" (at 356). That is essentially the position advanced by the appellant and other non-claimant parties in the current case.

[168] McCamus nevertheless concludes that "the parasitic theory is simply misguided" (at 357). On the basis of his analysis of history, policy and principle (at 357-358) he agrees with the proposition that:

> … we should answer the question [whether disgorgement should be granted] not by asking whether or not a tort was committed, but by asking whether or not the principles and policies underlying disgorgement claims recognized by the law suggest that such relief ought to be awarded … on these facts. … *[T]here is simply no reason in principle why the rules for compensatory damages need to be identical to the rules for disgorgement*. The two different remedies serve different purposes or rationales and need not always be available in the same fact situations (at 359).
>
> (Emphasis added.)

[169] His conclusion:

> … the better view is that disgorgement relief generally and disgorgement for tort in particular should be viewed as independent sources of liability which are not parasitic in the sense of being dependent upon establishing all the elements of a cause of action in some other field of law. … [A]s a matter of legal policy, the two questions of liability for compensatory damages as opposed to liability for disgorgement seem to be separate and distinct. … *[T]here does not appear to be a compelling reason of principle or policy why the rules relating to compensatory damages should be precisely the same as the rules relating to disgorgement.* (at 359-360)

(Emphasis added.)

[170] The time has come to jettison the terminology of waiver of tort and to recognize that a cause of action exists that, in principle, allows for the disgorgement of profits acquired as a result of the commission of a tortious wrong. While the parameters have yet to be precisely defined, it in principle allows for a restitutionary or disgorgement remedy where the following circumstances apply:

> 1. The defendant has committed a tortious wrong against the plaintiff;
>
> 2. The wrong need not be limited to particular classes of torts, such as those involving interference with the plaintiff's property or personal rights such as rights to protection of reputation. The key is the effect of the commission of the tort on the ability of the defendant to acquire a benefit;
>
> 3. The defendant acquired a benefit (an accretion of wealth or saving of expense) that he or she would not have acquired but for the commission of the wrong;
>
> 4. The benefit need not have been a result of a deprivation of or loss to the plaintiff but may be acquired from other sources so long as it has been derived from the commission of the tortious wrong against the plaintiff;
>
> 5. Considering all the circumstances, including the principle that a wrongdoer should generally not be allowed to profit from his or her wrong, the enrichment of the defendant is determined to be unjust (or perhaps better terminology, unjustifiable);
>
> 6. Whether the enrichment is unjust will essentially depend on whether it is appropriate to vindicate the deterrence/disincentive principle on the particular facts of the case. Factors affecting that determination would include: (i) special policy considerations affecting the particular tort (e.g. whether the defence of statutory or regulatory authority might apply); (ii) whether the commission of the tort was intentional, cynical or calculated to make a profit at the expense of others; (iii) whether to allow disgorgement would inappropriately deter socially useful activity; and (iv) whether the wrong was a type that exposed persons to serious risk of physical, mental or emotional harm or loss.

[171] While the existence of a cause of action for unjust enrichment by tortious wrongdoing should not in principle depend on the type of tort committed, it should be recognized that the tort of negligence presents its own special challenges in this context. This is largely because of two factors: (i) the existence of loss on the part of the plaintiff is a necessary element of the cause of action; and (ii) in some circumstances the ambit of risk created by the tortious conduct can encompass a very large number of potential plaintiffs.

[172] The second factor is not peculiar to negligence (e.g. it could also apply to the tort of nuisance) but it perhaps is more acute in the negligence context because of the broad sweep of potential duties of care in some circumstances. Many people may be potentially within the ambit of the risk created by the negligent conduct. It is the injury suffered as a result of the negligent activity that individualizes the tort and limits a claim to a narrower number than all those within the ambit of created risk. But, in the context of unjust enrichment by wrongdoing generally, there is, as already discussed, no focus on or even a need to require that the plaintiff suffer any loss or deprivation; hence, in principle, there should be no need to allege actual loss, only that the risk created by the negligent conduct could potentially have caused loss to a person in the position of the plaintiff.

[173] Accordingly, since the purpose of the cause of action involving unjust enrichment by tortious wrongdoing is not, as in the case of tort, to vindicate the right to compensation for loss but to vindicate the idea that a wrongdoer should not profit from his wrong regardless of whether loss is caused, the necessity of requiring loss falls away. If enrichment is brought about by the commission of a wrong, i.e. the breach of a duty of care owed to the claimant, it is arguable that that should be sufficient. The defendant has still acted inappropriately, i.e. wrongfully, in the sense of failing to comply with the standard of behavior that is expected of him or her and exposing persons to the risk of harm, and has acquired a benefit to which he or she would not otherwise have been able to acquire but for the breach of the duty of care.

[174] That leaves the problem that if all that is needed is for the claimant to fall within the ambit of risk, even if no loss is actually suffered, there could (but not necessarily would) be multitudinous plaintiffs. How does the court resolve how much any particular plaintiff should be able to recover? Obviously, the upper limit would have to be the amount of the profit or other enrichment acquired by commission of the wrong. If a number of claimants were to commence separate actions, would the first claimant to receive judgment be entitled to a windfall of the total profits earned by the defendant, leaving subsequent claimants with nothing? If the claimant has actually suffered a deprivation, maybe the amount of recovery for *that* claimant could be limited to the amount of which he or she has actually been deprived? But that tends then to place focus on the loss to the claimant, rather on the stripping away of any wrongfully-acquired gains obtained by the defendant.

[175] It is inherent in this area that a claimant may receive a windfall which is regarded as the lesser evil than allowing a defendant to profit from a wrong. In

any event, a first-past-the-post approach may not be as unfair as it may at first seem. In reality, it is no different from what now exists in the area of compensation claims. A number of plaintiffs may separately press claims against one defendant in respect of one negligent act. Assuming they are tried separately, one may get judgment and have it satisfied before the others are even out of the gate, reducing the defendant's remaining assets to a point that would not be able to satisfy the remaining claims. To some degree this potential problem can be ameliorated by procedural devices of consolidation of cases and joint case management. This is equally true for restitution claims as for compensation claims.

[176] In fact, there should be less concern in the restitution area, because the issue is not fairness to individual plaintiffs to ensure they are justly and individually compensated but to ensure that profit-making defendants are not allowed to keep their ill-gotten gains. The claimants are by definition receiving a windfall and cannot complain if one or more, but not all, are successful in benefitting from it. In any event, the class action procedure seems particularly suited to resolving such multiple-plaintiff claims in an appropriate manner since all class plaintiffs can receive a proportionate share. One of the purposes of class action legislation is to deter or correct the behavior of wrongdoers.

[177] Considering the thrust of academic commentary, the general trend to try to systematize the law on the basis of underlying principles, the direction pointed in such cases as *Heward* and *Serhan* , I am therefore satisfied that it is appropriate to recognize unjust enrichment gained as a result of wrongdoing as a cause of action that can encompass a wide variety of torts, including negligence (in the sense of the breach of a duty of care), even in circumstances where there is no proof of loss to the claimants.

[178] It follows from these conclusions that I reject such decisions as *Reid v. Ford Motor Company et al.*, 2006 BCSC 712, 149 A.C.W.S. (3d) 804, which held that a claim based on waiver of tort was parasitic in nature, not an independent cause of action. I also reject the arguments in such academic commentaries as Barton, Hines and Therien, "Neither Cause of Action nor Remedy: Doing Away with Waiver of Tort," [2015] *Annual Review of Civil Litigation* 131 and Weber, "Waiver of Tort: Disgorgement *Ex Nihilo*"(2014) 40 Queen's L. J. 389 which argue that no separate cause of action should be recognized.

[179] The argument advanced by Barton, Hines and Therien is that recognition would involve "a tremendous leap into uncharted territory" (at 146) that "would

give birth to a new tort over night without the benefit of a jurisprudential period of gestation" (at 146). A better approach, they argue, would be to identify individual instances where disgorgement by way of awards of gain-based damages are presently recognized in the case law and to proceed slowly and incrementally, if at all, from that base to other possible situations which fit the same mould. With respect, I believe that the authors overstate the degree of the "leap into uncharted territory." 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.

[180] Weber argues that waiver of tort as an independent cause of action, without a requirement in every case for proof of all elements of a predicate tort (including loss, where that is an element), does not and should not exist. He puts it pithily: "Granting disgorgement without proof of loss (when it would otherwise be required) results in disgorgement arising out of legal nothingness" (at 424). In my view, this overstates the position. The recent cases cited by Weber in support of his analysis (*Reid*; *Pet Supplies (USA) Inc. v. Pivotal Partners Inc.*, 2008 BCSC 1667, 91 B.C.L.R. (4th) 328; *Dennis v. Ontario Lottery and Gaming Corp.* 2011 ONSC 7024, 344 D.L.R. (4th) 65 aff'd 2013 ONCA 501, leave to appeal to SCC refused, 355 O.A.C. 399; *Aronowicz v. Emtwo Properties Inc.*, 2010 ONCA 96, 98 O.R. (3d) 641; *Andersen v. St. Jude Medical Inc.*, 2012 ONSC 3660, 219 A.C.W.S. (3d) 725; *Parker v. Pfizer Canada Inc.*, 2012 ONSC 3681, 217 A.C.W.S. (3d) 22; and *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642, 220 A.C.W.S. (3d) 681, aff'd 2013 ONCA 657, leave to appeal to SCC refused 473 N.R. 387) − many of which he himself criticizes as being inconsistent or unclear − certainly cannot be said to be definitive in favour of not recognizing an independent cause of action. If, as is suggested by others, such as Maddaugh and McCamus, there can be an independent cause of action, then it does not matter that proof of loss must exist because, to quote the McCamus article again "there is simply no reason in principle why the rules for compensatory damages need to be identical to the rules for disgorgement". The independent cause of action will determine what elements need to exist to establish the predicate "wrong". Disgorgement does not arise "out of legal nothingness" but out of the rules relevant to the applicable cause of action.

[181] Although the case law is not uniform, and is often expressed in confusing and sometimes contradictory terms, the general trajectory over the last fifteen years is to recognize the potential for a cause of action for unjust enrichment gained through tortious wrongdoing to be recognized. Typical is the comment of Rothstein J. writing for the Supreme Court in *Pro-Sys*:

> [94] Microsoft advances two arguments as to why this claim should be struck. First, it states that Pro-Sys has pleaded waiver of tort as a remedy and not a cause of action, and therefore proof of loss is an essential element. Second, if indeed waiver of tort is pleaded as a cause of action, the underlying tort must therefore be established, including the element of loss. *In my view, neither argument provides a sufficient basis upon which to find that a claim in waiver of tort would plainly and obviously be unsuccessful.*
>
> (Emphasis added.)

[182] Although the Court did not decide the issue, it recognized that other cases such as *Serhan*, had identified other authorities that had accepted "the viability of waiver of tort as its own cause of action intended to disgorge a defendant's unjust enrichment gained through wrongdoing" (at paragraph 95) and that American and United Kingdom jurisprudence and academic texts had "largely rejected the requirement that the underlying tort must be established in order for a claim in waiver of tort to succeed" (at paragraph 96). If waiver of tort as an independent cause of action had no basis and should not have a basis in the law, the Court could have said so. It did not. The message from this analysis is that the door is not closed to a conclusion that a separate cause of action exists. As I have indicated above, it should be recognized.

[183] In the current case, the claimants have asserted a relationship of proximity to the appellant through the machine use (statement of claim at paragraph 56), that the appellant knew or ought to have known that "VLTs when used as intended, are addictive and could cause suicide, attempted suicide and suicidal ideation" and that as a consequence a duty of care to "perform due diligence on the safety of the games" and to warn potential users, including the claimants, of the risks of playing the games (paragraph 57). They further assert that the appellant failed to give proper or any warnings (paragraph 58) or to make design changes as might make the games "acceptably safe" (paragraph 66). They also assert that any breach of duty occurred at the "operational level" rather than at a policy-making level or, alternatively, even if it occurred at a policy level, it was not made in the *bona fide* exercise of statutory discretion. That is sufficient at the pleading stage to amount to a claim that the appellant cannot avoid liability

by simply relying on its public regulatory function. They also assert that the appellant acted in a "high-handed, wanton and reckless or deliberate manner" (paragraph 67) and that compensatory damages would, in this case, be inadequate (paragraph 68).

[184] In paragraph 69 of the statement of claim, the claimants list factors relevant to the remedies being sought:

> (a) The conduct is planned and deliberate;
>
> (b) The intent and motive of the Defendant is to maximize profit as a result of its deceit;
>
> (c) The Defendant has persisted in its outrageous conduct over a lengthy period of time;
>
> (d) The Defendant has concealed and attempted to cover up its misconduct;
>
> (e) The Defendant is aware that what it has been doing is wrong;
>
> (f) The Defendant has profited from its misconduct;
>
> (g) The interest threatened or violated is deeply personal and is irreplaceable, including the life, liberty and personal security of members of the plaintiff class;
>
> (h) There is a vast imbalance in power and knowledge between the Defendant and the plaintiff members, and class members are vulnerable to the predatory deceptions of the Defendant;
>
> (i) The Defendant has abused public trust by promoting the image that it manages and controls "responsible VLT gaming" for the public good. The abuse of public trust is the greater, given the Defendant's role as regulator.

[185] Assuming, following trial, the claimants are able to convince the court of some or all of these contentions, it could lead to a conclusion of cynical opportunistic wrongdoing thus providing a justification, over and above the profit-stripping principle itself, for concluding that the resultant profit-making by the appellant was unjust and warrants disgorgement of all or a portion of those profits. Even on the narrower Burrows formulation of the test for disgorgement for wrongdoing, therefore, a claim on the current pleading is not bound to fail. Further, such findings could lead to the conclusion that the manner of operation of VLTs was not socially useful, even though the appellant was performing a regulatory function, and that to vindicate the deterrence/disincentive principle disgorgement was appropriate.

[186] Much was made in argument on the appeal of the claimants' plea in paragraph 72 of the statement of claim that "the Plaintiffs do not advance claims for personal injuries." This disclaimer does not assert that the claimants did not *suffer* any injuries, only that they are not *advancing any claims* for those injuries. Indeed, as noted earlier, they also assert that the "the defendant has caused, and continues to cause, injury" (paragraph 73). As well, they assert that they "suffered loss or damage", including the money paid to play the VLTs (paragraph 43). On the pleading, therefore, I do not see that the claimants are precluded from leading evidence that the breach of duty (assuming it can be proven) led to some form of injury to the claimants or some of them. As I understand the claimants' position, it is that the nature of the claims being advanced will not involve an attempt to prove the extent of their injuries as a basis for asserting a compensation claim, so as to avoid objections to certification of the class action. This is not inconsistent with the position taken in the claimants' litigation plan (Appeal Book, Vol. 3, Tab 22, pp. 704-712). As noted by the Divisional Court in *Heward*, restitutionary relief may be available in class proceedings "even in the case where only a portion of the class are victims of the wrongful conduct" (at paragraph 40). On this analysis proof of some injury would complete the establishment of the tort of negligence in a class proceeding and would enable a disgorgement claim to be made out on the basis that all the elements of the tort are present.

[187] Even if that were not the case, however, and no damage is proven, it would still be possible, for the reasons given earlier, to proceed with an unjust enrichment by wrongdoing claim on the basis that a duty of care existed, a breach of the duty occurred and the claimant was within the ambit of risk created by the breach of duty, without proof of actual damage. It does not follow, of course, that such a claim would necessarily succeed. That would depend on a consideration of all relevant factors favouring or working against a conclusion that the enrichment was unjust. It is at that stage where the appropriateness of stripping the wrongdoer of some or all of his or her profits would be determined.

[188] This absence of a requirement to prove actual damage also provides the answer to the appellant's other argument as to why a cause of action in negligence has not been effectively pleaded. The appellant argued that the claimants have not pleaded that the failure to give a warning of risks of harm caused the loss or injury complained of, in the sense that they would have acted differently (ie. refrained from playing), if properly warned. Since the cause of action based on unjust enrichment gained from wrongdoing does not depend on

loss to or deprivation of the claimant, it follows that causal connection to damage is not a necessary element.

[189] In any event, however, I am satisfied that the statement of claim, though perhaps not felicitously expressed, does in fact adequately plead a causal connection. The claimants allege that the appellant failed to disclose, in its representations to the public, that use of VLTs created serious risks of addiction, suicide, attempted suicide and suicidal ideation (paragraph 41(b)). They also plead that this, amongst other representations, were "material and affected the decision of the Plaintiffs to play the Defendant's VLTs" (paragraph 42) and as a result, the claimants suffered loss or damage (paragraph 43). Although these pleas were made in the context of allegations involving the *Competition Act*, to the extent that they are allegations of fact they can be relied on in respect of any cause of action that is disclosed on those facts.

[190] Accordingly, even if causation of damage was a requirement in the context of the cause of action based on unjust enrichment gained from wrongdoing, it has been sufficiently pleaded.

[191] The third and fourth respondents also submitted that the claim in negligence was bound to fail because no general duty of care could arise by the appellant, as regulator, towards the class of VLT users, there being no proximity, in the sense of a close and direct relationship, between the appellant and the claimants. Reference was made to such cases as *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; *Moreira v. Ontario Lottery and Gaming Corporation*, 2013 ONCA 121, 302 O.A.C. 244 leave to appeal to SCC refused, 327 O.A.C. 399 and 333 O.A.C. 401; *Burrell v. Metropolitan Entertainment Group*, 2011 NSCA 108, 309 N.S.R. (2d) 375; *Walsh v. Atlantic Lottery Corporation*, 2015 NSCA 16, 355 N.S.R. (2d) 384; and *Paton Estate v. Ontario Lottery and Gaming Corporation*, 2016 ONCA 458, 131 O.R. (3d) 273.

[192] In *Edwards*, there was no relationship, contractual or otherwise, between the Law Society and members of the public, to establish proximity grounding a duty of care to protect them from lawyers who acted inappropriately. In *Moreira*, it was held that a statutory regulator owed no private duty of care to members of the public who were problem gamblers, due to lack of proximity. There was no direct relationship between the regulator and members of the public who may have lost money at a casino. In *Burrell*, it was held that there was no general duty of care owed by a casino to a problem gambler who had self-identified as such and voluntarily subjected himself to a casino exclusion

order which was not enforced, where the plaintiff's losses preceded his request for the exclusion order. The court's rejection of a general duty of care towards problem gamblers was also applied to negligence claims against the casino regulator. On the facts, however, there was nothing establishing a direct relationship between the person claiming the duty of care and the regulator.

[193] Unlike the foregoing cases, there was in the current case a direct relationship between the appellant and the claimants in the form of alleged direct commercial transactions. That relationship is arguably not of a regulatory nature. What is at issue in this case is not the policy decision to introduce VLTs into the province and to allow persons to use them. Rather, it is the specific actions of the appellant, allegedly with the knowledge of specific games' deceptiveness and inherent addictiveness, in putting those games into currency. In choosing *particular* games to offer to the public and in engaging in individual transactions with the claimants, the appellant is arguably not performing regulatory functions but engaging in commercial activity designed to make a profit.

[194] The appellant is unlike the paradigm regulator discussed in such cases as *Edwards*. Here, the appellant stands to benefit financially by its activities and, in particular, by engaging in gambling transactions with the claimants. This arguably places the appellant in a conflict of interest with its regulatory function which is to be performed in the public interest. Furthermore, the appellant is alleged to be in a direct relationship with the claimants and others in the class.

[195] In *Paton Estate*, the claim was by a victim defrauded by an addicted gambler but brought against the Ontario Lottery and Gaming Corporation (OLGC) who operated a casino, for allegedly failing to take steps to reduce the risk of problem gamblers defrauding third parties to feed their gambling addiction. The majority of the Ontario Court of Appeal acknowledged that there were "formidable barriers" to finding "a duty of care to third parties who are the victims of problem gamblers" (at paragraph 37). One of the reasons given was that casinos (operated by OLGC) had no relationship of proximity with the third parties. The majority went on, however and drew a distinction between commercial and social activities, citing *Childs v. Desormeaux*, 2006 SCC 18, [2016] 1 S.C.R. 643, and noted that "where the defendant is a commercial enterprise that benefits from offering a service to the general public, it may have attendant responsibilities to act with special care to reduce risk and a duty of care may arise" (at paragraph 40). Relying on the fact that OLGC was in the casino business the majority concluded that it was not plain and obvious that the third parties' claim in negligence was bound to fail.

[196] In *Walsh*, which the third and fourth respondents say is closely analogous to the current case (except it was not a class action), the plaintiff who was addicted to VLT gambling, sued Atlantic Lottery Corporation alleging negligence, breach of fiduciary duty and strict liability for creating an inherently dangerous product, for exposing him to use of VLTs which were inherently dangerous and deceptive, causing him to become addicted to their use. The Nova Scotia Court of Appeal upheld a motion judge's striking out of the claim on the basis, amongst other things, that the decision to introduce VLTs into Nova Scotia was a policy decision based on economic, social and political factors, which could not involve a private duty of care on the part of the regulator to the plaintiff.

[197] The applications judge distinguished *Walsh* on the basis that what was being attacked in the current case was not a policy decision to introduce VLTs into Newfoundland and Labrador but the *implementation* of that decision which, he concluded, could give rise to a duty of care:

> [147] … In this case, the Plaintiffs do not argue that the policy decision to introduce VLT gambling gives rise to liability. They allege that in its implementation, the Defendant introduced machines that were inherently dangerous by virtue of their design, manufacture and operation, and that gives rise to a duty to warn. …
>
> …
>
> [149] … If I accept the Defendant's argument, would it be possible for it to knowingly offer dangerous, but attractive, services to the public, and hide behind the regulatory veil? In my view, the boundary between regulation and operations has yet to be determined in the context of agencies which perform both roles. It is certainly not appropriate to determine this issue on a striking application.
>
> (Emphasis added.)

[198] In my view, this conclusion is defensible in the circumstances of this case. What the applications judge was effectively saying is that where the defendant performs both regulatory and commercial roles, it is the non-regulatory role combined with other relationship factors, that, in particular cases can bring the claimants into a proximity relationship with the appellant. It is not so much the regulatory/operational distinction *per se* that is important here but the nature of the relationship between the appellant and the claimants as users of VLTs. In *Hill v. Hamilton – Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, McLachlin C.J. observed:

> [24] Generally speaking, the proximity analysis involves examining the relationship at issue, considering factors such as expectations, representations, reliance and property or other interests involved. …

[199] Here, it is alleged that there was a direct commercial relationship between the appellants and the claimants, and the appellant, in engaging in that relationship, was arguably not acting as a regulator but as a commercial actor seeking a profit. Further, there are allegations of expectations on the part of the claimants and others in the class that the appellant would act in good faith by not exposing them to inherently deceptive and potentially addictive and harmful games, and that by its actions or inactions, including its failure to warn of the dangers, the appellant effectively misrepresented to all players the nature of particular games and the associated risks.

[200] These factors differentiate the current case from the others discussed, including *Walsh*. While the court in *Walsh* disagreed that the choice of VLT games put in circulation in that case was not an "operational" decision, it did not fully address the problems created by the dual roles (regulatory and commercial) played by the appellant. It is open to the claimants in the current case to attempt to establish the degree of proximity necessary to support a duty of care on the facts pleaded.

[201] It follows that the applications judge did not err in deciding not to strike the claims based on waiver of tort (although I would describe them as claims based on unjust enrichment gained by tortious wrongdoing). It was not plain and obvious that such claims, as analyzed herein, could not succeed.

(d) Alleged *Criminal Code* Contraventions

[202] The claimants allege that the appellant's conduct and management of VLTs, which are inherently deceptive, addictive and dangerous, are not a permitted lottery pursuant to section 207(1) of the *Criminal Code* and hence illegal, because they are not lotteries or games of chance or skill (paragraphs 26, 30, 36 and 38). They further allege that the VLTs operated by the appellant (and by choosing not to implement available safe design technologies as alleged in paragraph 31), are so manipulative 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" as contained in section 206(1)(g) of the *Code* (paragraph 38). Later, when pleading claims based on unjust enrichment, the claimants claim a disgorgement or restitutionary remedy based on "breaches of the *Criminal Code…",* among other wrongs (paragraph 60).

[203] This pleading puts in play the question whether it is open to the claimants to rely on criminal activity of the appellants (assuming proof at trial) as a form of wrong that would justify a disgorgement remedy relative to the profits made as a result of the allegedly criminal activity. This is a matter of some controversy.

[204] Before dealing with this substantive issue, however, it is appropriate to address two preliminary matters. First, the appellant takes issue with the claimants' twin propositions that VLT operation, as conducted in this province, is prohibited because it does not constitute a lottery and that it amounts to the prohibited three-card monte or something similar to it. They say that any doubt in the application of the *Code* provisions should be resolved in favour of non-criminalization because of the presumption in favour of giving an accused the benefit of the more favourable construction. 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 an 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.

[205] The second preliminary matter relates to the analysis of my colleague, Welsh J.A., with respect to whether VLT operation could constitute the game of three-card monte or a game similar to it. She concludes that it could not. She relies on dictionary definitions and a description of three-card monte in the Quebec Court of Appeal case of *The King v. Rosen and Lavoie* (1920), 61 D.L.R. 500 at 502-503:

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

[206] My colleague concludes that the "essence of three-card monte" is that it involves "manipulations of cards or objects or sleight of hand that invite the player to identify and bet on the location of a particular item" (at paragraph 26, above) and that VLT games do not involve this procedural essence. With respect, reaching this conclusion as to what the "essence" of three-card monte is involves pre-determining the issue, without evidence, especially expert evidence, as to the nature of three-card monte or games "similar" to it. This is a

matter that must be left to trial. This does not amount to impermissibly relying on expert evidence for the purpose of statutory interpretation (*Apotex Inc.* v. *Merck & Co.*, 2004 FCA 298, 134 A.C.W.S. (3d) 70). 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.

[207] Three-card monte, as a game properly played according to known rules, may be innocuous enough; however, it has been criminalized because of the easy opportunity for persons operating the game, especially in public sidewalk settings, to act fraudulently by palming or secreting cards (or the other objects in use) or otherwise manipulating them in an improper and surreptitious manner that effectively cheats the participant out of his or her money. This is recognized in the *Rosen and Lavoie* case where Martin J. described it as involving "the exercise of judgment, observation and mental effort" but qualified it by saying "*always assuming that no fraudulent substitution has been made"* (at 503). The type of three-card monte to which the *Criminal Code* prohibition is directed is obviously the mischief of the potential for cheating participants in an improper way.

[208] On this analysis, the essence of three-card monte could, instead, be the giving of the illusion of a straight-forward gambling game played by fair and known rules that depends in part on the exercise of judgment and mental acuity and which gives it an air of legitimacy in order to encourage continued playing, whereas in reality it is actually played in a deceptive way without following rules so as to cheat participants. Here, the claimants have pleaded that VLTs as operated by the appellant are deceptive and are designed falsely to give the illusion of control and a certain degree of judgment by the participant when in fact they are designed not to operate by the rules and methodologies as represented. Whether that can be said to be congruent with the "essence" of three-card monte or a game similar to it is a matter that may well depend on expert evidence as to just what the mischief of three-card monte is perceived to be and whether VLTs exhibit the same essential characteristics. That requires a trial. It cannot be said at this stage that it is "plain and obvious" that such a claim cannot succeed.

[209] The questions that remain, therefore, are whether there is a plausible argument in favour of the provisions' application to VLT operation and if, so, whether a claim of disgorgement based on wrongful criminal activity is recognized by the law.

[210] Section 206(1)(g) of the *Criminal Code* prohibits inducing "any person to stake or hazard any money or other valuable property or thing on the result of … three-card monte…". Three-card monte is defined in section 206(2) of the *Code* as follows:

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

[211] This makes it clear that the prohibited game is not limited to usage of cards or to the type of game that is "commonly known" as three-card monte. It includes "any other game that is similar to it." 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, i.e. 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.

[212] The applications judge reached the same conclusion on this point (2014 NLTD(G) 114):

> [31] The defendant says that it is "plain and obvious" that there is no prospect for success on the point that VLTs are similar to three-card monte. It points to the difference between physical cards and the use of video screens. It maintains that a video game cannot fall under the prohibition in the *Code.* However, this approach does not acknowledge that the definition of "three-card monte" as set out in the *Code*, and in particular, does not enable a party to present evidence as to the similarity of the VLTs to the prohibited games. The fact that one is electronic and the other uses physical cards is not sufficient to determine the question.

[213] In reaching this conclusion, the applications judge considered and refused to rely on the Saskatchewan Court of Appeal decision in *R. v. Andrews*, [1976] 1 W.W.R. 376, 28 C.C.C. (2d) 450 (Sask. C.A.) which held, in construing the words "wheel of fortune" in the *Code* prohibition, that they should be given a

"narrow" and "limited" interpretation such that they had to involve a device that had the characteristics of a revolving wheel. The applications judge, correctly in my view, concluded that, unlike the case of three-card monte, there was no extended definition of "wheel of fortune" based on similarity and that there was no basis for construing three-card monte, as it was employed in the *Code*, as being limited to the physical characteristics of use of cards or similar playing mechanisms:

> [30] 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".

[214] I agree with these conclusions. It follows that I believe that the analysis of my colleague, Welsh J.A., is misdirected. She relies on dictionary definitions of three-card monte which describe it as a gambling game using three cards (paragraph 23, above) and concludes that "it is clear from the above definitions … and the relevant provisions of the *Criminal Code*" (paragraph 26, above) that the pleadings, which do not focus on cards but instead emphasize the deceptive nature of VLT games, could not establish that VLTs amount to three-card monte. This analysis 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.

[215] Counsel for 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 licence lottery schemes) does not, in section 207(4)(a), extend to "three-card monte". The result is that three-card monte cannot be licensed provincially. But, they point out, 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. Emphasizing that the definition is restricted to "in this section" (i.e. section 206), they suggest that the "three-card monte" exception in section 207 may be more limited in scope.

[216] While this is a possible interpretation of the interrelation of the two sections, I believe that it is more likely that Parliament would be presumed to use the term 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-authorized 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.

[217] It cannot be said therefore that on the pleadings a claim that VLTs fall within the prohibition against three-card monte because they are "similar" to it is certain to fail.

[218] That being so, it is necessary to consider whether Canadian law will recognize a claim for disgorgement of profits based on criminal wrongdoing. In England, Graham Virgo, emphasizing that "it is a fundamental policy of English law that no defendant should profit from his or her crime" (at 542), asserts that as a matter of principle such a claim should be recognized:

> (i) Torts and breaches of fiduciary duty
>
> … [T]he victim of the crime may found his or her restitutionary claim on the commission of a wrong. Where the crime also constitutes the commission of a restitution-yielding tort then it is clear that the claimant may sue the criminal in tort and seek a restitutionary remedy. So, for example, where the defendant commits a crime involving deception, such as obtaining property by deception, this will also constitute the tort of deceit and so the claimant can obtain a restitutionary remedy from the criminal in respect of that tort. …
>
> (ii) Founding a claim on the crime itself
>
> …
>
> Where the victim of the crime is unable to sue the criminal for the commission of a tort or breach of fiduciary duty, is it possible to found a restitutionary claim on the crime itself? In principle the answer should be 'yes' because the commission of a crime is an even more heinous form of wrongdoing. …
>
> (*The Principles of the Law of Restitution,* 2d ed., at 540).

[219] By contrast, Andrew Burrows, while recognizing the relevance of the "no-person-should-profit-from-his-or-her-own-crime" principle, asserts that "this area falls outside the ambit of the law of restitution" as defined by him (*The Law of Restitution*, 3d ed. at 641). The main reason he gives for this conclusion is that "a crime is a 'wrong' against the state and is not against any particular person" (at 641). While that is true in theory and while some crimes are directed

to prevention of societal harm generally, the reality is, however, that many criminal offences, such as those described in the *Criminal Code* as offences against the person, are directed at protection of specific individuals or identifiable groups of individuals from particular types of harm-causing activity. Those who are victims of such crimes and who see others profiting from their commission can legitimately consider themselves, as well as society at large, as victims of a wrong committed against them. This is reflected in the increasing tendency in our criminal law to recognize victims of crime as legitimate participants in the criminal process and to accord to them specific rights. I therefore do not consider Burrows' position as justifying rejection of recovery in all circumstances which rely on the commission of a crime as a wrong justifying a claim to restitution or disgorgement of profits earned as a result of that crime.

[220] While there may be issues of causation that might affect recovery (see, e.g., *Rosenfeldt v. Olson* (1986), 25 D.L.R. (4th) 472 (B.C.C.A.), leave to appeal to S.C.C. refused, 72 N.R. 77n), (as where it cannot be said that the acquisition of the profit is a direct result of the commission of the crime but as a result of an indirect event consequent upon the crime), in principle the remedy should be available, subject to public policy considerations that might justify non-recovery in particular cases.

[221] Maddaugh and McCamus reach a similar conclusion. They rely on the analysis in the *Blake* case where, relying on the fact that disclosure of the information by Blake was held to be not only a breach of contract but also a crime because it contravened the British official secrets legislation, the court concluded, at page 276, quoting Lord Wolff of the Court of Appeal, that the Attorney General could invoke the assistance of civil proceedings in aid of the criminal law:

> If, as here, a criminal offence has already been committed, the jurisdiction extends to enforcing public policy with respect to the consequences of the commission of that crime, e.g. restraining receipt by the criminal of a further benefit as a result of or in connection with that crime… (per Lord Wolff, M.R., [1998] Ch. 439 (C.A.) at 462).

[222] Although the House of Lords did not have to address this issue because they concluded that disgorgement could be had for breach of contract, Maddaugh and McCamus conclude in their text:

> We would argue that 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

> indicated 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.* (at 23-40)

[223] While the case law on this issue in Canada is very sparse, decisions in each of the British Columbia, Alberta and Ontario Courts of Appeal (*Bodnar v. The Cash Store Inc.*, 2006 BCCA 260, 55 B.C.L.R. (4th) 53; *Ayrton v. PRL Financial (Alta.) Ltd.*, 2006 ABCA 88, 384 A.R. 1; and *Markson*) have upheld certification of class actions involving allegations, amongst other things, of violations of the *Criminal Code* relative to charging criminal rates of interest, although the *Bodnar* and *Ayrton* decisions acknowledged that even if contravention of the *Code* was proven, issues respecting the type of remedy flowing therefrom would still have to be dealt with. Although these cases did not appear to engage in any extensive analysis of the restitution-for-wrongdoing principles potentially applicable, they do stand as *sub silentio* precedents for basing claims for restitutionary-type remedies on breaches of the criminal law, at least in situations where the enrichment has occurred as a result of a crime-induced financial deprivation from the claimants.

[224] Counsel for the second, third and fourth respondents submitted, citing *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, 143 D.L.R. (3d) 9, that breach of a statute does not in itself give rise to a civil cause of action. Consequently, so it was argued, no civil claim for disgorgement of profits could be maintained based on a violation of the *Criminal Code.* In *Saskatchewan Wheat Pool*, the Supreme Court of Canada addressed the issue of whether Canadian law should recognize a separate nominate tort of breach of statutory duty and decided that it should not; rather, the civil tort consequences of a breach of statute should be subsumed in the law of negligence with proof of statutory breach which was causative of damages being used, instead, only as evidence of negligence.

[225] That decision has no application to the current discussion. 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 commission of a wrong (in this case, a crime).

[226] This was essentially the reasoning of the applications judge:

> [36] … The Plaintiffs say they have not [pleaded] 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. … [O]ne 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.

[227] I see no error in this approach.

[228] Accordingly, I cannot conclude that it is plain and obvious that a claim for restitution of benefits or disgorgement of profits based on a wrong constituting a crime cannot succeed. At the level of principle, such a claim should be permissible, academic analysis supports such a claim and what little case law there is, both in England and in Canada, suggests that, depending on the particular factual matrix, a court directly seized with the issue could well grant a remedy. Such a claim should not therefore be struck out on a preliminary application.

[229] All that said, it must be recognized that, given the limited amount of case law, the parameters of such a claim are yet to be established. Many questions remain. For example, must the enrichment be a direct result of the commission of the crime or can it merely be an unintended consequence? Must the crime be established on a criminal standard of proof? Are there any special policy considerations that might entitle the court to decline to grant a remedy? In this regard, should the Attorney General have the primary responsibility to seek disgorgement of the profits in situations where the crime-induced enrichment does not result in specific financial deprivation from the claimants or where the crime is one that cannot reasonably be regarded as having specific intended victims? Should the existence of statutory mechanisms for forfeiture of proceeds of crime within the criminal law (such as in Part XII.2 of the *Criminal Code*) or in the restitution-order provisions of the *Code* preclude civil recovery in other circumstances?

Notwithstanding the absence of current answers to questions such as these, I am satisfied that the claimants' claims should not be prevented at this stage from going forward on the basis that no cause of action is disclosed. These questions − and perhaps others − are best determined against a specific evidentiary matrix following a trial. The established facts will bring into focus whether the

particular enrichment of the criminal could be considered, in all the circumstances, unjust, and would enable the formulation of appropriate limiting principles to accommodate that situation. To borrow again from Lord Steyn in *Blake*, these issues are best hammered out on the anvil of concrete cases.

(e) Claims Based on Unjust Enrichment *Simpliciter*

[230] From the approach I have taken to the analysis of the issues in this case, it will appear that it is not necessary to address issues raised in argument under the heading of unjust enrichment *simpliciter*, i.e. whether the pleading discloses a cause of action in unjust enrichment, calling for the application of the traditional three-part test set out in such cases as *Garland.* As already discussed, the cause of action I have called unjust enrichment gained by wrongdoing (whether by breach of contract, tort, criminal activity or breach of fiduciary duty, the last category not being engaged in this case) depends on similar but slightly different elements as discussed above.

[231] Some cases dealing with claims for restitution or disgorgement of benefits acquired as a result of the commission of a wrong conduct the analysis in terms of the three-part *Garland* test. An example is the *Club 7* case where a claim for restitution of benefits acquired as a result of the tort of conversion was so analyzed. Indeed, there are elements of the pleadings in this case (e.g. paragraph 60 of the statement of claim) where the same appears to occur. In my view, this is not helpful and may lead to an inappropriate blurring of applicable principles.

[232] The two categories should be kept separate for purposes of analysis. In this case, I believe that it is the second category, unjust enrichment by wrongdoing, that is engaged. That said, it is possible that on a given set of facts, claims might be able to be made on the basis of both causes of action. As already noted, unjust enrichment by wrongdoing consists of two sub-classes: (i) cases where as a result of the wrong, the claimant has been deprived of wealth which has been transferred to and benefits the defendant for which the remedy may be the restoration (restitution) of the benefit to the claimant; and (ii) cases where as a result of the wrong, the defendant acquires a benefit which does not originate from the claimant, for which the remedy may be the disgorgement of the benefit to the claimant even though he or she has suffered no deprivation or loss. This second sub-class depends for its justification on the notion that a wrongdoer should not be allowed to profit from the wrong, in the same way that punitive damages are justified, so as to vindicate a deterrence/disincentive principle.

[233] To the extent that the commission of a wrong leads to a transfer of wealth from the claimant to the defendant (i.e. involves the conferral of a benefit on the defendant with a corresponding deprivation of the claimant), it may be possible, alternatively, to assert a claim in unjust enrichment *simpliciter*. For example, where the defendant induces the claimant to pay money to the defendant as a result of the commission of the tort of deceit, the claimant might also be able to claim in unjust enrichment on the basis of payment under a mistake. Depending on which claim route is taken, different principles for determining liability could apply. Further, the monetary amount of recovery could be different. It is sufficient to note this potentiality here since it does not directly arise on the specific facts of this case.

(f) Exemplary or Punitive Damages

[234] The claimants also advance claims for exemplary or punitive damages. One of the reasons for awarding such damages is to vindicate a restitutionary principle (*McCarey v. Associated Newspaper Ltd. (No. 2)*, [1965] 2 Q.B. 86 (C.A.) at 107). That said, the ability to obtain such a remedy may depend on the claimants being able to establish at trial that a predicate cause of action supporting a punitive or exemplary damages claim exists.

[235] In *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, 58 D.L.R. (4th) 193 McIntyre J. observed at 1106:

> Punishment may not be imposed in a civilized society without a justification in law. The only basis for the imposition of such punishment must be a finding of the commission of an actionable wrong which caused the injury complained of by the plaintiff.

[236] In the case of the negligence claim, that would include proof of all elements of the cause of action, including loss. I note in passing, however, that in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, Binnie J., writing for the majority, drew a distinction between the notion of "actionable wrong" and a tort, thereby leaving open the possibility that all the elements of a tortious claim may not be required. In any event, as previously noted, while the claimants are not advancing claims for damages for injury in the context of the claims based on unjust enrichment by wrongdoing, they are not asserting that they did not *suffer* any loss. To the extent that some loss or injury is established at trial, therefore, the remedy of punitive or exemplary damages may still be available.

[237] I would also note, in any event, that in *Vorvis*, Wilson J. in dissent expressed a different view on the necessity for a predicate wrong before punitive or exemplary damages could be awarded (at 1130):

> I do not share my colleague's view that punitive damages can only be awarded when the misconduct is in itself an "actionable wrong". In my view, the correct approach is to assess the conduct in the context of all the circumstances and determine whether it is deserving of punishment because of its shockingly harsh, vindictive, reprehensible or malicious nature.

[238] In the context of a claim for exemplary or punitive damages in a claim based on unjust enrichment by wrongdoing, Maddaugh and McCamus also express the view (at 24-36, footnote 183) that:

> It has been suggested that the plaintiff's decision to elect a restitutionary remedy by proceeding with an action in waiver of tort should not preclude the awarding of additional damages by the court in the form of punitive damages in appropriate circumstances. See Ontario Law Reform Commission, *Report in Exemplary Damages* (Toronto: Ministry of the Attorney General, 1991, pp. 62-3).

[239] In this case, I note that the claimants have asserted reprehensible and high-handed conduct on the part of the appellant.

[240] For all of the foregoing reasons, it is inappropriate to delete reference in the Certification Order to punitive or exemplary damages. Such issues should be sorted out at trial, not on a preliminary motion.

5. Certification Issues

[241] The appellant also challenged the applications judge's decision to certify the class action on a number of grounds.

[242] Section 5(1) of the *Class Actions Act*, SNL 2001, c. C-18.1 sets out the criteria that have to be met before a proceeding can be certified as a class action:

> 5. (1) On an application made under section 3 or 4 , the court shall certify an action as a class action where
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise a common issue, whether or not the common issue is the dominant issue;

> (d) a class action is the preferable procedure to resolve the common issues of the class; and
>
> (e) there is a person who
>
> (i) is able to fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.
>
> (2) In determining whether a class action would be the preferable procedure for the fair and efficient resolution of the common issues, the court may consider all relevant matters including whether
>
> (a) questions of fact or law common to the members of the class predominate over questions affecting only individual members;
>
> (b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) the class action would involve claims that are or have been the subject of another action;
>
> (d) other means of resolving the claims are less practical or less efficient; and
>
> (e) the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other means.

[243] When deciding an application to certify, the applications judge must be guided by, amongst other things, considerations relating to fairness, efficiency and manageability of the proceedings so as to advance the objectives of the class actions legislation, which are to achieve access to justice, judicial economy and the modification of wrongdoers (*Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 27), while always keeping in mind that the legislation does not create new substantive rights. It is procedural in nature, designed to enable existing rights to be advanced collectively in a better way than if they were left to be asserted individually: *Pro-Sys* at para. 133.

[244] All that said, findings of fact and exercises of discretion on an application to certify are entitled to considerable deference on appeal: *Dow Chemical Company v. Ring, Sr.*, 2010 NLCA 20, 297 Nfld. & P.E.I.R. 86 at paras. 7-8, leave to appeal to SCC refused, 309 Nfld. & P.E.I.R. 362. In *Canada (Attorney General) v. Andersen*, 2011 NLCA 82, 315 Nfld. & P.E.I.R. 314, the standard of appellate review was expressed this way:

> [38] They [i.e. judges on certification applications] 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.

[245] It is accepted that the deferential standard applies to determinations with respect to all criteria with the exception only of whether the pleadings disclose a cause of action.

(a) Disclosure of a Cause of Action

[246] In refusing to strike out any of the pleaded causes of action, the applications judge concluded (2014 NLTD(G) 114:

> [207] Since the striking application fails, as agreed, the Plaintiffs have met the requirements of paragraph 5(1)(a) of the *Class Actions Act* in that the pleadings disclose a cause of action. The Plaintiffs may apply for certification in respect of the remaining requirements of subsection 5(1) of that Act.

[247] On this appeal, the appellant challenged the judge's conclusion on this issue on the basis that he erred in not striking out all of the claims. For the reasons given earlier, I have concluded that with the exception of the claims based on the *Competition Act* and the *Statute of Anne*, the judge did not err in refusing to strike the other claims. Consequently, for the purposes of this appeal, to the extent that the claims have not been struck, it can be concluded that the pleadings disclose a cause of action and the appeal fails on this point.

(b) Other Criteria

[248] The thrust of the appellant's argument with respect to other alleged errors by the applications judge in the certification process was to take issue with the judge's conclusion that "the individual issues are minimal" (2016 NLTD(G) 216 at para. 134) leading to his conclusions that it was possible to define a single

class with common issues, including remedy, and that a class action was the preferable procedure.

[249] The appellant, instead, argues that the claims advanced and the remedies claimed could not be given without complex inquiries and factual determinations that were specific to individual members of the class. They point out, as they did to the applications judge, that with respect to the allegation of a breach of a duty of care to warn of the risks associated with VLT use, there were a large number of different games with different features and with potentially different levels of risk. Accordingly, they argue, to resolve the negligence claim would require individual inquiries as to how each class member might have responded to and been affected by the games they played. Such individual inquires would, it was argued, overwhelm the utility of trying the common issues and trying to fashion an appropriate remedy.

[250] Noting that common issues do not have to be "the dominant issue", the applications judge found that:

> [122] …(a) Determination of each of the common issues will avoid duplication of fact-finding or legal analysis;
>
> (b) Each of them has some basis in evidence;
>
> (c) Each question is a significant ingredient of each class member's claim, and its determination or resolution will advance the resolution of that claim;
>
> (d) While many of them, alone, will not dispose of the litigation, resolution of each of them will advance the litigation for (or against) the class;
>
> (e) All members of the class will benefit from the successful resolution of each of the common questions;
>
> (f) I believe the 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.*
>
> (Emphasis added.)

[251] He also concluded that:

> [130] 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 behavior modification than be having the issues raised properly adjudicated through this procedure.
>
> [131] In my view, *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 damage for injury or harm. They are not, so individual actions would not serve the goals of the *Act*. They say that the claims of misrepresentation can only be considered individually. That might be true if there was a claim for harm or reliance on the misrepresentation. In the absence of a claim for harm, the Plaintiffs only have to prove there was deception, either deliberate or inadvertent. …
>
> (Emphasis added.)

[252] Applying the observation in *Hollick* at paragraph 30, that "the question of preferability … must take into account the importance of the common issues in relation to the claims as a whole" and that "class actions will be allowable even where there are substantial individual issues", the judge concluded that a class action was the preferable procedure; in fact, it was "the only way to achieve the … policy goals" of the legislation and that:

> [134] … Once the plaintiffs deny any individual injury or harm, then the inquiry at trial will centre on whether there was misrepresentation or deception which applies to all members of the class. Accordingly, the requirement that the class action be the preferable procedure is made out.

[253] The arguments of the appellant on these aspects of the appeal 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.

[254] I would dismiss this aspect of the appeal.

Summary and Conclusion

[255] I would grant leave to appeal.

[256] I would allow the appeal in part and strike the claims based on the *Statute of Anne* and the *Competition Act.* The Certification Order should be amended by:

(a) Deleting the words "the *Competition Act* and the *Statute of Anne (Gaming Act) 1710*" from paragraph 4(b);

(b) Deleting paragraphs 5(e), 5(g), 5(h) and 5(i);

(c) Deleting paragraphs 6(d) and 6(h).

[257] In all other respects, I would dismiss the appeal and allow the matter to proceed as a class action.

[258] In light of section 37(1) of the *Class Actions Act*, there should be no order as to costs. Like my colleague, I regard the application to strike the statement of claim as being intertwined with all of the issues relating to certification. Consequently, no separate award of costs should be made in respect of the appeal for the application to strike.

J.D. Green J.A.

I concur with the reasons of Green J.A.:

M.F. Harrington J.A.

Correction Notice:

Corrections to the style of cause and title pages made on January 22, 2019:

1. On page 1, two additional docket numbers (201701H007 and 201701H0021) were added.

2. On page 2, the description of Bally Gaming Canada Ltd. and Bally Gaming Inc was changed from “Ninth Respondents” to “Ninth Respondents/Cross-Appellants”.

3. On page 3, the description “Counsel for the Ninth Respondents” was changed to “Counsel for the Ninth Respondents/Cross-Appellants”.