



**SUPREME COURT OF CANADA**

**CITATION:** Atlantic Lottery Corp. Inc. v. Babstock,  
2020 SCC 19

**APPEALS HEARD:** December 3, 2019  
**JUDGMENT RENDERED:** July 24, 2020  
**DOCKET:** 38521

**BETWEEN:**

**Atlantic Lottery Corporation Inc.**  
Appellant

and

**Douglas Babstock and Fred Small**  
Respondents

**AND BETWEEN:**

**VLC, Inc., IGT-Canada Inc., International Game  
Technology, Spielo International Canada ULC and  
Tech Link International Entertainment Limited**  
Appellants

and

**Douglas Babstock and Fred Small**  
Respondents

- and -

**Attorney General of Ontario, Attorney General of Manitoba, Attorney General  
of Saskatchewan, Bally Gaming Canada Ltd., Bally Gaming Inc., Western  
Canada Lottery Corporation, Alberta Gaming, Liquor, and Cannabis  
Commission, Canadian Gaming Association, Canadian Chamber of Commerce  
and British Columbia Lottery Corporation**  
Intervenors

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,  
Martin and Kasirer JJ.

**REASONS FOR JUDGMENT:** Brown J. (Abella, Moldaver, Côté and Rowe JJ. concurring)  
(paras. 1 to 72)

**REASONS DISSENTING IN PART:** Karakatsanis J. (Wagner C.J. and Martin and Kasirer JJ.  
(paras. 73 to 173) concurring)

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ATLANTIC LOTTERY v. BABSTOCK

**Atlantic Lottery Corporation Inc.**

*Appellant*

v.

**Douglas Babstock and  
Fred Small**

*Respondents*

- and -

**VLC, Inc., IGT-Canada Inc.,  
International Game Technology,  
Spielo International Canada ULC and  
Tech Link International Entertainment Limited**

*Appellants*

v.

**Douglas Babstock and  
Fred Small**

*Respondents*

and

**Attorney General of Ontario,  
Attorney General of Manitoba,  
Attorney General of Saskatchewan,  
Bally Gaming Canada Ltd., Bally Gaming Inc.,  
Western Canada Lottery Corporation,  
Alberta Gaming, Liquor, and Cannabis Commission,  
Canadian Gaming Association,  
Canadian Chamber of Commerce and**

**British Columbia Lottery Corporation**

*Intervenors*

**Indexed as: Atlantic Lottery Corp. Inc. v. Babstock**

**2020 SCC 19**

File No.: 38521.

2019: December 3; 2020: July 24.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND AND LABRADOR

*Civil procedure — Class actions — Certification — Pleadings — Causes of action — Plaintiffs alleging defendants profited from dangerous and deceptive video lottery terminals — Plaintiffs relying on waiver of tort, breach of contract and unjust enrichment as causes of action and seeking gain-based award — Plaintiffs’ action certified as class proceeding — Whether plaintiffs’ claims disclose reasonable cause of action.*

ALC, constituted by the governments of the four Atlantic provinces, is empowered to approve the operation of video lottery terminal games (“VLTs”) in Newfoundland and Labrador. The plaintiffs applied for certification of a class action

against ALC, on behalf of any natural person resident in Newfoundland and Labrador who paid to play VLTs in that province in the six years preceding the class action. The plaintiffs claim that VLTs are inherently dangerous and deceptive. Relying on three causes of action (waiver of tort, breach of contract and unjust enrichment), the plaintiffs seek a gain-based award, quantified by the profit ALC earned by licensing VLTs.

ALC applied to strike the plaintiffs' claim on the basis that it disclosed no reasonable cause of action, and the plaintiffs applied for certification of their claim as a class action. The certification judge dismissed ALC's application, and further held that the plaintiffs had satisfied the requirements necessary for certification. The Court of Appeal substantially upheld the certification judge's conclusions, and allowed the plaintiffs' claims in waiver of tort, breach of contract and unjust enrichment to proceed to trial.

*Held* (Wagner C.J. and Karakatsanis, Martin and Kasirer JJ. dissenting in part): The appeals should be allowed, the certification order set aside and the plaintiffs' statement of claim struck in its entirety.

*Per* Abella, Moldaver, Côté, **Brown** and Rowe JJ. : Each claim that the plaintiffs have pleaded is bound to fail because it discloses no reasonable cause of action.

The plaintiffs cannot rely on the doctrine of waiver of tort as an independent cause of action for disgorgement. This novel cause of action does not exist in Canadian law and has no reasonable chance of succeeding at trial. In addition, the term “waiver of tort” is apt to generate confusion and should be abandoned. Despite its early acceptance, this term is a misnomer. Rather than forgiving or waiving the wrongfulness of the defendant’s conduct, plaintiffs relying on the doctrine are simply electing to pursue an alternative, gain-based, remedy.

Restitution for unjust enrichment and disgorgement for wrongdoing are two types of gain-based remedies. What the plaintiffs seek in this case is disgorgement, which does not require proof of deprivation to the plaintiff, and requires only that the defendant gained a benefit. Restitution is awarded in response to the causative event of unjust enrichment, where there is correspondence between the defendant’s gain and the plaintiff’s deprivation. Disgorgement should be viewed as an alternative remedy for certain forms of wrongful conduct, not as an independent cause of action. In order to make out a claim for disgorgement, a plaintiff must first establish actionable misconduct. By pleading disgorgement as an independent cause of action, however, the plaintiffs in this case seek to establish an entirely new category of wrongful conduct — one that is akin to negligence but does not require proof of damage. Although disgorgement is available for some forms of wrongdoing without proof of damage (for example, breach of fiduciary duty), it is a far leap to find that disgorgement without proof of damage is available as a general proposition in response to a defendant’s negligent conduct. Granting disgorgement for negligence

without proof of damage would result in a remedy arising out of legal nothingness, and would be a radical and uncharted development. This is not the type of incremental change that falls within the remit of courts applying the common law.

The plaintiffs' claim that VLTs are "similar to" three-card monte within the meaning of s. 206 of the *Criminal Code* and that their operation is therefore prohibited also has no reasonable chance of success. Statutory interpretation requires discerning legislative intent by examining statutory text in its entire context and in its grammatical and ordinary sense, in harmony with the statute's scheme and objects. In determining what games can be considered "similar to" three-card monte, it must be kept in mind that courts cannot create common law crimes through an act of judicial interpretation. Furthermore, while expert evidence may assist in deciding whether the defined elements of an offence are made out on the facts of a particular charge, expert evidence cannot purport to define the elements of an offence. The text of the provision and its surrounding context suggest that the prohibition of games similar to three-card monte was directed towards the game's concrete attributes and not towards the abstract feature of deception. Had Parliament sought to prohibit broadly deceptive games, it would have straightforwardly done so. Games "similar to" three-card monte must therefore involve, at a minimum, a player betting on the location of an object after a series of a manipulations. Nothing in the pleadings describes VLTs as operating in this manner.

The plaintiffs' breach of contract claim is also doomed to fail. Whether this claim discloses a reasonable cause of action should be considered in light of the remedies the plaintiffs actually seek — that is, disgorgement and punitive damages — and the question of whether these remedies are available to the plaintiffs, assuming the truth of their pleadings. The ordinary form of monetary relief for breach of contract is an award of damages, measured according to the position which the plaintiff would have occupied had the contract been performed. Disgorgement for breach of contract may be appropriate in exceptional circumstances, but only where, at a minimum, other remedies are inadequate and only where the circumstances warrant such an award. As to those circumstances, courts should in particular consider whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity. The key to developing principles for gain-based recovery in breach of contract is to consider what legitimate interest a gain-based award serves to vindicate. A coherent approach that reconciles the relief awarded with the structure of breach of contract as a cause of action should be preferred. While the circumstances in which a gain-based award will be appropriate cannot be clearly delineated in advance, one would expect future legitimate interests protected by a gain-based award to resemble those interests that have been protected in the past. Courts have, in some exceptional circumstances, long awarded monetary amounts departing from the ordinary measure of expectation damages. An award that appears to be measured by a defendant's gain might serve a compensatory purpose that distinguishes it from disgorgement and which therefore tends to support recovery. Where, as here, the argument is that the quantum of loss is equal to the defendant's gain, but the plaintiff

would simply rather pursue disgorgement, a gain-based remedy is not appropriate. Further, there is nothing exceptional about the breach of contract the plaintiffs allege: once the allegations of criminal conduct are put aside, the plaintiffs' claim is simply that they paid to play a gambling game and did not get exactly what they paid for. The plaintiffs cannot be said to have a legitimate interest in ALC's profit-making activity, and their claim has no reasonable chance of achieving disgorgement damages for breach of contract.

Punitive damage awards for breach of contract are also exceptional, but will be awarded where the alleged breach of contract is an independent actionable wrong. The actionable wrong need not be tortious: punitive damages may also be awarded where the defendant breaches a contractual obligation. Not every contract, however, imposes actionable good faith obligations on contracting parties: while good faith is an organizing principle of Canadian contract law, it manifests itself in specific circumstances and its application is generally confined to existing categories of contracts and obligations. The alleged contract between ALC and the plaintiffs does not fit within any of the established good faith categories; accordingly, their claim for punitive damages has no reasonable chance of success.

Finally, the plaintiffs' unjust enrichment claim has no reasonable chance of success. The principled unjust enrichment framework requires establishing that ALC was enriched, that the plaintiffs suffered a corresponding deprivation, and that the enrichment and corresponding deprivation occurred in the absence of any juristic

reason therefor. The juristic reason element proceeds in two stages: first, the plaintiff must demonstrate that the defendant's enrichment cannot be justified by any of the established categories of juristic reason; and second, the defendant can rebut the plaintiff's case by showing that there is a residual reason to deny recovery. In the present case, there is no need to go beyond the first stage. The plaintiffs' own pleadings allege that there was a contract between ALC and the plaintiffs under which the plaintiffs paid to play VLTs, and nothing in the pleadings could serve to vitiate the alleged contract. A defendant that acquires a benefit pursuant to a valid contract is justified in retaining that benefit.

*Per* Wagner C.J. and **Karakatsanis**, Martin and Kasirer JJ. (dissenting in part) : The appeal should be allowed in part. There is agreement with the majority that a mere breach of a duty of care, in the absence of loss, cannot ground a claim for disgorgement. There is also agreement that VLTs cannot constitute "three-card monte" as defined in the *Criminal Code*, and that the plaintiffs' claim in unjust enrichment must be struck. However, there is disagreement with whether the plaintiffs' claim in breach of contract is a reasonable cause of action, as well as the conclusion that there are no available remedies for that breach. The plaintiffs' claim should be certified as a class action on the common issues of breach of contract, punitive damages and the appropriateness of a disgorgement remedy.

The elements of a cause of action for breach of contract are the existence of a contract and the breach of a term of that contract. Loss is not an essential

element. The plaintiffs have pleaded the nature of the contract, the terms they say are implied, and the manner in which ALC breached the contract between them. The first implied term pleaded is a warranty that the VLTs were not inherently dangerous. In the alternative, the plaintiffs plead that ALC breached an implied term requiring ALC to warn the plaintiff class of any inherent danger in the consumption of the games and to satisfy itself of their safety. Finally, the plaintiffs allege that ALC breached an implied term of good faith. It is not plain and obvious that implying these terms would improperly touch on or fetter ALC's authority as a public regulator of VLTs.

The claim for breach of contract should not be struck on the basis that it is plain and obvious that there are no available remedies. There are several remedies that are open to the plaintiffs on their pleadings, including nominal damages, declaratory relief, disgorgement, and punitive damages.

A court finding breach of contract may make binding declarations of right, whether or not any consequential relief is or could be claimed. Nominal damages are always available for causes of action, like breach of contract, that do not require proof of loss. This alone precludes striking the claim.

Whether disgorgement is an appropriate remedy for breach of contract in this case is a matter for trial that cannot be resolved on the pleadings alone. While the customary remedy for a breach of contract is compensation measured in the form of expectation damages, in some cases, disgorgement of a defendant's profits can be an appropriate remedy for breach of contract. Disgorgement is an exceptional remedy,

available where a plaintiff has shown that the ordinary remedies of contract law are inadequate to protect and vindicate their contractual right. Although compensatory damages will often help to achieve deterrence of wrongful conduct, they will not always be adequate or appropriate in the circumstances of the breach. The measure of a disgorgement award implicitly effects deterrence and is dictated by the minimum amount necessary to make the wrong unprofitable.

Disgorgement awards are not limited to situations in which they serve a compensatory purpose. A self-interested and deliberate breach; the impracticability of calculating loss; and the plaintiff's legitimate interest in preventing the defendant's profit-making activity, including where the defendant had a quasi-fiduciary duty to the plaintiff, weigh in favour of a disgorgement remedy. No single factor is necessarily crucial or dispositive. The plaintiffs' pleadings in this case correspond with several factors that, if established at trial, may point to a disgorgement remedy, including that the plaintiffs were vulnerable to ALC's abuse of its power and that ALC's breach was self-interested, deliberate, and in bad faith. A trial judge may also find that ascertaining the actual amount lost is impracticable since VLTs are designed not to create records of who uses them and how much money they have lost.

The plaintiffs have also pleaded a sufficient basis to support a claim for punitive damages. The focus of punitive damages is on the defendant's misconduct, not the plaintiff's loss, and injury to the plaintiff is not a condition precedent to an award of punitive damages. The plaintiffs have pleaded a breach of the duty of honest

performance, which can constitute an actionable wrong to ground a claim for punitive damages.

With regard to certification, the class representative must show that there is some “basis in fact” that there is an identifiable class of two or more persons, that there is at least one common issue, and that the class action is the preferable procedure. This standard ensures that there is an evidentiary foundation to support the certification order.

The proposed class definition uses objective criteria that will allow for identification of those who can attest to playing the games, and there is a basis to believe that at least two persons will be able to establish that they paid ALC to gamble on VLT games during the proposed class period.

An issue is common where its resolution is necessary to the resolution of each class member’s claim. The issues relating to breach of contract, disgorgement, and punitive damages are appropriate common issues, but the issue relating to aggregate monetary relief is not. On breach of contract, the pleadings assert a civil wrong that is common to each member of the class: whether the terms alleged by the plaintiffs are in fact implied, and whether the functioning of the VLTs routinely violates those terms, would be the same for every consumer. On disgorgement, determining whether the circumstances of this case are exceptional, such that other contractual remedies are inadequate, is a substantial ingredient of each member’s claim and will benefit all members of the class. For punitive damages, ALC’s conduct

and the alleged breach of the duty of good faith would be common to all class members.

But there is no basis in fact to certify aggregate monetary relief as a common issue. Before making an award of disgorgement, the court must be satisfied that the breach of contract is causally connected to the gain to be disgorged. To ensure that ALC's total liability is limited to that flowing from the breach, some plausible methodology is needed to estimate ALC's liability from its breach of contract, including what its profits might have been had it not breached its contractual obligations. No methodology has been suggested.

Finally, with regard to preferability, the keystone of the plaintiffs' action is a deception common to each member of the class. Determining the content of a contract entered into by each member, and whether that contract was systematically breached, does not require individualized assessments and is more practical and efficient than individual actions. A class action has the potential to acknowledge, vindicate and protect individual players' contractual interest in a safe and fair game.

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By Karakatsanis J. (dissenting in part)

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APPEALS from a judgment of the Newfoundland and Labrador Court of Appeal (Green, Welsh and Harrington JJ.A.), 2018 NLCA 71, 29 C.P.C. (8th) 1, 53 C.C.L.T. (4th) 12, [2018] N.J. No. 383 (QL), 2018 CarswellNfld 470 (WL Can.), affirming in part decisions of Faour J., 2016 NLTD(G) 216, 93 C.P.C. (7th) 307, [2016] N.J. No. 443 (QL), 2016 CarswellNfld 532 (WL Can.), and 2014 NLTD(G) 114, 356 Nfld. & P.E.I.R. 293, 1108 A.P.R. 293, [2014] N.J. No. 288 (QL), 2014 CarswellNfld 281 (WL Can.). Appeals allowed, Wagner C.J. and Karakatsanis, Martin and Kasirer JJ. dissenting in part.

*Julie Rosenthal, Mike Eizenga, Sarah Stothart and Jonathan G. Bell, for the appellant the Atlantic Lottery Corporation Inc.*

*Ian F. Kelly, Q.C., and Daniel M. Glover*, for the appellants VLC, Inc., IGT-Canada Inc. and International Game Technology.

*Colm St. R. Seviour, Q.C., and Koren A. Thomson*, for the appellant Spielo International Canada ULC.

*Jorge P. Segovia*, for the appellant Tech Link International Entertainment Limited.

*Kirk M. Baert and Celeste Poltak*, for the respondents.

*Brent Kettles and Tom McKinlay*, for the intervener the Attorney General of Ontario.

*Denis Guénette and Tom Dobson*, for the intervener the Attorney General of Manitoba.

*Jared G. Biden*, for the intervener the Attorney General of Saskatchewan.

*Paul D. Dicks, Q.C., Michael D. Lipton, Q.C., and Kevin J. Weber*, for the interveners Bally Gaming Canada Ltd. and Bally Gaming Inc.

*Keith Kilback, Q.C., and Alexander Shalashniy*, for the intervener the Western Canada Lottery Corporation.

*Mandy L. England* and *Michael Sobkin*, for the intervener the Alberta Gaming, Liquor, and Cannabis Commission.

*Brandon Kain*, *Gillian P. Kerr* and *Adam Goldenberg*, for the intervener the Canadian Gaming Association.

*Matthew Milne-Smith*, for the intervener the Canadian Chamber of Commerce.

*K. Michael Stephens*, *Shannon Ramsay* and *Aubin Calvert*, for the intervener the British Columbia Lottery Corporation.

The judgment of Abella, Moldaver, Côté, Brown and Rowe JJ. was delivered by

BROWN J. —

## I. Introduction

[1] The appellant Atlantic Lottery Corporation Inc. (“ALC”), constituted by the governments of the four Atlantic provinces, is empowered to approve the operation of video lottery terminal games (“VLTs”) in Newfoundland and Labrador by the *Video Lottery Regulations*, C.N.L.R. 760/96. The respondents Douglas Babstock and Fred Small (“the plaintiffs”) applied for certification of a class action

against ALC, on behalf of any natural person resident in Newfoundland and Labrador who paid to play VLTs in that province in the six years preceding the class action, or on behalf of the estate of any such person. The other appellants are suppliers of VLTs that ALC has added to the action as third-party defendants.

[2] The plaintiffs' essential claim is that VLTs are inherently dangerous and deceptive. Indeed, they say that VLTs are so deceptive that they contravene the *Criminal Code*'s prohibition of games similar to "three-card monte" (*Criminal Code*, R.S.C. 1985, c. C-46, s. 206). Relying on three causes of action ("waiver of tort", breach of contract and unjust enrichment), the plaintiffs seek a gain-based award, quantified by the profit ALC earned by licensing VLTs.<sup>1</sup>

[3] More particularly, and as to waiver of tort, the plaintiffs allege that ALC breached a duty to warn of the inherent dangers associated with VLTs, including the risk of addiction and suicidal ideation. This, they say, supports their claim in waiver of tort, which they also say is an independent cause of action that allows for a gain-based remedy to "be determined at trial of common issues without the involvement of any individual class member" (A.R., vol. II, at p. 104).

[4] As to the claim for breach of contract, the plaintiffs allege a contract arising from ALC's offer of VLTs to the public, and the plaintiffs' corresponding acceptance by paying to play. As an implied term of this contract, they say that ALC

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<sup>1</sup> While the pleadings advance other causes of action, those claims were struck by the Newfoundland and Labrador Court of Appeal, and the plaintiffs have not cross-appealed that decision.

was required to provide safe games that were fit for use and of merchantable quality, to use reasonable skill and care in its provision of VLT gaming, and to act in good faith. ALC breached these terms, they say, by supplying deceptive VLTs.

[5] Finally, the plaintiffs say that ALC has been unjustly enriched at their expense.

[6] The plaintiffs succeeded in obtaining certification at the Supreme Court of Newfoundland and Labrador, and that result was substantially affirmed by the Newfoundland and Labrador Court of Appeal. In my respectful view, however, none of these claims have any reasonable chance of success. I would therefore allow the appeals, set aside the certification order, and strike the plaintiffs' claims against ALC.

## II. Overview of Proceedings

- (1) Supreme Court of Newfoundland and Labrador — 2014 NLTD(G) 114, 356 Nfld. & P.E.I.R. 293; 2016 NLTD(G) 216, 93 C.P.C. (7th) 307

[7] The matter came before the certification judge in the form of two applications: (1) ALC's application, made under R. 14.2(1)(a) of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D (2014 NLTD(G) 114, 356 Nfld. & P.E.I.R. 293), to strike the plaintiffs' claim on the basis that it disclosed no reasonable cause of action, and (2) the plaintiffs' application for certification of their claim as a class action under the *Class Actions Act*, S.N.L. 2001, c. C-18.1. The parties agreed

that the certification judge's decision on ALC's application would also determine whether the plaintiffs had satisfied the first criterion for certification in s. 5 of the *Class Actions Act* — that “the pleadings disclose a cause of action”.

[8] The certification judge dismissed ALC's application, and further held that the plaintiffs had satisfied the requirements necessary for certification. In particular and because the plaintiffs intended to pursue a collective remedy (calculated on the basis of ALC's profits) without proving individual damage, he concluded that there were common issues among the class that would be better addressed through a class action.

(2) Newfoundland and Labrador Court of Appeal — 2018 NLCA 71, 29 C.P.C. (8th) 1

[9] ALC appealed the certification judge's decisions on both applications. Writing for the majority, Green J.A. substantially upheld the certification judge's conclusions, and allowed the plaintiffs' claims in waiver of tort, breach of contract and unjust enrichment to proceed to trial.

[10] Regarding waiver of tort, the majority concluded that the doctrine could operate as an independent cause of action for disgorgement, where it would serve the purpose of deterring wrongful conduct. Further, according to the majority, plaintiffs alleging negligence need not prove damage to establish an entitlement to disgorgement. All this led the majority to conclude that the plaintiffs' claim for

waiver of tort — that is, for disgorgement as a remedy for negligence in the absence of demonstrated damage — disclosed a reasonable cause of action (paras. 185 and 189).

[11] Addressing the plaintiffs' allegations of criminal conduct, the majority concluded that expert evidence would be required to conclude whether VLTs are similar to three-card monte and therefore prohibited by s. 206 of the *Criminal Code*. Such claims, said the majority, would have to be determined at trial.

[12] Finally, the majority held that the pleaded facts, particularly considering the allegations of criminal conduct, could reasonably support a claim for disgorgement as a remedy for breach of contract. In view of its conclusion on waiver of tort as an independent cause of action, the majority found it unnecessary 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 v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629]” (para. 230).

[13] In dissent, Welsh J.A. would have allowed ALC's appeal and struck all the claims. In her view, the claims in contract and tort did not have a reasonable chance of success given that the plaintiffs did not plead damage to individual plaintiffs; it was plain and obvious that VLTs were not similar to three-card monte; and, there was a juristic reason for ALC's enrichment at the expense of the plaintiffs.

### III. Analysis

[14] ALC's application to strike relies on r. 14.24(1) of the *Rules of the Supreme Court*, which allows the court to strike any portion of a statement of claim that discloses no reasonable cause of action. The parties agree that determining whether any reasonable cause of action is disclosed in the plaintiffs' statement of claim will also satisfy the first requirement of the plaintiffs' application for certification. The test to be applied under both applications, therefore, is whether it is plain and obvious, assuming the facts pleaded to be true, that each of the plaintiffs' pleaded claims disclose no reasonable cause of action. Simply stated, if a claim has no reasonable prospect of success it should not be allowed to proceed to trial (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17).

[15] A central issue in this case arises from the plaintiffs' reliance on the doctrine of waiver of tort. The plaintiffs say that a claim relying on waiver of tort as an independent cause of action for disgorgement has at least a reasonable chance of succeeding at trial. Before the Court of Appeal's decision in this case, however, no Canadian authority had recognized such a cause of action, although the plaintiffs rely on a line of class action certification decisions in which courts have *refrained* from finding that it is plain and obvious that such an action *does not* exist. The plaintiffs place significant emphasis on *Pro - Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477 ("*Microsoft*") where this Court, citing conflicting authorities on this point, declined to resolve it (para. 97).

[16] In my view, developments since *Microsoft*, and distinguishing features of this case, allow us to definitively resolve whether the novel cause of action proposed by the plaintiffs exists in Canadian law. I say so for four reasons.

[17] First, the argument in favour of recognizing the plaintiffs' novel cause of action relies on the relationship between the concept of waiver of tort and the broader law of restitution (or, as it is now more commonly referred to in Canada, the law of unjust enrichment). This area of our law has developed rapidly in recent years in ways that have deepened our understanding of unjust enrichment (see e.g. *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303; M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at pp. vii-ix; J. D. McCamus, "Waiver of Tort: Is There a Limiting Principle?" (2014), 55 *Can. Bus. L.J.* 333, at p. 334; A. Burrows, *The Law of Restitution* (3rd ed. 2011), at pp. 3-9). More particularly, several commentators have, since *Microsoft*, made helpful contributions by specifically commenting on waiver of tort as an independent cause of action (see e.g. G. Weber, "Waiver of Tort: Disgorgement *Ex Nihilo*" (2014), 40 *Queen's L.J.* 389; S. Barton, M. Hines and S. Therien, "Neither Cause of Action nor Remedy: Doing Away with Waiver of Tort", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation, 2015* (2015); E. M. Iacobucci and M. J. Trebilcock, "An Economic Analysis of Waiver of Tort in Negligence Actions" (2016), 66 *U.T.L.J.* 173). What was once seen as a state of legal uncertainty at the time *Microsoft* was decided has been made clearer.

[18] Secondly, and since *Microsoft* was decided, this Court has recognized in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 the need for a culture shift to promote “timely and affordable access to the civil justice system” (para. 2). Where possible, therefore, courts should resolve legal disputes promptly, rather than referring them to a full trial (paras. 24-25 and 32). This includes resolving questions of law by striking claims that have no reasonable chance of success (S. G. A. Pitel and M. B. Lerner, “Resolving Questions of Law: A Modern Approach to Rule 21” (2014), 43 *Adv. Q.* 344, at pp. 351-52). Indeed, the power to strike hopeless claims is “a valuable housekeeping measure essential to effective and fair litigation” (*Imperial Tobacco*, at para. 19).

[19] Of course, it is not determinative on a motion to strike that the law has not yet recognized the particular claim. The law is not static, and novel claims that might represent an incremental development in the law should be allowed to proceed to trial (*Imperial Tobacco*, at para. 21; *Das v. George Weston Ltd.*, 2018 ONCA 1053, 43 E.T.R. (4th) 173, at para. 73; see also *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670). That said, a claim will not survive an application to strike simply because it is novel. It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, *including novel claims*, which are doomed to fail be disposed of at an early stage in the proceedings. This is because such claims present “no legal justification for a protracted and expensive trial” (*Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 19). If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the

claim is plainly doomed to fail and should be struck. In making this determination, it is not uncommon for courts to resolve complex questions of law and policy (see e.g. *Imperial Tobacco*; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Syl Apps*; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261).

[20] Lax J.'s observations in *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660 are particularly apposite, as she heard arguments on the scope of waiver of tort after a 138-day trial. The circumstances did not require her to resolve the issue, but Lax J. observed that the parties “did not rely on any evidence . . . to support or oppose extending the waiver of tort doctrine to a negligence case”, nor did the plaintiffs “lead any policy evidence to explain why waiver of tort should be available” (para. 585 (CanLII)). She concluded that “deciding the waiver of tort issue does not necessarily require a trial and that it may be possible to resolve the debate in some other way” (para. 587).

[21] Thirdly, failing to address whether an independent cause of action for waiver of tort exists will perpetuate an undesirable state of uncertainty. As Greg Weber writes, “[w]aiver of tort has become a hollow and internally inconsistent doctrine, leaving judges and litigants confused about how and when a cause of action might support disgorgement” (p. 392). Uncertainty about whether an action lies for disgorgement without proof of damage has significant ramifications, which are most apparent in the context of class actions. For 16 years since *Serhan (Estate Trustee) v. Johnson & Johnson* (2004), 72 O.R. (3d) 296 (Sup. Ct.), such claims have been

commonly advanced but never fully tried. In the meantime, certification judges have had “little alternative but to affirm that the question of the doctrine’s availability is indeed a live issue for trial, which can and does result in certification to the detriment of the defendant, who is then practically compelled to pay a settlement to the plaintiff” (J. M. Martin, “Waiver of Tort: An Historical and Practical Study” (2012), 52 *Can. Bus. L.J.* 473, at para. 476 (footnote omitted); see also H. M. Rosenberg, “Waiving Goodbye: The Rise and Imminent Fall of Waiver of Tort in Class Proceedings” (2010), 6 *Can. Class Action Rev.* 37, at p. 38). Indeed, this Court’s decision to refrain from striking the waiver of tort claim in *Microsoft* has been taken as an affirmative statement that such claims are viable (see e.g. C.A. Reasons, at para. 182; *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187, 25 B.C.L.R. (6th) 268, at para. 73; *Authentic T-Shirt Co. ULC v. King*, 2016 BCCA 59, at paras. 41-42 (CanLII)). Nothing is gained, and much court time and considerable litigant resources are lost, by leaving this issue unresolved.

[22] Finally, while waiver of tort as a novel cause of action was not a central issue in *Microsoft*, it is in the present appeals. The Court of Appeal accordingly canvassed the law comprehensively, and concluded not only that the plaintiffs’ claim should proceed to trial, but that waiver of tort should be definitively recognized as an independent cause of action. On appeal to this Court, the parties and interveners have similarly devoted substantial attention to the issue. The question is therefore ripe for decision, and these appeals presents an appropriate vehicle for deciding it.

A. *Disgorgement for Tortious Wrongdoing*

(1) Disgorgement As a Novel Cause of Action

[23] As I discuss below, the term “waiver of tort” is confusing, and should be abandoned. The concern is not for consistent terminology for its own sake, but rather for clarity of meaning: cases dealing with gain-based remedies tend to employ inconsistent nomenclature that leads to confused and confusing results. Even the term “restitution” has been applied inconsistently, sometimes referring to the causative event of unjust enrichment and sometimes referring to a measure of relief (McInnes (2014), at pp. 10-11). In my view, *restitution* properly describes the latter — meaning, restitution is the law’s remedial answer to circumstances in which a benefit moves from the plaintiff to the defendant, and the defendant is compelled to restore that benefit. Further, restitution stands in contrast to another measure of relief, *disgorgement*, which refers to awards that are calculated exclusively by reference to the defendant’s wrongful gain, irrespective of whether it corresponds to damage suffered by the plaintiff and, indeed, irrespective of whether the plaintiff suffered damage at all (McInnes (2014), at p. 11-12; see also L. D. Smith, “The Province of the Law of Restitution” (1992), 71 *Can. Bar. Rev.* 672; J. Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (2002), at pp. 65-93). While this Court’s decisions have occasionally referred to disgorgement variously as “restitution damages” or “restitution for wrongdoing”, the ambiguity inherent in such terminology calls for greater precision (see e.g. *Bank of America Canada v. Mutual*

*Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 25; *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, at para. 33).

[24] In sum, then, restitution for unjust enrichment and disgorgement for wrongdoing are two types of gain-based remedies (McInnes (2014), at pp. 144-49; L. D. Smith, “Disgorgement of the Profits of Breach of Contract: Property, Contract, and ‘Efficient Breach’” (1995), 24 *Can. Bus. L. J.* 121, at pp. 121-23; G. Virgo, *The Principles of the Law of Restitution* (3rd ed. 2015), at pp. 415-17; Burrows, at pp. 9-12). Each is distinct from the other: *disgorgement* requires only that the defendant gained a benefit (with no proof of deprivation to the plaintiff required), while *restitution* is awarded in response to the causative event of unjust enrichment (most recently discussed by this Court in *Moore*), where there is correspondence between the defendant’s gain and the plaintiff’s deprivation (Edelman, at pp. 80-86).

[25] Here, the plaintiffs seek *disgorgement*, not restitution: they say that they are entitled to a remedy quantified solely on the basis of ALC’s gain, without reference to damage that any of them may have suffered. There are two schools of thought on where disgorgement fits in the overall legal structure of private obligations. The prevailing view is consistent with that which I have just stated. Disgorgement, as a gain-based remedy, is precisely that: a *remedy*, awarded in certain circumstances upon the plaintiff satisfying all the constituent elements of one or more of various causes of action (specifically, breach of a duty in tort, contract, or equity).

[26] Some scholars, however, see disgorgement as an independent cause of action, which addresses unjust enrichment but does not operate on the same basis as the principled unjust enrichment framework adopted by this Court (P. D. Maddaugh and J. D. McCamus, *The Law of Restitution*, vol. 1 (loose-leaf), at pp. 3-4 to 3-7; see also J. Beatson, “The Nature of Waiver of Tort” (1978-1979), 17 *U.W.O. L. Rev.* 1; D. Friedmann, “Restitution for Wrongs: The Basis of Liability”, in W. R. Cornish et al., eds., *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (1998), 133). And a handful of them have suggested that it should be possible to pursue a remedy of disgorgement in cases that are akin to negligence, but where the plaintiff cannot prove — or chooses not to prove — resulting damage (McCamus; C. Jones, “Panacea or Pandemic: Comparing ‘Equitable Waiver of Tort’ to ‘Aggregate Liability’ in Cases of Mass Torts with Indeterminate Causation” (2016), 2 *Can. J. of Compar. & Contemp. L.* 301). The plaintiffs’ waiver of tort claim relies on this latter proposition.

[27] As I will explain, disgorgement should be viewed as an alternative remedy for certain forms of wrongful conduct, not as an independent cause of action. This view follows naturally from the historical origins of unjust enrichment and gain-based remedies more generally.

[28] The modern law of unjust enrichment originated in the writ of *assumpsit* (*Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at pp. 786-88). Use of *assumpsit* allowed plaintiffs to avoid the limits imposed by other forms of action,

which might have prevented their claim from advancing (McInnes (2014), at p. 34; Martin, at pp. 482-84). While the writ was premised upon the defendant having undertaken to pay a sum of money to the plaintiff and having broken that promise, the specialized form of *indebitatus assumpsit* allowed plaintiffs to acquire the benefits of *assumpsit* where no such undertaking actually existed. It created the legal fiction of an implied contract, allowing plaintiffs to sue in *assumpsit*, “even where the imputation of a promise to pay was nonsensical, as when the defendant acquired a benefit through the commission of a tort.” (McInnes (2014), at pp. 34-35; see also Martin, at pp. 489-96).

[29] Where a tort was made out but the plaintiff chose to pursue a claim in *assumpsit* to recover the defendant’s ill-gotten gains, the plaintiff was said to “waive the tort” (Edelman, at pp. 121-22). Despite its early acceptance, however, the term waiver of tort was a misnomer. Rather than forgiving or waiving the wrongfulness of the defendant’s conduct, plaintiffs relying on the doctrine were simply electing to pursue an alternative, gain-based, remedy (Edelman, at p. 122; see also *United Australia, Ltd. v. Barclays Bank Ltd.*, [1941] A.C. 1 (H.L.), at pp. 13 and 18). The doctrine always operated as “nothing more than a choice between possible remedies”, and *not* as an independent cause of action (*United Australia*, at p. 13; Martin, at pp. 504-5). That this is so is apparent from decisions of this Court, including *Arrow Transfer Co. Ltd. v. Royal Bank of Canada*, [1972] S.C.R. 845 where Laskin J. (as he then was), for the majority on this point, held that the plaintiff’s claim for a

gain-based remedy was dependent on the tort of conversion having been completed (p. 877).

[30] Two points follow from this. First, and as this case demonstrates, the term waiver of tort is apt to generate confusion and should therefore be abandoned (Edelman, at p. 122). Secondly, and relatedly, in order to make out a claim for disgorgement, a plaintiff *must* first establish actionable misconduct.

[31] Recognizing that disgorgement is simply a remedy for certain forms of wrongful conduct places the central issue in this case in context. By pleading disgorgement as an independent cause of action, the plaintiffs seek to establish an entirely new category of wrongful conduct — one that is akin to negligence but does not require proof of damage. Supporters of this type of claim assert that “there is simply no reason in principle why the rules for compensatory damages need to be identical to the rules for disgorgement” (McCamus, at p. 359) and that, given that the purpose of granting disgorgement is to deter wrongful conduct rather than to provide compensation, there is no reason to require proof of damage (p. 354).

[32] I acknowledge that disgorgement is available for some forms of wrongdoing without proof of damage (for example, breach of fiduciary duty). But it is a far leap to find that disgorgement without proof of damage is available as a general proposition in response to a defendant’s negligent conduct. Determining the appropriate remedy for negligence, where liability for negligence has not already been established, is futile and even nonsensical since doing so allows “the remedy tail

[to] was the liability dog” (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [2004] 3 S.C.R. 511, at para. 55). This observation applies with no less force to the plaintiff who seeks disgorgement, since the availability of gain-based relief lies in “aligning the remedy with the injustice it corrects” (E. J. Weinrib, “Restitutionary Damages as Corrective Justice” (2000), 1 *Theor. Inq. L.* 1, at p. 23 (emphasis added)).

[33] It is therefore important to consider what it is that makes a defendant’s negligent conduct wrongful. As this Court has maintained, “[a] defendant in an action in negligence is not a wrongdoer at large: he is a wrongdoer only in respect of the damage which he actually causes to the plaintiff” (*Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 16). There is no right to be free from the *prospect* of damage; there is only a right not to *suffer* damage that results from exposure to unreasonable risk (E. J. Weinrib, *The Idea of Private Law* (rev. ed. 2012), at pp. 153 and 157-58; R. Stevens, *Torts and Rights* (2007), at pp. 44-45 and 99). In other words, negligence “in the air” — the mere creation of risk — is not wrongful conduct. Granting disgorgement for negligence without proof of damage would result in a remedy “arising out of legal nothingness” (Weber, at p. 424). It would be a radical and uncharted development, “[giving] birth to a new tort over night” (Barton, Hines and Therien, at p. 147).

[34] The difficulty is not just normative, although it is at least that. The practical difficulty associated with recognizing an action in negligence without proof

of damage becomes apparent in considering how such a claim would operate. As the Court of Appeal recognized, a claim for disgorgement available to any plaintiff placed within the ambit of risk generated by the defendant would entitle *any one* plaintiff to *the full gain* realized by the defendant. No answer is given as to why any particular plaintiff is entitled to recover the whole of the defendant's gain. Yet, corrective justice, the basis for recovery in tort, demands *just that*: an explanation as to why *the plaintiff* is *the* party entitled to a remedy (*Clements*, at para. 7; Weinrib (2000), at pp. 1-7). Tort law does not treat plaintiffs "merely as a convenient conduit of social consequences" but rather as "someone to whom damages are owed to correct the wrong suffered" (Weinrib (2000), at p. 6). A cause of action that promotes a race to recover by awarding a windfall to the first plaintiff who arrives at the courthouse steps undermines this foundational principle of tort law.

[35] This is not the type of incremental change that falls within the remit of courts applying the common law (*Salituro*, at p. 670). It follows that the novel cause of action proposed by the plaintiffs has no reasonable chance of succeeding at trial.

(2) Disgorgement for the Completed Tort of Negligence

[36] The Court of Appeal majority concluded that, even if disgorgement for wrongdoing is not an independent cause of action, the plaintiffs have adequately pleaded the elements of the tort of negligence, and may therefore seek disgorgement for tortious wrongdoing on that basis. While disgorgement for tortious wrongdoing was initially applied only in the context of proprietary torts, including conversion,

deceit, and trespass, it found broader application in the late 20th century (Martin, at pp. 505-6). It has even been suggested that disgorgement may be available for negligence in certain circumstances, and the issue remains unsettled (Edelman, at pp. 129-30; C.-M. O'Hagan, "Remedies", in L. N. Klar et al., ed., *Remedies in Tort* (loose-leaf), vol. 4, at §200). While that may have to be decided in an appropriate case, as I will explain the plaintiffs have not adequately pleaded a claim in negligence, and it is unnecessary to resolve the question here.

[37] Causation of damage is a required element of the tort of negligence. As I have explained, the conduct of a defendant in negligence is wrongful only to the extent that it *causes* damage (*Clements*, at para. 16). While the plaintiffs allege that ALC had a duty to warn of the inherent dangers associated with VLTs, including the risk of addiction and suicide, those dangers are not alleged to have materialized. The plaintiffs do not allege that proper warnings would have caused them to spend less money playing VLTs or to avoid them altogether.

[38] It follows that I respectfully disagree with Court of Appeal's conclusion that the plaintiffs would not be "precluded from leading evidence that the breach of duty (assuming it can be proven) led to some form of injury" (para. 186). Again, causation of damage is a required element of the cause of action of negligence, and it must be pleaded. Here, not only have the plaintiffs *not* pleaded causation, their pleadings expressly disclaim any intention of doing so. The absence of a pleading of causation, they acknowledge, arises from an intentional litigation strategy to increase

the likelihood of obtaining certification of their action as a class action by avoiding having to prove individual damage. This particular claim also has no reasonable chance of success.

B. *Alleged Criminal Conduct*

[39] The plaintiffs further allege that the *Criminal Code* prohibits the operation of VLTs. While breach of statute is not a recognized cause of action (*R. in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, at p. 225), the allegations of criminal conduct are intended to serve two purposes. First, the plaintiffs say that the presence of criminal conduct warrants exceptional relief for breach of contract, specifically disgorgement or punitive damages. Secondly, the plaintiffs argue that, if ALC's conduct is criminal, there is no juristic reason for ALC's enrichment at the plaintiffs' expense, which grounds their claim in unjust enrichment.

[40] The plaintiffs' argument is that VLTs are so inherently deceptive that they should be considered a game "similar to" three-card monte within the meaning of s. 206 of the *Criminal Code*, which states in part:

**206 (1)** Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 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;

...

- (2) 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.

While s. 207(1)(a) of the *Criminal Code* exempts provincial lottery schemes from most gaming and betting prohibitions, that exemption does not extend to three-card monte (s. 207(4)(a)). Thus, the argument goes, if VLTs are games similar to three-card monte, their operation would be unlawful, even through a provincial lottery scheme.

[41] It is well-settled that statutory interpretation requires discerning legislative intent by examining statutory text in its entire context and in its grammatical and ordinary sense, in harmony with the statute's scheme and objects. In determining what games can be considered "similar to" three-card monte, I also bear in mind that courts cannot create common law crimes through an act of judicial interpretation (*R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 3).

[42] The Court of Appeal concluded that expert evidence is required to determine the essence of three-card monte, which would then be used to evaluate whether VLTs share three-card monte's essential features (para 208). I find myself in respectful disagreement with that conclusion. While expert evidence may assist in deciding whether the defined elements of an offence are made out on the facts of a

particular charge, expert evidence cannot purport to define the elements of an offence (*R. v. Levkovic*, 2013 SCC 25, [2013] 2 S.C.R. 204, at para. 73). While permissible expert evidence might therefore describe the *features* of VLTs for the purpose of establishing similarity, it is a court’s role, and only a court’s role, to discern Parliament’s intention in prohibiting games “similar to” three-card monte.

[43] Beginning with the text of the prohibition, I observe that s. 206(2) refers to “the game commonly known as three-card monte” (emphasis added). The *Canadian Oxford Dictionary* (2nd ed. 2004), defines “three-card monte” as a game played with three cards where “players bet on which of three cards lying face down is the queen.” Similarly, and shortly before Parliament enacted this *Criminal Code* prohibition, the Quebec Court of Appeal described three-card monte as “a game played with three cards . . . shuffled or manipulated by the dealer and placed face down and the opponent backs his ability to spot the position of a particular card” (*The King v. Rosen and Lavoie* (1920), 61 D.L.R. 500 (Que. C.A.), at pp. 502-3).

[44] Section 206(2)’s text has a wider reach, however, capturing “similar” games, “whether or not the game is played with cards and notwithstanding the number of cards or other things that are used for the purpose of playing”. The plaintiffs contend that this expanded definition is meant to capture all games of a broadly deceptive nature. In my view, however, it is apparent from the historical background, from statements indicating why the provision was introduced, and from

the text of the provision itself, viewed in its surrounding context that this prohibition does not reach so far.

[45] The state of the law prior to this provision's enactment lends important insight into its purpose. In *Rosen and Lavoie*, the Quebec Court of Appeal held that three-card monte did not constitute a contravention of the *Criminal Code*'s cheating at play offence (s. 209). Shortly thereafter, the Member of Parliament for Jacques Cartier introduced a private member's bill to outlaw three-card monte specifically. He stated during second reading that the proposed changes were a direct response to *Rosen and Lavoie* targeting the specific game of three-card monte (*House of Commons Debates*, vol. 2, 5th Sess., 13th Parl., April 11, 1921, at p. 1858). As to why it was necessary to further prohibit games *similar* to three-card monte, he explained:

If we made it a crime for people to play with three cards, they might play with four cards or they might play with other instruments than cards, and that is why we thought it proper to enlarge the clause so as to endeavour to cover other cases.

The Minister of Justice adopted the member's statements and opted to include the new provisions in broader Bill of proposed amendments to the *Criminal Code* (*House of Commons Debates*, vol. 2, at p. 1857; see also *House of Commons Debates*, vol. 4, 5th Sess., 13th Parl., May 6, 1921, at p. 3006).

[46] While this Court has recognized that the statements of particular Members of Parliament cannot necessarily be taken as expressing the intention of Parliament as a whole (*R. v. Heywood*, [1994] 3 S.C.R. 761, at pp. 788-89), the statements recounted here were made by those directly responsible for introducing the three-card monte prohibition, and as such provide relevant evidence of legislative purpose. They indicate that the phrase “similar to” was included in s. 206(2) to capture games that involve betting on the location of a particular object after a series of movements, regardless of whether the game is played with three playing cards.

[47] The text of the provision and its surrounding context further suggest that the prohibition of games *similar to* three-card monte was directed towards the game’s concrete attributes and not towards the abstract feature of deception. One would expect that, had Parliament sought to prohibit broadly deceptive gambling games, it would have straightforwardly done so (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 207-8). It defies logic that Parliament would choose to create such an offence by prohibiting three-card monte. Moreover, three-card monte is listed alongside other types of gambling games that are defined by their physical characteristics (punch boards, coin tables, and wheels of fortune). It would be anomalous to interpret the inclusion of three-card monte in this list as an intention to prohibit all deceptive games (Sullivan, at pp. 230-34).

[48] All this leads me to conclude that games “similar to” three-card monte involve, at a minimum, a player betting on the location of an object after a series of

manipulations. Nothing in the pleadings describes VLTs as operating in this manner. Thus, the claim that VLTs are similar to three-card monte has no reasonable chance of success.

C. *Breach of Contract*

[49] At first glance, the plaintiffs' breach of contract claim might merit different treatment than their claim in tort, since breach of contract — unlike the tort of negligence — does not require proof of loss as an element of the cause of action (*Rogers & Rogers Inc. v. Pinehurst Woodworking Co.* (2005), 14 B.L.R. (4th) 142 (Ont. Sup. Ct.), at para. 91). But that is of no moment here, since the plaintiffs have made it clear — both in their pleadings and at every level of court — that they seek only *non-compensatory* remedies for breach of contract, namely disgorgement and punitive damages. Whether the plaintiffs' breach of contract claim discloses a *reasonable* cause of action should be considered in light of the remedies the plaintiffs actually seek. The question to be decided here, then, is whether these remedies are available to the plaintiffs, assuming the truth of their pleadings.

(1) Disgorgement for Breach of Contract

[50] The ordinary form of monetary relief for breach of contract is an award of damages, measured according to the position which the plaintiff would have occupied had the contract been performed (*Bank of America*, at para. 25). Correspondingly, the orthodox position maintained that disgorgement of the defendant's profits was not an

available remedy for breach of contract (H. D. Pitch and R. M. Snyder, *Damages for Breach of Contract* (2nd ed. (loose-leaf)), at pp. 1-36 to 1-39; S. Watterson, “Gain-Based Remedies for Civil Wrongs in England and Wales”, in E. Hondius and A. Janssen, eds., *Disgorgement of Profits: Gain-Based Remedies throughout the World*, 29, at p. 55; see also *Asamera Oil Corp. Ltd. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, at p. 673).

[51] More recently, courts have accepted that disgorgement may be available for breach of contract in certain exceptional circumstances (*Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.); *Bank of America*, at paras. 25 and 30-31). In *Blake*, the defendant was a former member of the British secret intelligence service who had defected to become an agent for the Soviet Union. He was discovered and sentenced to 42 years’ imprisonment, but escaped prison and fled the country. Blake later entered into a contract to publish his memoirs, in contravention of the confidentiality undertaking in his employment agreement with the intelligence service. The information in his memoirs was, however, “no longer confidential, nor was its disclosure damaging to the public interest” (p. 275). Further, Blake’s fiduciary obligations ceased to exist when he was dismissed from his post. The sole question was, therefore, whether the Crown could pursue disgorgement for his breach of contract.

[52] Lord Nicholls, for a majority of the House, held that disgorgement for breach of contract may be appropriate in exceptional circumstances, but only where,

at a minimum, the remedies of damages, specific performance, and injunction are inadequate (*Blake*, at p. 285; *One Step (Support) Ltd. v. Morris-Garner*, [2018] UKSC 20, [2018] 3 All E.R. 649, at para. 64; see also Watterson, at p. 55). As to the types of circumstances that should be considered exceptional, Lord Nicholls concluded:

No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit. [Emphasis added; p. 285.]

[53] Nothing in the law of Canada contradicts the “exceptional” standard articulated by Lord Nicholls in *Blake*. Indeed, this Court’s statement in *Bank of America*, at para. 31 — that “[c]ourts generally avoid [the restitution] measure of damage” — affirms this Court’s view, like that expressed by the House of Lords in *Blake*, that disgorgement awards are not generally available. In particular, and again as was held in *Blake*, disgorgement for breach of contract is available only where other remedies are inadequate and only where the circumstances warrant such an award. As to those circumstances, courts should in particular consider whether the plaintiff had a legitimate interest in preventing the defendant’s profit-making activity.

[54] Ultimately, Lord Nicholls concluded in *Blake* that the circumstances before him were indeed “exceptional”. The ordinary measure of expectation damages

could not have vindicated the Crown's interest, as no economic loss resulted from the publication of Blake's memoirs. Further, in Lord Nicholls view, the Crown had a legitimate interest in Blake's profits because his confidentiality undertaking was "closely akin to a fiduciary obligation" (p. 287). I pause here because, I respectfully differ on this latter point. The imposition of "quasi-fiduciary" relationships by operation of law is a concept foreign to Canadian law (*RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54, [2008] 3 S.C.R. 79, at paras. 51-54, per Abella J. (dissenting)). I therefore prefer the view of Professor McInnes, who states:

To . . . impose relief in a contractual context on the basis of an undefined notion of *quasi*-fiduciary duty dangerously ignores Justice Sopinka's warning that such obligations "should not be imposed . . . simply to improve the nature or extent of the remedy". It is not merely that Lord Nicholls' approach fails to reveal a sound basis for liability; it also implicitly invites lower courts to similarly manipulate equitable doctrine for instrumental purposes. Such an exercise is inimical to the development of coherent principle.

("Gain-Based Relief for Breach of Contract: *Attorney General v. Blake*" (2001), 35 *Can. Bus. L.J.* 72, at p. 85, citing *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, at p. 312)

[55] As to what circumstances *will* create a legitimate interest in the defendant's profit-making activity, I agree with Lord Nicholls that the boundaries of this remedy are "best hammered out on the anvil of concrete cases" (*Blake*, at p. 291). I can, however, offer some observations.

[56] Many scholars have recognized that it is difficult to reconcile disgorgement for breach of contract with private law principles (see e.g. E. J.

Weinrib, “Punishment and Disgorgement as Contract Remedies” (2003), 78 *Chi.-Kent L. Rev.* 55; at p. 70; D. Winterton, “Contract Theory and Gain-Based Recovery” (2013), 76 *M.L.R.* 1129; McInnes (2001)). This Court has gone even further, cautioning that disgorgement awards may have the undesirable effect of deterring “efficient breach[es] of contract” (*Bank of America*, at paras. 30-31, Weinrib (2003), at p. 73). More importantly, it is difficult to explain disgorgement for breach of contract from the standpoint of corrective justice (Weinrib (2003), at p. 57). Granted, some attempts have been made to articulate a corrective justice rationale, but those accounts have been met with substantial criticism (see P. Benson, “Contract as a Transfer of Ownership” (2007), 48 *Wm. & Mary L. Rev.* 1673; A. Botterell, “Contractual Performance, Corrective Justice, and Disgorgement for Breach of Contract” (2010), 16 *Legal Theory* 135; and A. R. Sangiuliano, “A Corrective Justice Account of Disgorgement for Breach of Contract by Analogy to Fiduciary Remedies” (2016), 29 *Can. J.L. & Jur.* 149, at pp. 160-74).

[57] In my view, the key to developing principles for gain-based recovery in breach of contract is to consider what legitimate interest a gain-based award serves to vindicate. A coherent approach that reconciles the relief awarded with the structure of breach of contract as a cause of action should be preferred (McInnes (2001), at pp. 88-93; see also N. W. Sage, “Disgorgement: From Property to Contract” (2016), 66 *U.T.L.J.* 244). To that end, it is useful to recall that courts have, in some exceptional circumstances, long awarded monetary amounts departing from the ordinary measure of expectation damages. That is to say, while disgorgement awards

quantified solely by reference to the defendant's profit are a relatively recent development, other gain-based awards are nothing new. For example, this Court has awarded damages quantified by the amount a defendant saved through deficient performance, though the plaintiff would have been no better off had the contract been performed (*Sunshine Exploration Ltd. v. Dolly Varden Mines Ltd. (N.P.L.)*, [1970] S.C.R. 2). The Court of Appeal of Nunavut suggested a similar measure of relief in circumstances where the damage caused by the defendant's deficient performance was simply too difficult to quantify (*Nunavut Tunngavik Inc. v. Canada (Attorney General)*, 2014 NUCA 2, 580 A.R. 75, at para. 88 (“*Inuit of Nunavut*”). And courts have also granted what might be termed “negotiating damages” to prevent a defendant from obtaining for free an advantage for which it did not bargain (*Wrotham Park Estate Co. v. Parkside Homes Ltd.*, [1974] 2 All E.R. 321 (Ch. D.); *Smith v. Landstar Properties Inc.*, 2011 BCCA 44, 14 B.C.L.R. (4th) 48, at paras. 39-44; see also *Morris-Garner*, at paras. 91-100). As the Supreme Court of the United Kingdom recently explained in *Morris-Garner*, at para. 95:

Negotiating damages can be awarded for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset . . . . The rationale is that the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset. The defendant has taken something for nothing, for which the claimant was entitled to require payment. [Emphasis added.]

[58] As these various examples demonstrate, an award that appears to be measured by a defendant's gain might arguably, in certain circumstances, serve a

compensatory purpose that distinguishes it from disgorgement and which therefore tends to support recovery (McInnes (2001), at pp. 76-80; Weinrib (2003), at pp. 71-72; see also *Morris-Garner*, at paras. 39-40). Whether viewed as compensatory or not, these cases are indicative of the types of circumstances where a plaintiff is entitled to receive a monetary award that goes beyond the economic position that it would have occupied had its contract been performed (see Burrows, at pp. 672-77; McInnes (2014), at p. 285). While the circumstances in which a gain-based award will be appropriate cannot be clearly delineated in advance (*Blake*, at p. 285; *Morris-Garner*, at para. 94), one would expect future legitimate interests protected by a gain-based award to resemble those interests that have been protected in the past.

[59] Returning to the present case, and applying the standard articulated in *Blake*, the plaintiffs' claim for disgorgement is plainly doomed to fail. I say this, first, because disgorgement is available for breach of contract only where, at a minimum, other remedies are inadequate. Circumstances of inadequacy arise when the nature of the claimant's interest is such that it cannot be vindicated by other forms of relief. This may arise where, for example, the plaintiff's loss is "impossible to calculate" or where the plaintiff's interest in performance is not reflected by a purely economic measure (*Inuit of Nunavut*, at para. 80; see also *Morris-Garner*, at paras. 39-40; Burrows, at p. 676). Where, as here, the argument is that the quantum of loss is equal to the defendant's gain, but the plaintiff would simply rather pursue disgorgement, a gain-based remedy is not appropriate.

[60] My colleague Karakatsanis J. suggests that compensatory damages may be inadequate here because VLTs do not create records for particular customers, and that ALC's conduct may have contributed to the plaintiffs' lack of evidence. But the plaintiffs do not make these allegations. More importantly, compensatory damages are not inadequate merely because a plaintiff is unwilling, or does not have sufficient evidence, to prove loss (*Inuit of Nunavut*, at para. 85; see also *Morris-Garner*, at para. 90). Again, and as *Inuit of Nunavut* demonstrates, inadequacy flows *not* from the availability of evidence, but from the nature of the claimant's interest. There, the claimant's interest was in the Government of Canada's agreement to develop a general monitoring plan to support collection and analysis of "information on the long term state and health of . . . the Nunavut Settlement Area" (para. 9). While the Government of Canada's failure to do so resulted in an identifiable loss to the Inuit of Nunavut, it could not possibly be quantified in monetary terms. The Nunavut Court of Appeal therefore recognized that it would be appropriate to award gain-based damages measured by the amount the Government of Canada saved by breaching the agreement. This is a far cry from the plaintiffs' circumstances here. Their gambling losses are readily quantifiable and can be remedied through an award of compensatory damages.

[61] Disgorgement for breach of contract is exceptional relief; it is not available at the plaintiff's election to obviate matters of proof. And there is nothing exceptional about the breach of contract the plaintiffs allege. Once the allegations of criminal conduct are put aside (given that I determined that they should be struck),

the plaintiffs' claim is simply that they paid to play a gambling game and did not get exactly what they paid for. The plaintiffs cannot be said to have a legitimate interest in ALC's profit-making activity.

[62] It follows that the plaintiffs' claim has no reasonable chance of achieving disgorgement damages for breach of contract.

(2) Punitive Damages for Breach of Contract

[63] Punitive damage awards for breach of contract are also exceptional, but will be awarded where the alleged breach of contract is an independent actionable wrong (*Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 78). As this Court held in *Whiten*, the actionable wrong need not be tortious: punitive damages may also be awarded where the defendant breaches a contractual obligation of good faith (para. 79).

[64] Having concluded that all of the plaintiffs' other claims are bound to fail, the only remaining actionable wrong is the claim that ALC breached an obligation of good faith owed to the plaintiffs under the alleged contract. To that effect, the plaintiffs' claim alleges:

[T]he nature of the contract between the parties and the vulnerability of the Plaintiffs implies a duty of good faith which requires the Defendant to consider the interests of the Plaintiffs as at least equal to its own and not to offer or supply an inherently dangerous service or product. The Defendant breached its implied duty of good faith 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 Defendant knew or ought to have known would lead to dependency and addiction.

(A.R., vol. II, at pp.101-2)

[65] As this Court explained in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, however, not every contract imposes actionable good faith obligations on contracting parties. While good faith is an organizing principle of Canadian contract law, it manifests itself in specific circumstances. In particular, its application is generally confined to existing categories of contracts and obligations (para. 66). The alleged contract between ALC and the plaintiffs does not fit within any of the established good faith categories. Nor did the plaintiffs advance any argument for expanding those recognized categories.

[66] Accordingly, the plaintiffs' claim for punitive damages has no reasonable chance of success.

(3) Whether the Claim Should Survive For Nominal Damages

[67] The remaining question on breach of contract is whether the plaintiffs' claim should survive as a hollow cause of action that does not support any of the remedies they seek. In my view, it should not. While I agree with my colleague Karakatsanis J. that declaratory relief and nominal damages are available in theory as remedies for breach of contract, a reasonable claim is one that has a reasonable

chance of achieving the outcome that the plaintiff seeks. That is not this claim. To be sure, the circumstances here are unusual. Not only did the plaintiffs plead only gain-based relief and punitive damages, both of which I have concluded are unavailable in the circumstances, the plaintiffs also expressly disclaimed remedies quantified on the basis of individual loss. At no point did the plaintiffs argue that their claim should survive because nominal damages are available. In my view, the plaintiffs' breach of contract claim should be assessed on the basis of the questions put before the Court — namely, whether a gain-based remedy or punitive damages are available in the circumstances. And on that basis, it is obvious that the plaintiffs' breach of contract claim does not disclose a reasonable cause of action. To allow this claim to proceed to trial would simply be to delay the inevitable, and would not reflect a “proportionate procedur[e] for adjudication” (*Hryniak*, at para. 27).

#### (4) Certification

[68] Even were the breach of contract claim to survive, the application judge's certification decision would have to be revisited. Given my conclusion that each of the plaintiffs' claims should be struck, it is unnecessary to address certification in detail. I respectfully disagree with my colleague, however, that the plaintiff's breach of contract claim, standing alone, would satisfy the preferability requirement in s. 5(1)(d) of the *Class Actions Act* (Karakatsanis J. Reasons, at paras. 165-70). As I have explained, punitive damages and disgorgement are unavailable to the plaintiffs. Without those remedies, the plaintiffs would be pursuing a breach of contract action

wherein each plaintiff effectively elects to pursue nominal damages in lieu of the actual damages they have suffered. Such an action would not further the principal goals of class actions, namely judicial economy, behavior modification, and access to justice (*Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at paras. 27-28).

D. *Unjust Enrichment*

[69] The plaintiffs also rely on the principled unjust enrichment framework (or what the Court of Appeal referred to as “unjust enrichment *simpliciter*”). This claim requires establishing that ALC was enriched, that the plaintiffs suffered a corresponding deprivation, and that the enrichment and corresponding deprivation occurred in the absence of any juristic reason therefor (*Moore*, at para. 37). The appellants argue that this claim is bound to fail because, even if ALC has been enriched at the plaintiff’s expense, there is a juristic reason for the exchange.

[70] The juristic reason element of the unjust enrichment analysis proceeds in two stages. First, the plaintiff must demonstrate that the defendant’s enrichment cannot be justified by any of the established categories of juristic reason. If none of the established categories of juristic reason are present, the plaintiff has a *prima facie* case for unjust enrichment. At the second stage, the defendant can rebut the plaintiff’s *prima facie* case by showing that there is a residual reason to deny recovery (*Moore*, at paras. 57-58).

[71] Here, I do not have to go beyond the first stage of the analysis. The plaintiffs' own pleadings allege that there was a contract between ALC and the plaintiffs under which the plaintiffs paid to play VLTs. A defendant that acquires a benefit pursuant to a valid contract is justified in retaining that benefit (*Moore*, at para. 57). Nothing in the pleadings, apart from perhaps the allegations of criminal conduct that I have determined are bound to fail, could serve to vitiate the alleged contract between the plaintiffs and ALC. It follows that I agree with the appellants that the plaintiffs' unjust enrichment claim has no reasonable chance of success.

#### IV. Conclusion

[72] Each claim that the plaintiffs have pleaded is bound to fail because it discloses no reasonable cause of action. I would allow the appeals, set aside the certification order, and strike the plaintiffs' statement of claim in its entirety. The appellants have not sought costs, and I would therefore award none.

The reasons of Wagner C.J. and Karakatsanis, Martin and Kasirer JJ. were delivered by

KARAKATSANIS J. —

#### I. Introduction

[73] The plaintiffs in this proposed class action allege that the Video Lottery Terminal (VLT) games offered by Atlantic Lottery Corporation (ALC) in Newfoundland and Labrador are deceptive, harmful, and inherently addictive. They further contend that ALC, both a regulator and a business corporation, deliberately put people at risk of addiction by deceiving the paying public for the sole purpose of making money. The statement of claim seeks a gain-based remedy through seven possible causes of action.

[74] The application judge at the Supreme Court of Newfoundland and Labrador dismissed ALC's application to strike the plaintiffs' statement of claim and certified the class action. The majority of the Court of Appeal of Newfoundland and Labrador struck two claims but allowed the remainder to proceed as a class action. ALC and several third parties now appeal to this Court.

[75] There are two main issues before this Court: whether to strike the plaintiffs' claims and whether to certify the plaintiffs' class action. The Court's concern is not whether the plaintiffs' claim will be successful, but rather whether it should be allowed to proceed to trial, and proceed as a class action.

[76] I agree with Brown J. that a mere breach of a duty of care, in the absence of loss, cannot ground a claim for disgorgement and that the term "waiver of tort" should not be used to refer to a cause of action. I also agree that VLTs cannot constitute "three-card monte" as that phrase is defined in the *Criminal Code*, R.S.C. 1985, c. C-46, and that the plaintiffs' claim in unjust enrichment must be struck.

However, I disagree with his analysis of whether the plaintiffs' claim in breach of contract is a reasonable cause of action as well as his conclusion that there are no available remedies for that breach.

[77] I agree with the courts below that common issues relating to breach of contract, punitive damages, and the availability of the remedy of disgorgement of ALC's gains are properly certified. However, I would not, on this record, certify the availability of aggregate monetary relief as a common issue. It follows that I would allow the appeals only in part, allowing the breach of contract claim to proceed and remain certified as a class action.

## II. Statement of Claim and Procedural History

[78] ALC is a corporation incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (*CBCA*), whose shareholders are the governments of the four Atlantic provinces, including Newfoundland and Labrador. Under the *Video Lottery Regulations*, C.N.L.R. 760/96, made under the *Lotteries Act*, S.N.L. 1991, c. 53, ALC is authorized to offer gambling to the public. As part of this business, ALC offers games through VLTs at approved sites.

[79] The plaintiffs, Douglas Babstock and Fred Small, are individuals seeking to be the representative plaintiffs in a class action against ALC. In their statement of claim, the plaintiffs bring a class action on behalf of persons and estates harmed by

the VLT gambling that the defendant, ALC, manages in the Province of Newfoundland and Labrador. ALC has not yet filed its defence.

[80] The plaintiffs state that ALC is both a regulator and a business corporation driven by profit motive, remitting profits to the province in the range of \$60-90 million annually. The statement of claim alleges that ALC knows or ought to know that VLTs are, and have been designed to be, inherently deceptive, addictive, and dangerous, programmed to create cognitive distortions of consumers' perceptions of winning. The plaintiffs say that ALC acted in bad faith, and that the reprehensibility of ALC's conduct is relevant to the issue of remedy. They do not advance claims for personal injuries but instead seek, among other remedies, damages equal to the total unlawful gain obtained by ALC from the class members, disgorgement of ALC's profits, and punitive damages.

[81] ALC joined several third parties in the action, including VLC, Inc.; IGT-Canada Inc.; International Game Technology; Spielo International Canada ULC; and Tech Link International Entertainment Limited (collectively, the third parties), who are the manufacturers and suppliers of VLTs and who supplied VLTs to ALC during the proposed class period.

[82] The plaintiffs brought an application for certification under the *Class Actions Act*, S.N.L. 2001, c. C-18.1 (CAA), and ALC brought an application to strike the plaintiffs' statement of claim under r. 14.24 of the *Rules of the Supreme Court*, 1986, S.N.L. 1986, c. 42, Sch. D.

### III. Decisions on the Breach of Contract Claim and Certification

- A. *Supreme Court of Newfoundland and Labrador (2014 NLTD(G) 114, 356 Nfld. & P.E.I.R. 293, and 2016 NLTD(G) 216, 93 C.P.C (7th) 307 (Faour J.))*

[83] On ALC's application to strike the claim, the application judge found that breach of contract was a reasonable cause of action and that disgorgement was potentially available as a remedy. He rejected the argument that ALC's status as a regulator prevented the implication of any terms into its contracts with the plaintiffs, finding that it was not plain and obvious that ALC would be able to defend against every allegation on the basis of its regulatory status. He found that the plaintiffs' failure to plead damage or individual loss arising from the breach of contract, and to instead claim the defendants' gain from the breach, was not a bar to their cause of action. In his certification reasons (which touched on other claims beyond breach of contract), Faour J. found that the criteria for certification had been established.

- B. *Court of Appeal of Newfoundland and Labrador (2018 NLCA 71, 29 C.P.C. (8th) 1 (Green, Welsh, and Harrington J.J.A.))*

[84] In the Court of Appeal, Green J.A., writing for the majority, upheld the application judge's conclusion that breach of contract was a reasonable cause of action on the basis that it is actionable in the absence of pleaded or proven loss. The majority found disgorgement to be a potential remedy given its uncertain parameters; it could not be said that the claim for disgorgement of profits was doomed to fail. The majority also refused to strike the plaintiffs' claim for punitive damages given their

allegations that ALC had engaged in reprehensible and high-handed conduct. Finally, the majority concluded that the application judge had not erred in certifying the plaintiffs' class action.

[85] Welsh J.A. dissented, finding that the claim for breach of contract should be struck because the plaintiffs did not plead loss or damage.

#### IV. Analysis

[86] In these reasons, I consider two issues. First, is breach of contract a reasonable cause of action on these pleadings? Second, should the action for breach of contract remain certified as a class action?

##### A. *Standard on a Motion to Strike*

[87] A pleading may be struck or amended on the ground that it discloses no reasonable cause of action or defence (*Rules of the Supreme Court, 1986*, r. 14.24(1)(a)). When considering whether to strike a pleading on this ground, the question is whether the claim has “no reasonable prospect of success” (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17), or whether it is “plain and obvious” that the action cannot succeed (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980). This is a high standard that applies to determinations of fact, law, and mixed fact and law. The facts pleaded are assumed to be true “unless they are manifestly incapable of being proven” (*Imperial Tobacco*, at para. 22).

[88] On a motion to strike, the statement of claim should be read “as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies” (*Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at p. 451), because “cases should, if possible, be disposed of on their merits” (*Montreal Trust Co. of Canada v. Hickman*, 2001 NFCA 42, 204 Nfld. & P.E.I.R. 58, at para. 12). At times, a proposed cause of action is so obviously at odds with precedent, underlying principle, and desirable social consequence that regardless of the evidence adduced at trial, the court can say with confidence that it cannot succeed. But this is not often the case, and our common law system generally evolves on the basis of the concrete evidence presented before judges at trial.

[89] This is why claims that do not contain a “radical defect” (*Hunt*, at p. 980) should nevertheless proceed to trial. Courts should consider whether the pleadings are sufficient to put the defendant on notice of the essence of the plaintiff’s claim (*Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551, at para. 15) and whether “the facts pleaded would support one or more arguable causes of action” (*Anderson v. Bell Mobility Inc.*, 2009 NWTCA 3, 524 A.R. 1, at para. 5). In *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94, this Court explained that a cause of action is “only a set of facts that provides the basis for an action in court” (para. 27).

[90] The threshold to strike a claim is therefore high. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial (*Imperial Tobacco*, at paras. 17 and 21). The correct posture for the Court to adopt is to consider whether the pleadings, as they stand or may reasonably be amended, disclose a question that is not doomed to fail (*Hunt*, at p. 978, quoting *Minnes v. Minnes* (1962), 39 W.W.R. 112 (B.C.C.A.), at pp. 116 and 122).

## B. *Breach of Contract*

### (1) Breach of Contract as a Cause of Action

[91] The elements of a cause of action for breach of contract are the existence of a contract and the breach of a term of that contract. In order to strike the claim for breach of contract, ALC and the third parties must demonstrate either that a necessary fact is not pleaded or that there is a legal reason why no contractual term existed or could be breached. In my view, they have done neither. As I discuss below, the plaintiffs have pleaded everything necessary to sustain a claim of breach of contract in this case. I begin by reviewing the plaintiffs' statement of claim more broadly before turning to the breach of contract claim.

[92] The plaintiffs allege that a disproportionate number of VLT gamblers have become addicted to gambling and are the source of a disproportionately large share of ALC's VLT revenues in the province. According to the pleadings, in Newfoundland and Labrador, 9.7 percent of VLT players are at moderate risk of

problem gambling and an additional 8.6 percent are problem gamblers, compared to a problematic gambling rate of only about 3 percent for other forms of gambling. The plaintiffs have not pleaded that either of the representative plaintiffs are problem gamblers.

[93] The statement of claim also alleges that VLTs are deceptive in that both the mechanics of the game and the odds of winning are concealed. The VLTs are said to have asymmetrical virtual reels that are programmed to weight the distribution of symbols so that the visual reels give a false impression of the odds of winning. The plaintiffs also allege that the machines include a “stop” button that creates the illusion of control over the outcome, but is deceitful in that it provides no such control: in reality, the outcome is based on a random number generator. The pleadings further state that ALC knows or ought to know of the deceptive nature of VLTs and that these deceptive design features can be eliminated such that VLTs become a reasonably safe form of gambling and generate a reasonable stream of profit.

[94] Turning to the breach of contract claim, the plaintiffs allege that there was a contract between the parties “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” (Statement of Claim, at para. 46). Given the absence of a written contract between the parties, their claim rests on the existence of an implied contract. The plaintiffs have pleaded that ALC breached some of the contract’s terms.

[95] The first implied term is a warranty that the VLTs were of merchantable quality and fit for use — that they were not inherently dangerous. ALC is alleged to have breached this term by “designing, testing, researching, formulating, developing, manufacturing or altering, producing, labeling, advertising, promoting, distributing and/or selling” VLTs that were “inherently dangerous to users” (Statement of Claim, at para. 47). The plaintiffs allege that ALC knew or ought to have known using VLTs would lead to dependency and addiction. In the alternative, the plaintiffs state that ALC breached a second implied contractual term: to use reasonable care and skill in its provision of VLT gaming. The plaintiffs plead that a necessary incident of this second implied term was that ALC owed the plaintiff class a duty to warn of any inherent danger in the consumption of the games and to satisfy itself of the safety of the games, which they allege ALC did not do. Finally, the plaintiffs allege that ALC breached an implied term of good faith.

[96] In this case, the plaintiffs have pleaded the nature of the contract between the parties, the terms they say are implied, and the manner in which ALC breached the contract between them. The existence and breach of these implied terms are thus matters that would usually be left for trial. Indeed, as *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, confirmed, implied terms in a contract may be inferred

based on the presumed intention of the parties where the implied term must be necessary “to give business efficacy to a contract or as otherwise meeting the ‘officious bystander’ test as a term which the parties would say, if questioned, that they had obviously assumed” . . . .

(para. 27, quoting *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711, at p. 775)

[97] This is the most commonly invoked manner of inferring the existence of implied terms in a contract and requires a factual determination based on the evidence adduced in a particular case. These terms are thus often referred to as being “implied in fact”, and the existence of such a term in a contract is a question of fact that must be made out at trial (G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at pp. 176-78).

[98] The third parties, however, submit that the parties would have been precluded from implying these contractual terms because ALC, one of the parties to the alleged contract, is a public regulator. They submit that the contract here is simply the right to play a VLT game that has been approved by ALC as a regulator, whose authority cannot be limited or fettered by implying terms in the contract of play.

[99] I see no reason to find at this early stage that the terms the plaintiffs allege are implied in fact are unavailable at law. Without deciding whether ALC was acting in its capacity as a natural person in relation to its VLT operations, I note that ALC has authority to enter into contracts given that it has the capacity, rights, powers, and privileges of a natural person (*CBCA*, s. 15(1)). On a motion to strike, it is not enough for the third parties to point in broad strokes to ALC’s role as a “regulator” to ground a legal impediment to having implied these contractual terms.

[100] Indeed, the third parties have not pointed to anything in the regulatory scheme that would clearly preclude the terms the plaintiffs allege are implied when ALC sells games to playing members of the public. Under s. 5 of the *Lotteries Act*, the Lieutenant-Governor in Council is authorized to make regulations in relation to lottery schemes, including with respect to the amounts and values of prizes, the terms and conditions attached to prizes, and the consideration to be paid or given to secure a chance to win prizes (s. 5(d) and (e)). Section 8 of the *Video Lottery Regulations* delineates some of these conditions and prohibits operation of VLTs that do not comply with certain requirements — including the size of wagers, a player’s monetary exposure in one play, and the minimum and maximum payout of prizes for money accepted (between 80 percent and 96 percent). While some of the rules of the game are thus delineated in this regulatory scheme, the scheme leaves room to imply terms going to the core of the plaintiffs’ grievance — concealment of the mechanics of the game, the odds of winning, and the asymmetrical visual reels that give players a false illusion of control.

[101] In other words, at this preliminary stage, I see nothing in the regulatory scheme that would preclude the regular application of contract law or that would conflict with a contractual term relating to how ALC ensures the safety and transparency of the games it offers to the public. Further, it is not plain and obvious that implying the terms alleged by the plaintiffs would improperly touch on or fetter ALC’s authority. Under the *Video Lottery Regulations*, ALC is authorized to approve video lotteries (that is, a scheme or enterprise of one or more VLTs) and their sites

and advertisement (ss. 2(e), 3, 5, and 10); the manufacture, supply, and operation of VLTs (ss. 4 and 6); and the operation of video lottery games (s. 4). However, any impact that the alleged implied terms might have on ALC's authority, and the interaction, if any, of such a contract with fettering principles, is best determined with the benefit of a full and developed factual record (see *Andrews v. Canada (Attorney General)*, 2014 NLCA 32, 354 Nfld. & P.E.I.R. 42; *Levy v. British Columbia (Crime Victim Assistance Program)*, 2018 BCCA 36, 7 B.C.L.R. (6th) 84). This is particularly so given the public policy issues at play, involving the implication of terms aimed at protecting public safety by preventing, or warning of, the danger of addiction.

[102] It is thus not plain and obvious that the contractual terms alleged are unavailable at law. I would therefore conclude that the plaintiffs' statement of claim pleads a contractual term and a breach of that term — the necessary elements for a breach of contract claim.

(2) Available Remedies For Breach of Contract

[103] Brown J. concludes that the cause of action for breach of contract, as framed, must fail because it is plain and obvious that there are no available remedies for this claim. As I elaborate below, I cannot agree that there is no valid cause of action for breach of contract on the basis that there is *no* available remedy. In my view, there are several remedies that are open to the plaintiffs on their pleadings, including nominal damages, declaratory relief, disgorgement, and punitive damages.

(a) *Nominal Damages or Declaratory Relief*

[104] Unlike a claim in negligence, loss is not an essential element of a cause of action for breach of contract. In my view, there is a basis for an action for breach of contract and a basis to obtain remedies against ALC even in the absence of pleadings of specific personal loss. For example, a court finding breach of contract may make binding declarations of right, whether or not any consequential relief is or could be claimed, and whether or not a declaration was pleaded as relief sought (*Rules of the Supreme Court, 1986*, r. 7.16; see also L. Sarna, *The Law of Declaratory Judgments* (4th ed. 2016), at pp. 5-6; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, at pp. 647-48).

[105] In addition, nominal damages may be given in all cases of breach of contract as a manner of “affirming . . . that there is an infraction of a legal right” (*Owners of the Steamship “Mediana” v. Owners, Master and Crew of the Lightship “Comet”*, [1900] A.C. 113 (H.L.), at p. 116, per Lord Halsbury L.C.). Nominal damages are thus always available for causes of action, like breach of contract, that do not require proof of loss, even if they are not pleaded (see, e.g., *Place Concorde East Ltd. Partnership v. Shelter Corp. of Canada Ltd.* (2006), 211 O.A.C. 141, at paras. 56 and 75-78; *Saskatchewan Government Insurance v. Wilson*, 2012 SKCA 106, 405 Sask. R. 8, at para. 13; J. Edelman, *McGregor on Damages* (20th ed. 2018), at pp. 406-7; M. Gannage, “Nominal Damages for Breach of Contract in Canada” (2011), 69 *The Advocate* 833, at p. 834; J. Cassels and E. Adjin-Tettey, *Remedies:*

*The Law of Damages* (3rd ed. 2014), at p. 355). Assuming that the plaintiffs can ultimately prove the existence of a contract and its breach by ALC, they may be entitled to an award of nominal damages.

[106] Litigants have the right to pursue reasonable causes of action to vindicate their rights. In my view, the plaintiffs' breach of contract claim is a reasonable cause of action. As it is actionable without proof of loss, it always necessarily implies nominal damages. This alone precludes striking the claim.

(b) *Disgorgement of Profits*

[107] While I agree with Brown J. that disgorgement is not an independent *cause of action* and has no reasonable chance of success as such, it does not follow that disgorgement cannot be pleaded as a *remedy* for breach of contract. As I will explain, disgorgement can be an appropriate remedy for breach of contract, though whether it is appropriate in this case is a matter for trial that cannot be resolved on the pleadings alone.

[108] The customary remedy for a breach of contract is compensation, usually measured in the form of expectation damages (*Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 26; L. D. Smith, "Disgorgement of the Profits of Breach of Contract: Property, Contract and 'Efficient Breach'" (1995), 24 *Can. Bus. L.J.* 121, at p. 123; *Asamera Oil Corp. Ltd. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, at p. 645). This means the plaintiff is

generally entitled “to be placed in the same situation, with respect to damages, as if the contract had been performed” (*Robinson v. Harman* (1848), 1 Ex. 850, at p. 855; see also *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3, at para. 27).

[109] Nevertheless, despite this usual approach, the compensation principle does not always apply; there are well-established exceptions to that principle and other forms of relief can be appropriate, such as specific performance of the contract or an injunction (*IBM Canada Limited v. Waterman*, 2013 SCC 70, [2013] 3 S.C.R. 985, at para. 36; *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, at para. 14; R. J. Sharpe, *Injunctions and Specific Performance* (loose-leaf), at p. 2-1).

[110] And, in some cases, disgorgement of a defendant’s profits can be an appropriate remedy for breach of contract. Disgorgement is a measure of relief based solely upon the defendant’s profit rather than the plaintiff’s loss (Edelman (2018), at pp. 472-73). It is an exceptional remedy, available where a plaintiff has shown that the ordinary remedies of contract law are inadequate to protect and vindicate their contractual right.

[111] In *Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.), the House of Lords ordered disgorgement of profit as a remedy for breach of contract. In 1989, George Blake, a former member of the United Kingdom’s Secret Intelligence Service (and Soviet spy), entered into a contract to publish a book of state secrets that he had undertaken never to reveal, thereby breaching his contractual undertaking. By the

time of publication, however, the information was not confidential and its disclosure caused no loss to the Crown. There was, therefore, nothing to compensate. Compensatory damages could neither vindicate the government's contractual right nor deter and denounce the wrong committed by the defendant.

[112] The majority of the House of Lords concluded that disgorgement of the profits gained from that publishing contract — some £90,000 — was the appropriate remedy in all the circumstances for the breach of the undertaking. In determining that disgorgement was the appropriate remedy, Lord Nicholls explained that:

Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. [p. 285]

[113] Lord Nicholls held that “[n]o fixed rules can be prescribed” in this analysis and stressed the importance of having regard to all the circumstances, including:

- (a) the subject matter of the contract;
- (b) the purpose of the contractual provision which has been breached;
- (c) the circumstances in which the breach occurred;

(d) the consequences of the breach; and

(e) the circumstances in which relief is being sought.

[114] The majority of the House of Lords concluded that disgorgement was appropriate in the circumstances, including that: the Attorney General had a legitimate interest in preventing Blake from profiting from the disclosure of confidential information; Blake had a quasi-fiduciary obligation to the intelligence service; Blake's profits indirectly stemmed from his breaches in the 1950s (which brought him notoriety leading to the book deal); and allowing agents a financial incentive to violate their undertaking would endanger the effectiveness of the intelligence service (pp. 286-87).

[115] While *Blake* set a standard for disgorgement in "exceptional circumstances", some have emphasized the need to further circumscribe and better reconcile the remedy with private law principles (see, e.g., A. Swan, J. Adamski and A. Y. Na, *Canadian Contract Law* (4th ed. 2018), at p. 582; S. M. Waddams, "Breach of Contract and the Concept of Wrongdoing" (2000), 12 *S.C.L.R.* (2d) 1, at pp. 7-13). The disgorgement remedy can appear more difficult to justify under traditional contract principles than compensatory or restitutionary damages, as the measure of relief is not based on what was been transferred or subtracted from the claimant (J. Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (2002), at p. 81).

[116] But non-compensatory remedies for breach of contract are not inherently contrary to private law principles. For example, punitive damages may be awarded for breach of contract, even though they bear no relation to what the plaintiff should receive in compensation (see, e.g., *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 92). Thus, the availability of punitive damages for breach of contract confirms that gain-based remedies, such as disgorgement, are compatible with the existing scheme of remedies for private wrongs (R. J. Sharpe, “Commercial Law Damages: Market Efficiency or Regulation of Behaviour?”, in The Law Society of Upper Canada, ed., *Special Lectures 2005: The Modern Law of Damages* (2006), 327, at p. 346).

[117] Indeed, it has been posited that the existence of disgorgement as a remedy is primarily justified by the need to deter wrongful conduct, underpinned by the recurring principle of contract law that a wrongdoer should not be permitted to profit from their wrong (Edelman (2002), at pp. 81-83; K. Barnett, *Accounting for Profit for Breach of Contract: Theory and Practice* (2012), at pp. 12 and 26; *Attorney-General v. Observer Ltd.*, [1990] 1 A.C. 109 (H.L.), at p. 286; J. D. McCamus, “Disgorgement for Breach of Contract: A Comparative Perspective” (2003), 36 *Loyola of Los Angeles L. Rev.* 943, at p. 945). Although compensatory damages will often help to achieve deterrence of wrongful conduct (*Royal Bank of Canada v. W. Got Associates Electric Ltd.*, [1999] 3 S.C.R. 408, at para. 28), they will not always be adequate or appropriate in the circumstances of the breach. And since disgorgement awards are limited by the amount of profit, the measure of the award implicitly effects deterrence

and is “dictated by the minimum amount necessary to make the wrong unprofitable” (Edelman (2002), at p. 83).

[118] Further, it is clear that disgorgement awards are not limited to situations in which they serve a compensatory purpose. While the United Kingdom Supreme Court has recognized that some remedies that appear to be gain-based serve compensatory purposes (*One Step (Support) Ltd. v. Morris-Garner*, [2018] UKSC 20, [2018] 3 All E.R. 649, at para. 91), the remedy in *Blake* cannot be described as compensatory. The facts of *Blake* make clear that an award of disgorgement may be available without the claimant’s having suffered a loss to be compensated, and Canadian courts have suggested that disgorgement may be available where “expectation damages are not readily quantifiable, or where the circumstances of the case call for a different measure of damages to provide an effective remedy” (*Nunavut Tunngavik Inc. v. Canada (Attorney General)*, 2014 NUCA 2, 580 A.R. 75, at para. 85 (emphasis added)). Compensatory principles of contract law do not explain why a disgorgement remedy may be necessary to vindicate or protect a contractual right in a particular case.

[119] For example, although it may not support disgorgement on its own, a self-interested and deliberate breach weighs in favour of disgorgement when awarding compensatory damages alone would fail to deter wrongdoers who are “prepared to hurt somebody” because they “may well gain by doing so” (Edelman (2002), at p. 84, quoting *Cassell & Co. Ltd. v. Broome*, [1972] A.C. 1027 (H.L.), at

p. 1094; see also P. Birks, “Restitutionary damages for breach of contract: *Snepp* and the fusion of law and equity” (1987), 4 *L.M.C.L.Q.* 421; American Law Institute, *Restatement of the Law, Third: Restitution and Unjust Enrichment* (2011), vol. 2, at §40).

[120] Further, when calculating loss is impracticable, a narrow focus on compensation may relieve a wrongdoer from the obligation to remedy their wrong, whereas an award of disgorgement ensures that those who breach their contracts do not do so for free (see *Nunavut Tunngavik*, at paras. 85 and 88; *Esso Petroleum Co. Ltd. v. Niad Ltd.*, [2001] EWHC Ch. 458, at para. 63).

[121] And there are multiple circumstances in which a plaintiff has a legitimate interest in preventing the defendant’s profit-making activity, even when they themselves may have suffered no loss. These include where the defendant expressly contracted not to do the particular thing that constituted the breach (*Chitty on Contracts*, vol. I, *General Principles* (33rd ed. 2018), at para. 26-063; *Experience Hendrix LLC v. PPX Enterprises Inc.*, [2003] EWCA Civ. 323, at paras. 30 and 36); where the defendant had a quasi-fiduciary duty to the plaintiff (*Blake*, at p. 287); and where the plaintiff’s contractual right is quasi-proprietary, such as in *Blake*, where the information released by Blake “in a sense, belonged to the government” but was used for his own gain (S. Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (2011), at p. 201; see also D. Friedmann, “Restitution of

Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong” (1980), 80 *Colum. L. Rev.* 504).

[122] I cannot agree that it is plain and obvious that a quasi-fiduciary duty should be rejected as a factor justifying a disgorgement remedy. This Court has explicitly referred to the existence of quasi-fiduciary duties as an unresolved question and it is not appropriate to resolve that question on this motion to strike in the absence of argument (see *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54, [2008] 3 S.C.R. 79, at para. 22). I would thus not rule out the possibility that contractual relationships based on trust, confidence, and the protection of vulnerability arising from the relationship could give rise to a disgorgement remedy even if they are not strictly fiduciary (see A. R. Sangiuliano, “A Corrective Justice Account of Disgorgement for Breach of Contract by Analogy to Fiduciary Remedies” (2016), 29 *Can. J.L. & Jur.* 149, at p. 178). In such cases, as Lord Steyn wrote in *Blake*, it is arguable that “[t]he reason of the rule applying to fiduciaries” may apply to the defendant (at p. 292 (emphasis added)), even if the rule itself does not.

[123] The overarching question in awarding disgorgement for breach of contract is whether, in all the circumstances, other remedies would not adequately protect or vindicate the contractual right (*Blake*, at p. 285; Edelman (2002), at pp. 154-55; Barnett, at p. 11; McCamus, at p. 961). I agree with Lord Nicholls’s speech in *Blake* that when assessing whether disgorgement is appropriate, a non-exhaustive list of factors is to be preferred over a hard and fast rule. No single

factor is necessarily crucial or dispositive; these considerations may work in tandem to support a disgorgement remedy (Waddams (2011), at pp. 200-1; see also *Blake*, at p. 285; *Chitty on Contracts*, at para. 26-063).

[124] The plaintiffs' pleadings in this case correspond with several factors that, if established at trial, may point to a disgorgement remedy. For example, the pleading that ALC's breach was self-interested, deliberate, and in bad faith may engage the deterrence rationale. Similarly, the plaintiffs' pleading that they were vulnerable to ALC's abuse of its power and the public trust may engage some of the values underlying fiduciary relationships, as was the case in *Blake*. The pleading that the plaintiffs' relationship with ALC engages trust, confidence, and vulnerability tends to distinguish it from a standard commercial relationship, a factor which supports recovery (see *Vercoe v. Rutland Management Ltd.*, [2010] EWHC 424, at paras. 340-43).

[125] Thus, though I agree with Brown J. that disgorgement can only be awarded in exceptional circumstances for breach of contract, in my view, whether the circumstances of this case are exceptional is clearly a determination for the trial judge alone. I am not persuaded that the trial judge will inevitably conclude that there is nothing exceptional about this case, or that the plaintiffs' claim is simply that they paid to play a gambling game and did not get exactly what they paid for. The plaintiffs pleaded that ALC, a corporation charged with managing a profit-making lottery scheme offered to the public, intentionally deceived those playing members of

the public by knowingly providing an unfair game and putting them at risk of gambling addiction in order to turn a profit. They specifically pleaded that they had a legitimate interest in ALC's performance of its contractual obligation to provide safe games and that remedies other than disgorgement would be inadequate to deter ALC from misconduct. In assessing whether other remedies would be inadequate to protect their contractual rights, a trial judge may also find that ascertaining the actual amount lost is impracticable since VLTs are designed for players to have the opportunity to "win small cash prizes in exchange for small frequent cash bets" and not to create records of who uses them or how much money they have lost. The trial judge may even conclude that ALC's conduct in approving such designs may have, purposefully or not, contributed to that impracticability, such that the plaintiffs were not simply *unwilling* to prove their loss. These are matters for the trial judge.

[126] The plaintiffs' decision not to prove individualized loss, personal injury, or specific claims based on addiction is not fatal. As is evident from *Blake*, loss is not a legal prerequisite for disgorgement. The plaintiffs instead seek remedies based on a breach of contract allegedly suffered by all class members, and what ultimately matters is whether other remedies for breach of contract would be inadequate to vindicate and protect the plaintiffs' contractual rights.

[127] Finally, Brown J. finds that because the plaintiffs have failed to demonstrate a causal link between the remedy sought and the alleged breach of contract, there can be no remedy of disgorgement on these pleadings. Pleadings,

however, are not required to set out the evidence on which the parties will rely. Whether the plaintiffs will be able to prove causation between the breach and the gain to be disgorged is a matter of evidence, as I discuss below, but does not preclude disgorgement as an available remedy as a matter of law.

[128] As Lord Steyn noted in *Blake*, when to award disgorgement is an issue “best hammered out on the anvil of concrete cases” (p. 291). This is best done based upon evidence at trial.

(c) *Punitive Damages*

[129] The plaintiffs have also pleaded a sufficient basis to support a claim for punitive damages: their allegations of reprehensible conduct and deception in the performance of a contract have put the duty of honest performance in issue.

[130] The objective of punitive damages is to punish the defendant rather than compensate a plaintiff (*Whiten*, at para. 36). They are to be awarded where the defendant’s conduct is “so malicious, oppressive and high-handed that it offends the court’s sense of decency” (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196). Critically, the focus of punitive damages is on the defendant’s misconduct, not the plaintiff’s loss (*Whiten*, at para. 73), and injury to the plaintiff is not a condition precedent to an award of punitive damages (H. D. Pitch and R. M. Snyder, *Damages for Breach of Contract* (loose-leaf), at pp. 4-1 to 4-2).

[131] The misconduct at issue must “take it beyond the usual opprobrium that surrounds breaking a contract”, and punitive damages should only be resorted to in “exceptional cases” (*Fidler*, at para. 62). In addition to this exceptional conduct requirement, the defendant’s conduct giving rise to the claim must itself be an independent actionable wrong (*Whiten*, at para. 78; *Fidler*, at para. 63).

[132] This Court confirmed in *Whiten* that an independent actionable wrong does not require an independent tort, and held that a breach of the contractual duty of good faith can constitute an “actionable wrong” to ground a claim for punitive damages (para. 79). I note that since the pleadings in this case were filed in 2012, this Court in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, has recognized a duty of honest performance applicable to *all* contracts as a “general doctrine of contract law” (at paras. 74-75 and 93): parties “must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract” (para. 73). *Bhasin* was resolved on the basis of a breach of that duty alone.

[133] The plaintiffs have pleaded a breach of the duty of honest performance recognized in *Bhasin*. They allege that the contractual relations between ALC and consumers of VLT gaming are subject to an implied term of good faith. In addition to this allegation, the pleadings are replete with allegations of dishonesty — that VLTs are “inherently deceptive”, “give a false impression of the odds of winning”, “manipulate” consumers, and contain a “stop” button that is “deceitful” (Statement of Claim, at paras. 12, 14, 19, and 21) — and allege ALC’s full knowledge of that

deception. In *Bhasin* itself, Cromwell J. recognized that allegations of dishonesty were sufficient to put the duty of honest performance in issue (para. 19).

[134] Thus, I disagree with Brown J.'s conclusion that the alleged contract between ALC and the plaintiffs does not give rise to an established duty of good faith. The plaintiffs have specifically pleaded punitive damages, as well as facts to justify such damages with sufficient particularity (*Whiten*, at paras. 85-86). There is no reason to conclude that punitive damages are unavailable to these plaintiffs as a matter of law.

(3) Conclusion on Motion to Strike the Breach of Contract Claim

[135] I therefore conclude that the plaintiffs' statement of claim discloses a reasonable cause of action for breach of contract, with several potential remedies available to the plaintiffs at law. There is no basis to strike their claim for breach of contract.

C. *Certification*

[136] There are five requirements for certification of a class action: (1) the pleadings must disclose a cause of action, (2) there must be an identifiable class of two or more persons, (3) the proposed representative must be appropriate, (4) there must be at least one common issue, and (5) the class action must be the preferable procedure (*CAA*, s. 5).

[137] The parties agreed that the outcome of the motion to strike would determine the first factor of the certification analysis under s. 5(1) and the breach of contract claim therefore satisfies that requirement. There is no serious dispute that the proposed representatives are appropriate. The third parties dispute the remaining three requirements.

[138] The class representative must show that there is some “basis in fact” for each remaining requirement (*Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 99; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25). Certification requires that the representative plaintiff provide a “certain minimum evidentiary basis” (*Hollick*, at para. 24 (emphasis omitted), citing *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Gen. Div.), at pp. 380-81), and the “basis in fact” standard ensures that there is an evidentiary foundation to support the certification order, even if that record is not exhaustive or one upon which the merits will be argued (*AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at para. 41, citing *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445, 111 O.R. (3d) 745, at paras. 75-76). The certification process “does not allow for an extensive assessment of the complexities or challenges a plaintiff may face in establishing its case at trial” and the approach is not to engage “in a robust analysis of the merits at the certification stage” (*Microsoft*, at para. 105), but to instead ensure that the action is suited to being a class proceeding (*Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 312 D.L.R. (4th) 419, at para. 65; *Hollick*, at para. 16).

[139] At first instance, the application judge decided to certify the action on certain common issues (see appendix). The majority of the Court of Appeal amended the certification order in light of the claims it struck, but otherwise found that ALC and the third parties' arguments on appeal were no more than an attempt to reargue the factual and discretionary issues before the application judge.

(1) Identifiable Class of Two or More Persons

[140] The class is defined in the certification application as “Natural persons and their estates, resident in Newfoundland and Labrador, who, during the Class Period, paid the Defendant [ALC] to gamble on VLT games, excluding video poker and keno games, in Newfoundland and Labrador”. The third parties submit that the class is “indeterminate” because there is “no conceivable way to verify who the class members are”.

[141] The identifiable class requirement ensures it is possible to determine who is entitled to notice, who is entitled to relief, and who will be bound by the final judgment (*Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545, at para. 57). There must be some basis in fact that at least two persons will be able to self-identify as members of the class, and a person's claim to membership in the class must “be determinable by stated, objective criteria” (*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 38; *Jiang v. Peoples Trust Co.*, 2017 BCCA 119, 408 D.L.R. (4th) 1, at para. 81).

[142] In this case, the proposed class definition uses objective criteria that will allow for identification of those who can attest to playing the games, and there is a basis to believe that at least two persons will be able to establish that they paid ALC to gamble on VLT games during the proposed class period. This can be distinguished from the proposed class in *Sun-Rype*, which was defined as those who had purchased products containing a particular ingredient, which was often used interchangeably with another, and with product labels that did not identify it. In that case, there was no basis in fact to show that the putative class members would have had the information to determine their own class membership (*Sun-Rype*, at paras. 61-65). Here, there is no such evidentiary concern that would prevent individuals from determining their membership, and the fact that the number of class members or the identity of each class member is not or may not be determined is not a bar to certification (CAA, s. 8(d)).

(2) Common Issues

[143] The common issue requirement for certification is met if the “claims of the class members raise a common issue, whether or not the common issue is the dominant issue” (CAA, s. 5(1)(c)). An issue is common where its resolution is necessary to the resolution of each class member’s claim (*Dutton*, at para. 39). Issues are not common when they are dependent upon findings of fact that must be made with respect to each individual claimant (*Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54 (S.C.J.), at para. 39, aff’d (2003), 226 D.L.R. (4th)

112 (Ont. C.A.)). Findings made by the application judge on these issues are entitled to deference from an appellate court (*Microsoft*, at para. 111). As recognized in *Pioneer Corp. v. Godfrey*, 2019 SCC 42, at paras. 110-11, identification of an issue as common to the members of the class is a question of fact that attracts the standard of review of palpable and overriding error.

[144] In light of the causes of action that have been struck from the plaintiffs' statement of claim, only four of the common issues as certified by the application judge remain relevant to the plaintiffs' breach of contract claim:

(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?

[145] These issues overlap with one another, use unclear restitutionary language to describe the remaining claim for disgorgement of profits, and make reference to claims that have been struck. In my view, four core issues remain to be considered in this proposed class action:

- (a) whether ALC breached a duty owed in contract;
- (b) whether disgorgement of ALC's profits is an appropriate remedy;
- (c) whether monetary relief can be measured on an aggregate, class-wide basis and, if so, the amount; and
- (d) whether punitive or exemplary damages should be awarded against ALC and, if so, the amount.

I conclude that all but the issue relating to aggregate monetary relief are appropriate common issues.

(a) *Breach of Contract*

[146] The third parties submit that liability is not a common issue because only some class members became problem gamblers. They argue that it will have to be individually determined whether each person became a problem gambler and whether their loss of control was caused by the characteristics of the machines.

[147] I disagree. First, the third parties have approached this issue as though the plaintiffs' claim seeks recovery of losses particular to each problem gambler; this does not reflect the proposed class, nor the theory of the plaintiffs' case, as they chose

not to prove individual loss or use personal injury as the measure of damages. The pleadings instead assert a civil wrong that is common to each member of the class. Second, the VLTs are the vehicle for a contract between ALC and the consumer. Each time a consumer pays money to play the VLT, they enter into the same implied contract, carried out in the same way, based on the programming of the VLTs. The expert's affidavit suggests that what players see on the VLT screen conceals and misrepresents how the game actually works. Whether the terms alleged by the plaintiffs are in fact implied will be the same for each consumer. Whether the functioning of the VLTs routinely violates those terms would also be the same for every consumer and will be necessary to resolve each member's claim (*Dutton*, at para. 39). I would not disturb the finding of the courts below that breach of contract is a common issue.

(b) *Disgorgement*

[148] The plaintiffs seek an accounting or disgorgement of ALC's profits for the breach of contract claim. The third parties say that assessing ALC's gain from its breach of contract would require individual determination because some players have become problem gamblers and some have not. They submit that the amount of any benefit to ALC as a result of the breach of contract will have to be individually determined. In short, the third parties' submission is that success for one class member does not mean success for all.

[149] While I agree that the required causal link for disgorgement may preclude certification of some aspects of the disgorgement analysis (such as quantum, discussed below in relation to aggregate monetary relief), I am not persuaded that *no* aspect of disgorgement as a remedy can be determined on a class-wide basis. In my view, whether a disgorgement award is appropriate, based on the multi-factored analysis described above, can be determined for the entire class at once based on evidence and analysis that will be common to all class members.

[150] While compensatory damages are the normal measure of relief for breach of contract, it does not necessarily follow that they will be either practical or adequate for the class members in this case. The focus of the disgorgement analysis is on the gain of the defendant, and each of these contracts was allegedly entered into in materially the same circumstances and breached through the same conduct. If ALC's breaches are self-interested and deliberate in relation to the representative plaintiffs, then they are self-interested and deliberate in relation to the whole class; if it is impracticable to determine the amount of the representative plaintiffs' loss as a result of those breaches — because VLTs are operated with cash and do not produce receipts or other records for particular customers, or even that ALC's conduct contributed to that impracticability — then it is impracticable for the entire class. Whether the plaintiffs have a legitimate interest in ALC's profit-making activity would be common to all members of the VLT-playing public. The circumstances of the breach and the interest in deterring breaches of contracts of this nature will be similar for all members; a common inquiry into allegations of systemic

conduct by a corporation in a monopolistic lottery scheme offered to the public will avoid duplication of fact-finding and legal analysis (*Dutton*, at para. 39).

[151] An issue can be common “even if it makes up a very limited aspect of the liability question” (*Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 53). Here, determining whether the circumstances of this case are exceptional, such that other contractual remedies are inadequate, is a substantial ingredient of each member’s claim and will benefit all members of the class. I would therefore find that this aspect of ALC’s potential liability to the plaintiffs in disgorgement is amenable to common determination, and would articulate the question as follows: “Would the ordinary remedies of contract law be inadequate to protect or vindicate the class members’ contractual right such that disgorgement is available as a remedy?”

(c) *Aggregate Monetary Relief*

[152] The third potential common issue relates to whether monetary relief can be measured on an aggregate, class-wide basis and, if so, in what amount. In my view, there is no “basis in fact” on the record before us to certify this as a common issue.

[153] Section 29(1) of the *CAA* sets out three preconditions to an aggregate monetary award: (a) monetary relief must be claimed on behalf of some or all class members; (b) no questions of fact or law other than those relating to the assessment of

monetary relief can remain to be determined in order to establish the amount of the defendant's monetary liability; and (c) all or part of the defendant's liability to some or all class members must be reasonably determined without proof by individual class members. The inquiry invites the Court to consider whether the non-individualized evidence presented by the plaintiffs is sufficiently reliable, whether use of the evidence will produce unfairness or injustice to the defendant (e.g., overstating the defendant's liability), and whether denying an aggregate approach would result in reduced or denied access to justice for the plaintiffs (see *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921, 392 D.L.R. (4th) 490, at para. 76).

[154] The key concern in certifying this issue is whether there is some basis in fact to determine part or the whole of ALC's total liability as a result of its breach of contract. The issue is primarily a question of causation. Whether the remedy is ultimately based on compensating class-wide loss or disgorging ALC's gains, causation between the breach of contract and the quantum awarded will have to be proven.

[155] As Ernest J. Weinrib has recognized in the compensatory context, causation connects the plaintiff and defendant "as the doer and sufferer of the same injustice" ("Causal Uncertainty" (2016), 36 *Oxford J. Leg. Stud.* 135, at p. 136). The same reasoning requires a causal link between a wrong and a gain. Thus, while the appropriateness of a disgorgement remedy in contract is ultimately a contextual

question, before making the award the court must be satisfied that the *breach* of contract is causally connected to the *gain* to be disgorged — a requirement also found in other contexts in which disgorgement is an available remedy. For example, in the context of a breach of fiduciary duty, disgorgement is a familiar remedy, but it is only available where the breach of the duty is linked to the gain (*Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, at para. 77). Another example is that of an inventor seeking an accounting of profits, who “is only entitled to that portion of the infringer’s profit which is causally attributable to the invention” — consistent with a common sense view of causation from the breach (*Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34, [2004] 1 S.C.R. 902, at para. 101).

[156] In the context of a breach of contract, it is similarly important to connect the breach to the gain to be disgorged. Indeed, James Edelman writes that “the only difference between compensatory damages and disgorgement damages is that the former aim to put the claimant in the position as if the wrong had not occurred and the latter aim to put the defendant in that position” (Edelman (2002), at p. 103; see also Barnett, at p. 12; M. A. Eisenberg, *Foundational Principles of Contract Law* (2018), at p. 335). As noted by this Court in *Mutual Trust*, this remedy may be appropriate where “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” (para. 30 (emphasis added)). Applying a “but-for-the-breach” standard ensures a causal connection between the quantum of gain and the plaintiff’s right (Smith, at p. 136; Barnett, at pp. 189, 192 and 210).

[157] All this means that the plaintiffs need to provide some methodology that is “sufficiently credible or plausible to establish some basis in fact for the commonality requirement”, that is, a realistic prospect of assessing class-wide monetary relief in the aggregate (*Microsoft*, at para. 118).

[158] The plaintiffs seek disgorgement of the “unlawful gain” and have pleaded that VLTs could be “a reasonably safe form of gambling [that] generate[s] a reasonable stream of profit” absent the pleaded breaches (Statement of Claim, at para. 31). On this pleading, the plaintiffs must identify some methodology for determining the amount in excess of the “reasonable stream of profit” ALC would have gained absent the breach of contract. The plaintiffs’ evidence on this point is limited, as their expert was asked only to estimate ALC’s revenue from VLT line games that are derived from problem gamblers. However, the plaintiffs’ class membership is not limited to problem gamblers, and instead captures all natural persons or estates who paid ALC to gamble on VLT games. Further, the expert does not provide any estimation or methodology to account for any revenue ALC might have made even while upholding and performing its contract with the class, by offering safe and non-deceptive VLT games to class members or by warning class members of the inherent dangers of the games.

[159] To meet the required causal nexus and ensure that ALC’s total liability is limited to that flowing from the breach and not overstated, some plausible methodology, grounded in the facts and data of the case, is needed to estimate ALC’s

financial liability from its breach of contract, including what ALC's profits might have been had it not breached its contractual obligations to class members. No methodology has been suggested.

[160] I note that the plaintiffs have also pleaded that the deceptive nature of VLTs is so integrated into their profit generation that VLT gaming could not have been marketed at all without the wrongdoing. Although this pleading appears in the section pleading disgorgement as a cause of action (and would therefore be struck in its current form for disclosing no reasonable cause of action), I accept that it could be restored. On such a pleading, the amount to be disgorged to the class as a whole would be the entirety of ALC's profits from VLT gaming, and issues of causation are simplified. But a bare pleaded allegation is not enough to establish "some basis in fact". The purpose of the basis in fact requirement is to ensure that the class proceeding does not "founde[r] at the merits stage" (*Microsoft*, at para. 104). Here, the plaintiffs' expert has provided no evidence to suggest that VLTs could not be marketed without wrongdoing. This is a bare allegation and therefore cannot provide some basis in fact that monetary relief can ultimately be determined on a class-wide basis.

[161] For these reasons, I am not satisfied that there is some basis in fact to certify whether the amount of monetary relief can be assessed on an aggregate, class-wide basis as a common issue. There is no basis in fact on either of the

alternative pleadings that the quantum of monetary relief owed to all the class members could be reasonably determined.

[162] The failure to certify the calculation of aggregate monetary relief as a common issue does not preclude the trial judge from ultimately turning to the aggregate award provisions in the CAA if appropriate (*Pioneer*, at para. 114, citing *Microsoft*, at para. 134).

(d) *Punitive Damages*

[163] I agree with the application judge that the punitive damages claim is a common issue. As noted above, the focus of punitive damages is on the *defendant's* misconduct, not the plaintiff's loss (*Whiten*, at para. 73).

[164] This Court has recognized that punitive damages may be amenable to determination as a common issue, including in cases where liability will relate to a class of victims as a group and the court will be making “exactly the kind of fact-finding that will be necessary to determine whether punitive damages are justified” (*Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, at para. 34). In this case, ALC's conduct and the alleged breach of the duty of good faith would be common to all class members. The application judge's finding that “a determination on this question will address the common interests of all members of the class” (NLTD Certification Reasons, at para. 119) is entitled to deference and I see no reason to interfere with it.

(3) Preferable Procedure

[165] Section 5(2) of the *CAA* provides that in determining whether a class action is a 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.

[166] As noted in *Hollick*, preferability is best analysed through the lens of the three main advantages of class actions — judicial economy, access to justice, and

behaviour modification — and must take into account the importance of the common issues in relation to the claims as a whole (paras. 27 and 30). The third parties submit that individual issues predominate over common issues and that the claims break down into an individualistic determination with respect to both liability and quantum. Again, however, I agree with the application judge that ALC and the third parties' objections do not address the action as framed, and instead proceed on the assumption that the plaintiffs are seeking recovery of losses suffered, as particularized to each class member.

[167] The keystone of the plaintiffs' action is a deception common to each member of the class. Determining the content of a contract entered into by each member of the class, and whether that contract was systematically breached, does not require individualized assessments for each class member and is decidedly more practical and efficient than requiring each member to begin an action as an individual plaintiff. That alone would make this a preferable procedure.

[168] Further, a common set of fact-finding will allow the trial judge to determine, without duplication, whether other contractual remedies will adequately vindicate and protect the contractual interest the class members had in playing a safe, honest game offered by a corporation charged with running a monopolistic public scheme.

[169] On punitive damages in particular, ALC submits that a class action is not a preferable procedure, because granting punitive damages in the absence of other

monetary relief would allow the plaintiffs to play the role of “a private Attorney General”. However, punitive damages are not necessarily parasitic on the plaintiff’s having suffered a loss or personal injury. The fact that punitive damages focus on the defendant’s conduct makes a class proceeding “particularly well-suited” to such awards (*Chace v. Crane Canada Inc.* (1997), 44 B.C.L.R. (3d) 264 (C.A.), at para. 24), especially where the allegation of liability is founded on systemic wrongdoing (see, e.g., *Rumley*, at para. 34). Deterrence of wrongful conduct is a primary goal of class actions (C. Jones, “The Class Action as Public Law”, in J. Walker and G. D. Watson, eds., *Class Actions in Canada: Cases, Notes, and Materials* (2014), 28, at p. 29), and punitive damages are measured, in part, to ensure deterrence (*Whiten*, at para. 111).

[170] A class action is the preferable procedure for the plaintiffs’ claim, even if some individualized assessments are ultimately needed (see, e.g., *Pederson v. Saskatchewan*, 2016 SKCA 142, 408 D.L.R. 661, at paras. 80-94; *Chalmers v. AMO Canada Co.*, 2010 BCCA 560, 297 B.C.A.C. 186, at paras. 25-35; *Fakhri v. Capers Community Markets*, 2004 BCCA 549, 203 B.C.A.C. 227, at paras. 20-26). The existence of individual issues is no bar to a class action (*Microsoft*, at para. 140). The very point of a class action is that individuals can come together to pursue, as a class, a cause of action that they could, as a matter of law, already bring individually. The economy of the class action derives partly from the savings in litigation costs and partly from the removal of barriers that those individuals might otherwise face (*Rumley*, at para. 39). The latter point is particularly compelling in light of the many

economic, social, and psychological barriers that individual players or problem gamblers may face in coming forward and advancing a claim for breach of contract against ALC through individualized avenues. This is especially so given that those individuals who have suffered particularly from ALC's alleged breach may be the least capable of advancing a claim. Class actions "overcome barriers to litigation by providing a procedural means to a substantive end" (*Fischer*, at para. 34). In this case, that end includes the potential to acknowledge, vindicate, and protect individual players' contractual interest in a safe and fair game, or to encourage behavioural modification and to punish allegedly deceptive, manipulative, and high-handed conduct in the provision of such games. Even if breach of contract were the only common issue, a trial to determine whether ALC systematically breached contracts with VLT players would go some way to acknowledging players' contractual interests and, potentially, vindicating and protecting those interests.

(4) Conclusion on Certification

[171] For the above reasons, I conclude that the plaintiffs' claim should be certified as a class action on the common issues of breach of contract, punitive damages, and the appropriateness of a disgorgement remedy.

V. Conclusion

[172] For these reasons, I would allow the appeals in part. I would strike disgorgement (referred to in the pleadings as “waiver of tort”) and unjust enrichment as causes of action. I would certify the class action with common issues as follows:

- (1) Has ALC breached a duty owed in contract?
  
- (2) If there is a breach of contract, would the ordinary remedies of contract law be inadequate to protect or vindicate the class members’ contractual right such that disgorgement is available as a remedy?
  
- (3) If there is a breach of contract, should punitive or exemplary damages be awarded and, if so, in what amount?

[173] Of course, the plaintiffs may seek to amend their pleadings in accordance with these reasons. As s. 37 of the *CAA* generally precludes costs awards in respect of applications for certification, I would order that the parties bear their own costs.

## APPENDIX

### Common Issues as Certified by Faour J. (A.R., at p. 117)

- (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?
- (d) Has the Defendant breached s. 52 of the *Competition Act* [R.S.C. 1985, c. C-34]?
- (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?
- (h) Has the Defendant breached provisions of the *Statute of Anne, 1710* [9 Anne, c. 19], 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 Defendant and, if so, in what amount.

*Appeals allowed, WAGNER C.J. and KARAKATSANIS, MARTIN and KASIRER JJ. dissenting in part.*

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