ATLANTIC LOTTERY CORPORATION INC. V. BABSTOCK: A RESOUNDING SUCCESS AT THE SUPREME COURT OF CANADA FOR DICKINSON WRIGHT LLP

by Michael D. Lipton, Q.C. and Kevin J. Weber

In a close 5 to 4 decision of the Supreme Court of Canada, Michael D. Lipton, Q.C. and Kevin J. Weber emerged on July 24, 2020 as part of the successful side in the case of *Atlantic Lottery Corporation Inc. v. Babstock*[1]. The decision was the culmination of a 6-year long struggle against novel legal theories put forward by plaintiffs that might otherwise have threatened and exposed the Canadian gambling industry with unlimited liability to every person in Canada who played video lottery terminals ("VLT"s), untethered to any allegation that any one person lost money or encountered problem gambling issues as a result of such game play.

The class action against the Atlantic Lottery Corporation ("ALC") was initiated on behalf of all persons in Newfoundland who played VLTs offered by the ALC, based upon numerous causes of action which shared one common element: in none of them was it alleged that any plaintiff had suffered any actual damages from the dangers alleged to be created by the VLTs. The ALC in turn initiated third-party actions against the companies which had manufactured the allegedly impugned VLTs, including Bally Gaming Inc. and Bally Gaming Canada Ltd. (collectively "Bally"), the clients represented before the Supreme Court by Messrs. Lipton and Weber and their Newfoundland counsel, Paul D. Dicks, Q.C.

One of the notable causes of action pleaded by the plaintiffs was "waiver of tort", which plaintiffs in Canada have for years alleged to be an independent cause of action justifying an order requiring the defendant to disgorge profits earned by an impugned activity, without regard for damages suffered by the plaintiffs. All of the justices of the Supreme Court agreed that no such independent cause of action exists in Canadian law.

The submissions put forward by Messrs. Lipton, Weber and Dicks focused on the issue of causation in the context of the negligence claims brought by the plaintiffs. Theirs were the only submissions which clearly stated that the case law in Canada on negligence-based class actions launched on behalf of gambling patrons made it clear that such class actions could not be certified due to causation issues. The question of the extent to which the provider of gambling services has contributed to damages suffered by gamblers necessarily requires considerable inquiry into the individual circumstances of each gambler, and as such the courts have consistently held these matters to be inappropriate for class actions. In their written submissions, Messrs. Lipton, Weber and Dicks alleged that it was for this reason that the statement of claim had been carefully constructed to not allege damages, thereby eliminating the causation problem, and they were in fact the only counsel to allege that the failure to plead causation was an intentional litigation strategy. In response, counsel for the plaintiffs admitted this to be the case, an admission that appeared to have harmed their case, as the majority judgment stated:

> "…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…has no reasonable chance of success."[2]

The submissions of Messrs. Lipton, Weber and Dicks also influenced the findings of the majority on the "breach of contract" causes of action pleaded in the statement of claim, which was the issue upon which the court split 5 to 4. The plaintiffs alleged that the VLTs breached implied warranties of fitness that were part of the contract between VLT players and the ALC, and again sought only non-compensatory damages for those breaches (disgorgement and punitive damages). The justices agreed that disgorgement is only available for a breach of contract in "exceptional cases." Such an exceptional case might exist where other remedies are inadequate and unable to provide vindication for the plaintiff's legitimate interest, or where the nature of the case is such that quantification of a loss suffered is impossible. The majority declined to set out a definitive list of all possible circumstances that could constitute an "exceptional case," although they did conclude that a quasi-fiduciary or near fiduciary like duty should not be imported into Canadian contract law to ground the existence of such an exceptional case. The minority decision would have allowed the action to go to trial on the basis of a potentially valid claim for breach of contract asserted by the plaintiffs, claiming nominal damages and declaratory relief, and the minority also held that issues relating to the availability of the remedies of disgorgement and punitive damages for such breach of contract were matters better left for trial. The majority's finding that the cause of action that sought a disgorgement remedy for breach of contract had no reasonable chance of success and should be struck accordingly appeared to once again be affected by the argument that the plaintiffs sought disgorgement instead of compensatory damages as part of a deliberate litigation strategy:

> "…gambling losses are readily quantifiable and can be remedied through an award of compensatory damages…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."[3]

[1] 2020 SCC 19. See https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18425/index.do for the online version of the decision.
[2] *Ibid.* at para. 38.
[3] *Ibid.* at paras. 60-61.

In the final result, the majority decision resulted in the Supreme Court allowing the appeals, setting aside the class action certification order, and striking the plaintiffs' statement of claim in its entirety. Media reports indicate that plaintiffs' counsel responded to the decision by stating "the case is over and the issue of the alleged deceptive practices of the Atlantic Lottery Corp. will not be further explored." From the perspective of the Canadian gambling industry, this decision puts an end to any opening through which meaningful class action proceedings can be initiated by gamblers against lottery corporations or gaming equipment manufacturers that sell devices to those lottery corporations.

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