

IN THE SUPREME COURT OF NEWFOUNDLAND & LABRADOR  
TRIAL DIVISION

**BETWEEN:**

THE ESTATE OF SUSAN PIERCEY, as  
represented by KEITH PIERCEY

PLAINTIFF

**AND:**

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

DEFENDANT

BROUGHT PURSUANT TO THE *CLASS*  
*ACTIONS ACT*, SNL 2001, c.C-18.1

**AFFIDAVIT OF PETER AUSTIN**

I, Peter Austin, self-employed contractor, of the Town of Conception Bay South, of the Province of Newfoundland and Labrador, MAKE OATH AND SAY THAT:

1. I am a director and the chief executive officer of Win A Grand Incorporated (“WAG”), a corporation incorporated pursuant to the laws of Newfoundland and Labrador. As such, I have personal knowledge of the matters deposed to in this affidavit, and do believe the contents to be true and correct, except where I indicate that I am informed of matters by others.

2. I make this affidavit in support of the plaintiff’s motion for certification of this class action and for no other purpose.

3. In 2001 WAG began marketing the sale of a postcard product to retailers in Newfoundland. The postcard was primarily marketed to convenience stores and grocery stores, but it was also marketed to bars in the province.

4. WAG's postcard product ("Bonus Cards"), contained a recipe for a Newfoundland meal on one side and a space where the purchaser could write a message before mailing the postcard. The postcard also contained a simple game for fun (with no prizes), a scratch and win contest portion and the opportunity to enter a contest with WAG through the mail. Attached to my affidavit as **Exhibit "A"** is a true copy of one of WAG's Bonus Cards.

5. Before any of WAG's Bonus Cards had been placed in the market, a representative of the Atlantic Lottery Corporation ("ALC") telephoned WAG's office and spoke to Bob Bushy, a shareholder in WAG who was also active in managing WAG. The ALC representative advised Mr. Bushy that ALC believed WAG's Bonus Cards constituted an illegal lottery. I was present in the room and overheard Mr. Bushy's portion of the conversation. This occurred on or about April 21, 2001.

6. Shortly after ALC contacted Bob Bushy as above, the Royal Newfoundland Constabulary commenced an investigation into the legality of WAG's Bonus Cards. The RNC concluded its investigation of WAG in the spring of 2001 and did not lay charges under the *Criminal Code*.

7. In the late spring and summer of 2001 WAG produced and began to sell its Bonus Cards to retailers in the province. During this time various retailers advised me that ALC representatives had informed them orally that ALC would not allow them to offer ALC products for sale if they were also offering WAG's Bonus Cards.

8. WAG had some success in marketing its products to retailers. For instance, in September of 2001 it concluded an agreement with Sobeys, in which Sobeys agreed it would stock the Bonus Cards in convenience stores it owned in the province. Among the other businesses which

agreed to sell WAG's Bonus Cards were two bars: Tols' Timeout Lounge in Mount Pearl and Brewkies in (Goulds) St. John's.

9. WAG's Bonus Cards were actively selling in the province in the summer and fall of 2001.

10. Based on my review of a letter dated September 25, 2001 addressed to "Lottery Retailers" from Carmen McAfee, Vice-president of sales for ALC, a copy of which is attached to my affidavit as **Exhibit "B"**, I believe that:

(a) ALC advised ALC lottery retailers in writing that selling WAG's Bonus Cards constituted a breach of the Lottery Ticket Retailer Agreement between ALC and its retailers; and

(b) ALC advised ALC lottery retailers in writing that ALC's Lottery Ticket Retailer Agreements contained a clause which purported to restrict competition with its products.

11. Shortly after September 25, 2001 retailers in the province refused to carry WAG's Bonus Cards. Because of this, and my belief that it was caused by ALC's conduct, I, as a director of WAG, filed a complaint with the Competition Bureau about ALC's conduct.

12. I received a letter from William J. Parsley, general counsel for ALC, addressed to Richard Robicheau, Competition Law Officer, dated December 6, 2001. From this, it may be possible to infer that ALC feared competition from WAG's Bonus Cards. A copy of this correspondence is attached to my affidavit as **Exhibit "C"**. The following statements, found at pages 4 and 5 of this correspondence may be relevant:

ALC feels that protecting its integrity and reputation, and the integrity and reputation of its products, sometimes involves dealing with situations where other products could be confused with ALC's products. ...

ALC was concerned that the "bonus card" tickets could be confused with ALC's instant scratch tickets. ...

For the reasons outlined in this letter, ALC was concerned that ALC customers could confuse the bonus card tickets with ALC's lottery tickets. The producers of the bonus card tickets have taken measures to attempt to avoid attracting the lottery/gaming provisions of the Code. However, from ALC's perspective, the bonus card tickets look and operate similar to the type of instant scratch lottery tickets offered by ALC.

13. The "bonus card tickets" referred to in Mr. Parsley's letter are WAG's Bonus Cards. My complaint to the Competition Bureau was unsuccessful, in that the Competition Bureau chose not to refer the matter to the Competition Tribunal for review. Attached to my affidavit as **Exhibits "D"** and **"E"** are true copies of correspondence I received from Richard Robicheau, Competition Law Officer, dated January 3, 2001 and September 30, 2002. I believe that **Exhibit D** should have been dated January 3, 2002 as the complaint was initiated in the fall of 2001, and the letter was received by me in January of 2002.

14. I have reviewed the Hansard from a Government Services Committee (the "GSC Hansard") meeting held May 13, 2002 in the House of Assembly. A copy of the relevant portion of the GSC Hansard, obtained online from the url <http://www.assembly.nl.ca/business/committees/ga44session4/gs02-05-13.htm> on January 12, 2010 is attached to my affidavit as **Exhibit "F"**. I summarize the portions which may be relevant to competition as follows:

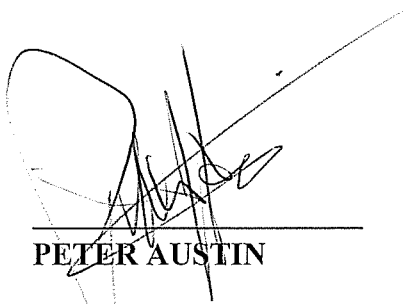
- (a) at that meeting, one of ALC's directors at the time (Deputy Minister of Finance Philip Wall) stated that the issue WAG created for ALC was whether or not it could prohibit retailers from selling what ALC determined to be lottery products; and
- (b) the Minister of Finance, Joan Marie Aylward, stated: "...the money made from ALC, goes into us to help pay for health and education. I guess the bigger question is: Do you, or do I, support a private entrepreneur putting the money in his pocket that may be made on a lottery?"

15. Based on my review of an article which appeared in the Telegram on January 24, 2002, I further believe that Mr. Wall stated that he viewed WAG as a competitor of ALC. A true copy of this newspaper article is attached to my affidavit as **Exhibit "G"**.

**SWORN TO** before me at the City of St. John's, in the Province of Newfoundland and Labrador, this 13<sup>th</sup> day of January, 2010.

*Gail J.S. Babstock*

**GAIL J.S. BABSTOCK**  
A Commissioner for Oaths in and for  
the Province of Newfoundland and Labrador.  
My commission expires on December 31, 2010.



**PETER AUSTIN**

This is Exhibit A referred to in the affidavit

of Peter Austin

sworn or affirmed before me this

13<sup>th</sup> day of January, 2010

Mail for Babstock

**\$2** TAX IN **BONUS CARD**

Spot at least 3 differences between the 2 foxes

**M O T H E R N A T U R E**

Sometimes we are so busy adding up our troubles,

that we forget to COUNT our BLESSINGS.

**SCRATCH + CONTEST**

scratch here only

SCRATCH the 3 BOXES (left) / ADD up the NUMBERS to WIN  
 200 = \$200 \* 100 = \$100 \*  
 80 = \$25 \* 60 = \$5 \* 70 = \$2 \*  
 110 = FREE BONUS CARD  
 TO CLAIM PRIZE: fill out flip side, fold & tear on dotted line, present at place of purchase

**VOID IF SCRATCHED HERE**

1 x \$200 (1 in 1500) + 8 x \$100 (1 in 187.5) + 8 x \$25 (1 in 187.5) + 7 x \$5 (1 in 214.3) + many chances 100 x \$2 (1 in 15) + 100 x FREE BONUS CARD (1 in 15) to win

place stamp here

WIN "A" GRAND INC., P.O. BOX 8248, ST. JOHN'S, NFLD, A1B 3N4. 709 - 739 - 7393

In a skillet, place 2 lbs. of ground beef, 1 finely cut onion, 1 tsp. of salt & 1 tsp. of pepper...fry until brown...add 1 pkg. of onion soup mix & 1 & 1/2 cups of water to mixture & let simmer for 15-20 mins...add 2 tsp. of cornstarch to 1/4 cup of water & add to boiling meat...remove from heat & transfer to a 12 in. x 8 in. casserole dish...layer 2 cans of kernel corn...cook 6 medium-sized potatoes...mash with 1/4 cup of butter & 1/4 cup of milk...use mixer to whip potatoes until creamy & place on top of corn...melt 2 TBS. of butter & brush over top of potatoes...garnish with paprika & bake at 350 degrees until golden brown. Serves 4-6.

**BRIDE'S**  
**Home-Made COOKING Collection**  
**SHEPHERD'S PIE**

**SCRATCH + CONTEST PRIZE CLAIM FORM**

NAME: \_\_\_\_\_ AGE: \_\_\_\_\_ PHONE: (\_\_\_\_) \_\_\_\_\_

ADDRESS: \_\_\_\_\_ CITY \_\_\_\_\_ CODE: \_\_\_\_\_

1000 X 2 + 500 - 1750 + 250 ÷ 1000 = \_\_\_\_\_

winners must correctly answer skill-testing question to claim prize

CONTEST CLOSING DATE: 11/01/01	1228	SCRATCH + draw date: 11/15/01
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WIN A GRAND INC. P.O. BOX 8248 ST. JOHN'S, NFLD. A1B 3N4. 709-739-7393

NO PURCHASE NECESSARY TO ENTER PROMOTION. SEE BACK OF POSTER FOR DETAILS.

his is Exhibit "B" referred to in the affidavit.

of Peter Austin

Sworn or affirmed before me this

13<sup>th</sup>

day of January, 18 2010

Gail J. Babstock

September 25, 2001

Dear Lottery Retailers:

**Re: Unauthorized Sale of Contest Tickets**

It has come to the attention of the Atlantic Lottery Corporation ("ALC") that ALC retailers are selling cards described as bonus cards that contain a postcard and/or recipe card as well as an instant win scratch contest. We understand that these cards are being sold to retailers in boxes containing 1,250 cards and that retailers are responsible for paying players any instant cash prizes from the scratch portion of the card (after the player answers a skill-testing question).

The Lottery Ticket Retailer Agreement between ALC and its retailers states that retailers agree not to "promote, display, operate or offer for sale, any lotteries, games of chance, games of mixed chance and skill or gaming devices that are illegal or that are not authorized by ALC." The scratch portion of the cards referred to above contain a game of mixed chance and skill and are not authorized by ALC. Accordingly, retailers are requested not to promote, display or offer for sale these cards.

ALC will be monitoring this situation over the next ten (10) days. Any retailer who continues to promote, display and/or offer to sell these cards at the end of this period will be considered in breach of their Lottery Ticket Retailer Agreement with ALC and may have their Lottery Ticket Retailer Agreement terminated without further notice.

Sincerely,



Carmen McAfee  
Vice-President, Sales  
cmca@alc.ca (506)867-5867

This is Exhibit C referred to in the affidavit.

of Peter Austin

sworn or affirmed before me this

13<sup>th</sup> day of January, 19 2010

Maile Jo Belsford

December 6, 2001

Atlantic Lottery Corporation  
Société des loteries de l'Atlantique

P.O. Box 5500  
922 Main St  
Moncton, NB  
E1C 8W6

C.P. 5500  
922, rue Main  
Moncton N.S. - B  
E1C 8W6

Tel/Tél: (506) 851-1111  
Toll Free/Sans frais: 1-800-561-3942  
Legal Services  
Fax: (506) 867-5111  
<http://www.alc.ca>

Industry Canada  
Commissioner of Competition  
Place du Portage I  
50 Victoria Street  
Hull, Québec  
K1A 0C9

Attention: Richard Robicheau  
Competition Law Officer

Dear Sir:

Re: Complaint by Win A Grand Incorporated

I write further to your November 6, 2001 letter which was received by Atlantic Lottery Corporation ("ALC") on November 14, 2001. Your letter relates to a complaint brought by Win A Grand Incorporated, a corporation operating in the Province of Newfoundland, and asks that I respond to certain questions as well as to provide any additional information that I feel would assist the Competition Bureau examine this complaint.

**Background**

It may be helpful for the Bureau to have some background knowledge of ALC and the industry in which ALC operates. Sections 206 and 207 of the *Criminal Code of Canada* ("Code") establish a regulatory regime for lotteries and games of chance in Canada. Section 206 of the Code creates a number of offences in relation to lotteries and games of chance and, effectively, makes lotteries/gaming illegal in Canada. Section 207(1) decriminalizes certain forms of gaming and creates a regulated industry. Section 207(1) basically permits lotteries to be created and run by:

- (a) the government of a province [section 207(1)(a)];
- (b) a charitable or religious organization, if the proceeds from the lottery scheme are used for charitable or religious objects or purposes and the lottery is conducted pursuant to a license [section 207(1)(b)];
- (c) by the board of a fair or an exhibition if the Lieutenant Governor in Council of the province designated that fair or exhibition as a fair

- or exhibition where a lottery scheme may be conducted and managed, and issued a license for the lottery scheme to the board [section 207(1)(c)];*
- (d) by any person at a public place of amusement in a province if*
- (i) the value of the prize does not exceed five hundred dollars;*
  - (ii) the money or other valuable consideration paid to secure a chance to win a prize does not exceed two dollars; and*
  - (iii) the Lieutenant Governor in Council has issued a license for the lottery scheme [section 207(1)(d)];*

ALC operates within the exemption provided by section 207(1)(a) of the Code. ALC has been appointed by the Atlantic Provinces to conduct and manage lottery schemes in Atlantic Canada. Under this mandate, ALC offers to Atlantic Canadians a variety of lottery/gaming products. ALC's products include draw based lotteries (example, Lotto 6/49, Super 7, Wild 5), instant scratch tickets, breakopen or pull-tab tickets as well as video lotteries. Video lotteries are offered through video lottery terminals installed in licensed establishments in Atlantic Canada. Proprietors of licensed establishments who wish to have video lottery terminals placed on their premises must sign a Video Lottery Agreement with ALC. ALC distributes its draw, instant scratch and breakopen tickets primarily through convenience stores/retail outlets and lottery booths. Retailers who wish to sell these products must sign an ALC Lottery Ticket Retailer Agreement (copy enclosed).

The gaming regime created by sections 206 and 207 of the Code results in there being no competition for provincial government gaming as offered by ALC. The only other lottery schemes permitted by section 207 are lottery schemes where the proceeds are used for charitable or religious objects (section 207(1)(b)), a lottery scheme operated by the board of a fair or an exhibition (section 207(1)(c)), and a lottery scheme operated by a person at a public place of amusement if prizes do not exceed \$500 and the cost of a ticket does not exceed \$2 (section 207(1)(d)). All these schemes, other than provincial government gaming under section 207(1)(a), require a license from the Lieutenant Governor in Council of the province.

ALC recognizes the importance of its lottery operations to the Atlantic Provinces and to the public of Atlantic Canada. Profits generated by ALC's lottery schemes are returned to the Atlantic Provinces for the benefit of Atlantic Canadians. It is fundamentally important for the continued success of ALC that its customers have absolute faith in the integrity of ALC and the lottery schemes it operates. It was primarily for the purpose of protecting the integrity and reputation of ALC, its operations and lottery schemes that ALC

included the provisions outlined below in its Lottery Ticket Retailer Agreement.

**"Business Practices" Provisions of ALC's Standard Lottery Ticket Retailer Agreement**

ALC's Lottery Ticket Retailer Agreement is broken down into two parts: the Agreement itself and a retailer policies document issued under the Agreement (which forms part of the Agreement). The specific provision that you refer to in your letter appears under the "Business Practices" portion of the Agreement. Paragraph 9 of the Agreement provides:

*BUSINESS PRACTICES*

*The Retailer covenants and agrees not to engage in conduct that, in the sole discretion of ALC, is contrary to the public interest or harmful to the integrity or reputation of ALC or its operations or the integrity or reputation of Authorized Lottery Tickets.*

Section 12(d)(VII) of the Agreement provides that ALC can terminate the Agreement immediately and without notice if

*the Retailer or any of its principals engaging in any activity which, in the sole discretion of ALC, is contrary to the public interest or is harmful to the integrity or reputation of ALC or Authorized Lottery Tickets or which is harmful to ALC's relationship with players of Authorized Lottery Tickets;*

The provision you refer to in your letter is contained in paragraph 5 of the Retailer Policies:

*BUSINESS PRACTICES*

*Retailers agree, in the Retailer Agreement, not to engage in conduct that, in ALC's sole discretion, is contrary to the public interest or harmful to the integrity or reputation of ALC or its operations or the integrity or reputation of Authorized Lottery Tickets. Without limiting the general nature of this commitment, ALC requires that retailers:*

- (a) not promote, display, operate or offer for sale, any lotteries, games of chance, games of mixed chance and skill or gaming devices that are illegal or that are not authorized by ALC;*

The Lottery Ticket Retailer Agreement currently used by ALC was introduced in Newfoundland, New Brunswick and Prince Edward Island in November 1999. It was introduced into Nova Scotia in August 2000. The above

provisions appeared in the Agreement, in their current form, at the time the Agreement was first used by ALC in November 1999.

### Bonus Card Tickets

ALC feels that protecting its integrity and reputation, and the integrity and reputation of its products, sometimes involves dealing with situations where other products could be confused with ALC's products. As discussed, only ALC can offer the types of provincial government gaming products referred to above. This includes instant scratch tickets which ALC has been selling in all the Atlantic Provinces since 1983.

ALC was concerned that the "bonus card" tickets could be confused with ALC's instant scratch tickets. The front of the bonus card tickets indicate a \$2 purchase price and direct players to scratch certain areas of the ticket to determine whether the ticket entitles them to a prize. ALC's most popular instant scratch tickets sell for \$2 and feature similar play dynamics. As discussed above, the Code provides for lotteries other than provincial government lotteries. However, the bonus card tickets could not be distinguished from ALC's tickets by reason that they were offered by a charitable or religious organization or another organization authorized by the Code (ex. board of a fair or exhibition).

Despite the fact that the suppliers of the bonus card tickets attempted to set them up as a contest, ALC felt the tickets looked and operated similar to lottery tickets and, therefore, could be confused with ALC's instant scratch tickets. Many other businesses use promotional contests to promote their products and services. The bonus cards "contest" does not appear to be such a promotional contest; what is being promoted are the bonus card tickets themselves. Promotional contests are generally very easily distinguishable from the type of lottery schemes offered by ALC under section 207(1)(a) of the Code; this was not the case with the bonus card tickets.

Predominant use of the flag of the Province of Newfoundland in advertisements for the bonus card tickets and unauthorized use of ALC's "Scratch'n Win" trademark in sales material did nothing to lessen this potential confusion.

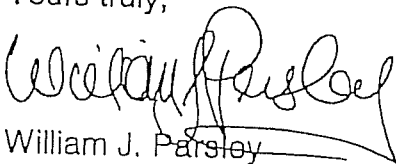
To summarize, I reiterate that ALC operates in a unique and regulated industry. Basically, ALC is the only entity authorized by the Atlantic Provinces to offer the type of "for profit" lottery schemes referred to above. For the reasons outlined in this letter, ALC was concerned that ALC customers could confuse the bonus card tickets with ALC's lottery tickets. The producers of

the bonus card tickets have taken measures to attempt to avoid attracting the lottery/gaming provisions of the Code. However, from ALC's perspective, the bonus card tickets look and operate similar to the type of instant scratch lottery tickets offered by ALC.

ALC has not taken a position with respect to whether the bonus card tickets scheme violates the lottery provisions of the Code or any other laws. However, from ALC's perspective, it appears in many respects as if the private operators of this scheme have attempted to use the promotional contest format to carry out what is, in substance, a lottery scheme. This scheme is characterized as a promotional contest but it is the bonus card tickets themselves that are being promoted. Whether the scheme offers a bona fide way of participating without paying consideration, whether it contains the element of a genuine test of skill and any other technical elements needed to avoid application of section 206 of the Code are not ALC's primary concern. ALC's primary concern is to ensure that lottery players in Newfoundland, and Atlantic Canada, do not confuse schemes operated for a private benefit with schemes offered by ALC. Considering the nature of the bonus card ticket scheme and the matters discussed above, ALC maintains that it has acted, and continues to act, appropriately in the circumstances. ALC acted pursuant to a pre-existing contractual right and did not act with an anti-competitive intent or purpose. Accordingly, we respectively request that the complaint be dismissed.

Should you have any further questions or require clarification of any of the points raised in this letter, please do not hesitate to contact the undersigned at your convenience.

Yours truly,



William J. Parsley  
General Counsel  
(Direct Line: 506-867-5686)

Enclosure



Commissaire de la concurrence

Commissioner of Competition

Télécopieur-Facsimile (819) 953-8546  
Téléphone-Telephone (819) 994-7703

Bureau de la concurrence

Competition Bureau

Place du Portage I  
50, rue Victoria  
Hull (Québec)  
K1A 0C9

Place du Portage I  
50 Victoria Street  
Hull, Québec  
K1A 0C9

This is Exhibit "D" referred to in the affidavit

of Peter Austin

sworn or affirmed before me this

13<sup>th</sup> day of January, 19 20

Marie-Josée Boivin

3 January 2001

Mr. Peter Austin  
Win A Grand Incorporated  
P.O. Box 8248  
St. John's, NF  
A1B 3N4

Dear Mr. Austin:

I am writing further to your complaint against the Atlantic Lottery Corporation ["ALC"] relating to a product supplied by Win A Grand Incorporated called Bonus Cards.

The Competition Bureau [the "Bureau"] is responsible for the enforcement and administration of the *Competition Act* [the "Act"], which defines a number of anti-competitive practices. Some of these are prohibited as criminal offences. Other provisions are civil matters which are subject to review and remedial action by the Competition Tribunal. It is important to recognize, however, that the Act does not provide the Bureau with any regulatory authority to decide the law or to compel entities to adopt a particular course of conduct in respect of their activities.

The four Atlantic Provinces have appointed ALC to conduct and manage lottery schemes in Atlantic Canada. ALC operates within the regulatory regime for lotteries established by the Criminal Code and the Newfoundland *Lotteries Act*.<sup>1</sup>

<sup>1</sup> The Criminal Code permits provincial governments to conduct and manage a lottery scheme:

The Bonus Cards supplied by Win A Grand are described as a promotional contest consisting of a postcard or recipe card or both as well as an instant win scratch contest that is a game of mixed chance and skill. In a letter to the Bureau dated 19 October 2001, Win A Grand complained that ALC restricts the ability of ALC retailers to sell certain products, including Win A Grand's Bonus Cards. Specifically, the Lottery Ticket Retailer Agreement requires ALC retailers not to "promote, display, operate or offer for sale, any lotteries, games of chance, games of mixed chance and skill or gaming devices that are illegal or that are not authorized by ALC."

Restrictive arrangements between buyers and sellers, such as that contained in the Lottery Ticket Retailer Agreement, are generally permissible, even common business practices in Canada. They are however reviewable under sections 77 and 79 of the Act. Under the abuse of dominant market position provision, section 79, on application by the Bureau, the Tribunal can issue a remedial order where a dominant firm has engaged in a practice of anti-competitive acts that has or is likely to substantially lessen or prevent competition. The exclusive dealing provision in section 77 also contains a competitive

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207. (1) Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful

- (a) for the government of a province, either alone or in conjunction with the government of another province, to conduct and manage a lottery scheme in that province, or in that and the other province, in accordance with any law enacted by the legislature of that province;

Section 3 of the Newfoundland *Lotteries Act* authorizes the Minister of Finance, with the approval of the Lieutenant-Governor in Council, to

- (a) develop, organize, undertake, conduct and manage lottery schemes on behalf of the government of the province or on behalf of the government of the province and the governments of other provinces;
- (b) enter into arrangements or agreements to develop, organize, undertake, conduct and manage lottery schemes on behalf of the government of the province; and
- (c) enter into and carry out agreements with the governments of 1 or more of the provinces or agencies of those provinces for the purpose of incorporating a body corporate to undertake, conduct and manage lottery schemes on behalf of the parties to those agreements.

effects test which serves to define the circumstances under which potentially anti-competitive conduct such as this restriction can be prohibited.

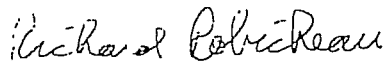
In applying the competitive effects test within sections 77 and 79, the Tribunal has found that a substantial lessening of competition results when a practice of anti-competitive acts creates, maintains or enhances market power, which principally means the ability to profitably raise prices significantly above competitive levels for a non-transitory period. Accordingly, the focus of the Bureau's review of this matter is to assess whether the restriction enables ALC to raise or maintain prices significantly above competitive levels. In this regard, the primary concern is the state of competition in the market as a whole, rather than on the effects on individual competitors within the market.

The regulatory regime for lotteries established by the *Criminal Code*, the *Lotteries Act*, and the appointment of ALC to conduct and manage lottery schemes on behalf of the provinces, creates a near monopoly with respect to lottery products and confers considerable market power on ALC, in as much as it may generally set prices for its lottery products unconstrained by competition. It is evident that competitive prices are not the norm intended for this unique and regulated industry.

In this context, the effect of the restriction on competition in the market as a whole is not material, relative to the impact of the regulatory regime, let alone substantial. Consequently, the grounds do not exist for making an application to the Tribunal in this matter.

Should you have any further questions, please do not hesitate to contact me.

Yours sincerely,



Richard Robicheau  
Competition Law Officer  
Civil Matters Branch



Industrie Canada Industry Canada

http://strategis.ic.gc.ca

Commissaire de la concurrence

Commissioner of Competition

Bureau de la concurrence

Competition Bureau

Place du Portage I  
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Hull (Québec)  
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Télécopieur-Facsimile  
(819) 953-8546  
Téléphone-Telephone  
(819) 994-7703

**Annex Exhibit "E" referred to in the affidavit**

of Peter Austin

**SWORN or affirmed before me this**

13<sup>th</sup> day of January, 192002

Gail J. Babstock

30 September 2002

Mr. Peter Austin  
Win A Grand Incorporated  
P.O. Box 8248  
St. John's, NF  
A1B 3N4

Dear Mr. Austin:

I am writing in response to your requests dated 23 July 2002 and 6 August 2002 for confirmation of the Competition Bureau's position in respect of your complaint against the Atlantic Lottery Corporation ["ALC"]. I regret that I was unable to reply earlier.

In a letter to the Competition Bureau [the "Bureau"] dated 19 October 2001, Win A Grand complained that ALC restricts the ability of ALC retailers to sell certain products, including Win A Grand's Bonus Cards. Specifically, the Lottery Ticket Retailer Agreement requires ALC retailers not to "promote, display, operate or offer for sale, any lotteries, games of chance, games of mixed chance and skill or gaming devices that are illegal or that are not authorized by ALC."

The Bonus Cards supplied by Win A Grand are described as a promotional contest consisting of a postcard or recipe card or both as well as an instant win scratch contest that is a game of mixed chance and skill. ALC conducts and manages lottery schemes in Atlantic Canada on behalf of four provincial governments. It operates within the regulatory regime for lotteries established by the Criminal Code and the Newfoundland *Lotteries Act*.

Restrictive arrangements of the type found in the Lottery Ticket Retailer Agreement are generally permissible in Canada. However, potentially anti-competitive practices like this are reviewable under sections 77 and 79 of the *Competition Act* [the

“Act”). The Act does not prohibit such conduct, but rather allows the Competition Tribunal [the “Tribunal”] to prohibit particular practices by one or more firms that, in its determination, have or are likely to substantially lessen or prevent competition.

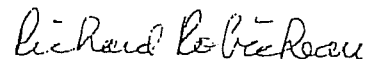
Until such time as the Tribunal issues an order prohibiting a firm to engage in particular conduct, the firm’s conduct is permissible. In this context, rather than questioning whether conduct is within or outside the law, it is more appropriate to speak in terms of whether reviewable conduct can be successfully challenged before the Tribunal.

The Bureau’s role in enforcing the Act is investigative. Where warranted, the Bureau can challenge a firm’s conduct by applying to the Tribunal for adjudication of the matter. In determining whether to challenge conduct before the Tribunal, the Bureau is not deciding the law. In fact, the Act does not provide the Bureau with any authority to decide the law; it gives this role strictly to the Tribunal. What is more, a decision not to challenge a practice does not imply that the Bureau endorses or supports the conduct which, even in the absence of sufficient grounds for the Tribunal to issue an order, may nevertheless adversely affect competition.

In a letter to you dated 3 January 2002, I explained the Bureau’s decision not to pursue your complaint. Essentially, our assessment of the available information did not give us reason to believe that reasonable grounds exist for the Tribunal to issue an order in respect of the conduct in question. As such, we had no reason to, nor did we, form an opinion on whether the regulatory regime governing the operation of lotteries would prevent the application of the Act in respect of ALC’s conduct.

Should you have any further questions, please do not hesitate to contact me.

Yours sincerely,



Richard Robicheau  
Competition Law Officer  
Civil Matters Branch

May 13, 2002 GOVERNMENT SERVICES COMMITTEE

Pursuant to Standing Order 68, Mary Hodder, MHA Burin-Placentia West, replaces Eddie Joyce, MHA Bay of Islands; and Bob Mercer, MHA Humber East, replaces Yvonne Jones, MHA Cartwright-L'Anse au Clair.

The Committee met at 9:00 a.m. in the House of Assembly.

**CHAIR (Mr. Sweeney):** Order, please!

Kevin, are you on-board this morning?

**WITNESS:** (Inaudible).

**CHAIR:** Yes, Kevin is on duty. He is down in the media center downstairs. We have a little code worked out there.

To the minister and her officials, you are all sitting in the right places. Please identify yourselves before you speak, and make sure your light is on by your mike. That way then you will know that Kevin is recording. We are being taped for sound but not for video this morning.

I would like to start off with the Committee introducing themselves. Mary Hodder will be here shortly. She is upstairs on her way down. Wally, do you want to start?

**MR. ANDERSEN:** Wally Andersen, MHA for Torngat Mountains.

**MR. MERCER:** Bob Mercer, MHA for Humber East.

**MR. SULLIVAN:** Loyola Sullivan, MHA for Ferryland.

**MR. E. BYRNE:** Ed Byrne, MHA for Kilbride.

**MR. COLLINS:** Randy Collins, MHA for Labrador West.

**CHAIR:** I am George Sweeney, Chair.

This morning we will do some housekeeping. We have the minutes of our last meeting on May 7. Could somebody move that they be adopted?

On motion, minutes adopted as circulated.

**CHAIR:** This morning we will start off, as we have with the same format that we have used, on a fairly casual, open basis and keep the line of questioning as close to the Estimates as we possibly can to the heads.

Elizabeth, if you will call the first head, and then we will ask the minister for her opening remarks and to introduce her officials.

This is Exhibit "F" referred to in the affidavit  
of Peter Austin  
sworn or affirmed before me this  
13<sup>th</sup> day of January, 2002  
Neil J. Babstock

**MS J.M. AYLWARD:** I do not think it was at the Cabinet level last fall. I do not think that was ever said, that it was at Cabinet level.

**MR. SULLIVAN:** Well, it is an issue that has to be -

**MS J.M. AYLWARD:** I said it was before government and it is something that we are certainly aware of. It is a cost factor, as I said to you. It is about a \$2 million cost factor and it is something -

**MR. SULLIVAN:** Some are advocating it is only a \$1.2 million cost. Have you worked out the cost?

**MS J.M. AYLWARD:** Our tax people are telling us that it is closer to \$2 million; \$2.1million.

**MR. SULLIVAN:** Okay.

The next question. I know the minister indicated before that you were getting a legal opinion basically on non-lottery products and so on. The minister indicated it has been referred for legal opinion. Has a legal opinion from your Justice Department been obtained on that one?

**MS J.M. AYLWARD:** Yes, it has been. Phil, do you want to speak on that. That is on our -

**WITNESS:** Win A Grand.

**MS J.M. AYLWARD:** Win A Grand recipe man, is it? Recipe person?

**MR. SULLIVAN:** What?

**MS J.M. AYLWARD:** The guy who got the recipe on (inaudible).

**MR. SULLIVAN:** It is called Win A Grand. That is a specific one. Because it had been referred for your own legal opinion, I am just wondering what the legal opinion was on that and where exactly government is with that.

**MR. WALL:** The Department of Justice and the Constabulary did look at the complaint from the private company called Win A Grand and advised, in their opinion, that it was not an illegal approach. That being said, the issue under dispute right now is whether or not the Atlantic Lottery Corporation has the ability to advise its retailers that they are not authorized to sell lottery products if they are selling the Win A Grand product. That issue was referred to the Competition Bureau by Win A Grand, and the Competition Bureau indicated to Win A Grand, and provided us with a copy of their correspondence which basically said that there is no issue for the Competition Bureau or no breaching of the Competition Act in this case.

From the Atlantic Lottery's perspective, we have had, for a number of years, an agreement with our retailers that sales of lottery products were only going to be allowed by retailers who only sold Atlantic Lottery products. The legal issue is not an issue for Atlantic Lottery; it is an issue of whether or not we are able, as the sole distributor of lottery products in the Province, to prohibit our retailers from selling other - what we determine are - lottery products. That is the issue right now before the company that proposes to sell these bonus cards. The legal issue is not the issue here.

**MR. SULLIVAN:** No. That is my understanding too, that it is not illegal, but maybe the ALC - it is not, maybe, anti-competitive deemed to say to the stores that if you sell this product we are not going to

allow you to sell a competing product, the same as someone who strikes a deal with Pepsi to sell their products and they are not going to sell Coke. Maybe you could look at it in that sense and it is the same thing.

Two people approached me on this. One, last week, a businessman here on the Avalon, the most recent one, said: I find it offensive. I do not sell any of these products. I do not sell any ALC products at all and I got a letter - I think it was a letter he said he received - that if he sells those products he is not going to be able to sell ALC products.

**MS J.M. AYLWARD:** That is right.

**MR. SULLIVAN:** But he does not even sell them, he said. I find that kind of -

**MS J.M. AYLWARD:** Why would it be offensive to him?.

**MR. SULLIVAN:** - oppressive, he said, that I would be told that, what I am able to sell in my business. I do not even sell ALC. If I selling them, I am reaping a profit. There could be a grounds on it, but somebody who is not even doing that would find it kind of oppressive. I do not know if the department -

**MS J.M. AYLWARD:** I guess it is just to give them a choice, that if they want to sell ALC then they cannot sell the others. If they want to sell this other one - I think the principle for us is very clear: the money we get, the money made from ALC, goes into us to help pay for health and education. I guess the bigger question is: Do you, or do I, support a private entrepreneur putting the money in his pocket that may be made on a lottery? I guess that is the philosophical question. Our view is that the money that we get should be spent for public health, education and other social programs. While it might be offensive to someone, I think the bigger decision is: if you are not selling either one, I do not know how you can be offended; but, if you are, you have the choice. The choice is, if you want to sell ALC then you do not sell the others. If he wants to go sell Win a Grand, that is totally up to him. Then the choice is, you will not sell ALC.

**MR. SULLIVAN:** Once again, it is a fundamental thing that you could debate on the merits of it. I do not think it is really the place to get into it here, but I will just make one point and then I will move on. If the minister has a comment, fine.

Basically, we are not dealing with a private company pushing a private product that gets an exclusion. We are dealing with publicly-controlled, government-controlled, corporations, and whether it is going into health care or education or whatever - and I am not saying I have drawn a final judgment myself on that one, but I have asked the question: Should government-controlled corporations, basically, be dictating that you do not sell this product; you sell this product. You are not going to be able to sell our product if you cannot sell another product that maybe would be competing. Even though it is not competitive to do it, is it right to do that or is it not? I know the good overall will and the good of those revenues are badly needed and they are going into, well, the general Treasury, to use for all basic programs. I certainly see that point of it, but some people do find it a little offensive, number one, when they are not even selling lotto products; and, secondly, when they are selling them and are told that if they sell something else.... Because anybody in a business is going to try to sell what they can. It sort of increases their margins there, but they are not going to allow it if it is going to cut into their Atlantic Lotto products. I mean, they are going to make a business decision, but they are being pressured into making a decision there and it takes another option away. Now, whether that is right for the overall good, I guess, that can be debated. I know this is not the point, but that is just a thing I throw out at least for your thoughts (inaudible).

**MS J.M. AYLWARD:** I think the answer, though, is that anybody who has the potential to sell is informed what the choices are, because if that individual who is so incensed, who you referred to, was not made aware of what Atlantic Lotto was doing, then they might have decided to sell both. So what we are doing, as a government, is trying to inform all the broader public, whether you sell them or not, that in the event you choose to seek a licence to sell them, then you cannot sell the other ones. I guess, like I say, as you said too, the bigger discussion is whether the money should go into the public purse for the provision of health and education or should it go into a person's pocket for their own individual use? I guess we have made the decision that it should go into the public purse. I am sure the people who are making a profit from the private one are incensed because it is their profit they are losing; but I am willing to stand up for that one.

**MR. SULLIVAN:** Okay, I just wanted to toss that out.

With reference to - I know Terry made reference to, I guess, back there when we looked at Income Tax. He indicated that the minister said: In the final year we did not implement this. It is my understanding, and you can correct me if I am wrong, that in November, 1999, there was a decision made to implement a three-year tax program on cuts; beginning January 1, 2000, and January 1, 2001 and 2002. At the time it was to move our provincial percentage of federal tax from 69 per cent to 62 per cent, to 55 per cent, to 49 per cent. I think the general figures were stated by Mr. Tobin and Mr. Dicks, at the time, in that release. Of course the federal government changed their tax rate then, effective that January, from 17 per cent to 16 per cent. The intent then was that our Province would reduce it a percentage of what the federal was at that time. I concede that point. So, our cuts are based on a percentage of the federal at that time, which was 17 per cent. First, I want to make sure we are right on that before I get to the second part. Would that be correct?

**WITNESS:** (Inaudible).

**MR. SULLIVAN:** That would be correct.

If you took the first cut, 62 per cent of 17 per cent is 10.54 per cent. If you went to the second stage last year, 55 per cent of 17 per cent is 9.35 per cent. If you took the third stage, 49 per cent of that, which did not occur, we are down to 8.73 per cent.

The question I am asking, only one cut, 62 per cent of 17 per cent gives you 10.54 per cent. We are now paying 10.57 per cent. If we said we got two cuts out of three, if we went to the 55 per cent level that should be 9.35 per cent. Why are we now paying 10.57 per cent?

**MS J.M. AYLWARD:** Are you adding in the surtaxes too or are you just (inaudible)?

**MR. SULLIVAN:** No.

**MS J.M. AYLWARD:** Well, there you go.

**MR. SULLIVAN:** Well, that is coming in your answer, I know that. It is coming in your answer; but we also have the surtaxes. I am familiar with them too, the basis provincial surtaxes. I gather your answer is going to be that we looked at incorporating changes in the surtax to give another balanced rate. I would assume something to that effect. I will let you answer this question: Why are we now paying a little over 62 per cent of the federal rate if we should have had two tax cuts?

**MS J.M. AYLWARD:** I am going to let Terry answer the specifics of it, but I can say that everything

Jan 24, 2002 Teleg. com

positions depending on its fiscal demands, he said. Numbers are also subject to change due to retirements.

Deering said the drop-off in RNC officers is exacerbated by a steady increase in calls for service.

That demand has increased about 16 percent per year, with the RNC now responding to about 63,000 calls for service annually.

See DEMAND, page A2

Kim Kielley of St. John's writes about being a mainlander growing to love her new home in Newfoundland.

4

# Company out of business, says government official

Continued from page A1

The Royal Newfoundland Constabulary is investigating whether Bonus Cards are a legal, non-lottery product, as Win A Grand Inc. maintains, or a lottery scheme, which can only be operated by a charity or government.

As far as Phil Wall, the deputy minister of finance, is concerned, the Competition Bureau ruling effectively puts the company out of business, no matter what the police investigation concludes.

"Even if the Department of Justice advises that this is a legal lottery, the Atlantic Lottery Corp. were not going to be backing off unless we were advised by the Competition Bureau that we had to," Wall said.

"We believe this is competition for us and, whether it's legal or not, it is taking money away from our product."

Win A Grand Inc. maintains that Bonus Cards are a promotional contest, consisting of a postcard or recipe, as well as an instant scratch-and-win contest that is a mixed game

of chance and skill.

The RNC investigated Win A Grand last year and concluded in May there were no breaches of the Criminal Code. However, the file has since been reopened based on additional information being brought forward, said RNC spokesman Sgt. Bob Garland.

The information is with the Justice Department for a legal opinion.

The Competition Bureau ruling gives the department what it needs to effectively shut Win A Grand out of the market — the ability to tell retailers not to carry Bonus Cards or they would lose Atlantic Lottery products.

"You can't stop someone from doing that — it's a free enterprise system," Wall said.

"If (the police) determine it's not a lottery scheme, then supposedly it's a legal sale and it doesn't violate the Lotteries Act, but ... the Competition Bureau has advised Atlantic Lottery that (Win A Grand's) complaint is dismissed without merit."

Peter Austin, the businessman behind Win A Grand Inc., reserved comment Wednesday until he has a chance to consult with his lawyer.

## GAMBLING

# Game over for Win A Grand Inc.

Competition Bureau dismisses complaint against lottery corp.

BY TRACY BARRON  
The Telegram

The federal Competition Bureau has dismissed a complaint of anti-competitive practices filed by a St. John's company against the Atlantic Lottery Corp., of which the Newfoundland government is a partner.

The bureau, which enforces the Competition Act of Canada, ruled the act doesn't apply in Win A Grand Inc.'s case, a bureau spokeswoman confirmed Wednesday.

Win A Grand Inc., producers of the retail product Bonus Cards, has complained the Atlantic Lottery Corp. is shutting it out of the market. It went to the Competition Bureau about a letter the Atlantic Lottery Corp. sent retailers in the province telling them Atlantic Lottery products, including scratch-and-win and break-open tickets, would be pulled if the store carried Bonus Cards.

See COMPANY, page A2

Exhibit "G" referred to in the affidavit

of Peter Austin

sworn or affirmed before me this

13<sup>th</sup> day of January, 2002

Marie J. Balsbode