

2009 01T 0732CP

IN THE SUPREME COURT OF NEWFOUNDLAND & LABRADOR  
TRIAL DIVISION

**BETWEEN:**

GREG RICE PLAINTIFF

**AND:**

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

**AND:**

VLC, INC. FIRST THIRD PARTY

**AND:**

SPIELO MANUFACTURING ULC SECOND THIRD PARTY

**AND:**

HI-TECH GAMING.COM LTD. THIRD THIRD PARTY

**AND:**

IGT-CANADA INC. FOURTH THIRD PARTY

**AND:**

INTERNATIONAL GAME TECHNOLOGY FIFTH THIRD PARTY

**AND:**

TECH LINK INTERNATIONAL  
ENTERTAINMENT LIMITED SIXTH THIRD PARTY

**AND:**

GTECH CORPORATION SEVENTH THIRD PARTY

BROUGHT PURSUANT TO THE *CLASS ACTIONS ACT*  
BEFORE THE HONOURABLE MR. JUSTICE WAYNE DYMOND,  
CASE MANAGEMENT JUDGE

**REFRESHED FURTHER AMENDED STATEMENT OF CLAIM**

(Amended pursuant to rule 15.01(b) of the *Rules of the Supreme Court*,  
by order of Mr. Justice Dymond dated December 1, 2010)

**The Plaintiff**

1. The Plaintiff, Greg Rice, resides in the City of St. John's, in the Province of Newfoundland and Labrador. The Plaintiff brings a class action pursuant to the *Class Actions Act*, SNL 2001, c. C-18.1, on behalf of persons and estates harmed by Video

Lottery Terminal (“VLT”) gambling which the Defendant purports to manage and control in the Province of Newfoundland and Labrador.

### **The Defendant**

2. The Defendant, Atlantic Lottery Corporation Inc. – Société des Loteries de l’Atlantique, was incorporated under the *Canada Business Corporations Act* in 1976, and registered to do business in Newfoundland and Labrador, with a current registered office at 30 Hallett Crescent, St. John’s, A1B 4C5 (“the Defendant”). The head office is located in Moncton, New Brunswick, and the name and address of the attorney for service is William J. Parsley, 922 Main Street, PO Box 5500, Moncton, New Brunswick, E1C 8W6.
3. The authorized share capital of the company consists of four shares, and the right to transfer the shares of the corporation is restricted to transfer to the governments of the provinces of New Brunswick, Newfoundland, Nova Scotia and Prince Edward Island, or their agencies. The present shareholders are the Lotteries Commission of New Brunswick, the Nova Scotia Gaming Corporation, the Prince Edward Island Lotteries Commission, and the Province of Newfoundland and Labrador (“the province”). Corporate documents state the nature of the Defendant’s business to be the operation of lotteries.

### **Statutory Background**

4. The *Criminal Code of Canada* broadly prohibits lotteries, gambling, gaming, slot machines, and video devices used for gambling, subject to s. 207. In effect, s. 207 decriminalizes certain forms of lotteries and creates a regulated industry. In particular, s. 207(1) permits the government of a province to conduct and manage lotteries, in accordance with laws enacted by the legislature of that province.

5. By the *Lotteries Act*, SNL 1991, c. 53, the province assumed the conduct and management, and licensing and regulation of lottery schemes, purportedly as permitted by the *Criminal Code*. The *Act* came into force on February 21, 1992.
6. Pursuant to s. 5 of the *Lotteries Act*, the Lieutenant-Governor in Council promulgated regulations known as the Video Lottery Regulations. The Regulations grant extensive monopolistic powers to the Defendant to approve who is permitted to operate a video lottery terminal (VLT), and the site on which it is operated. VLTs are installed directly by the Defendant, and must have affixed to them the official decal of the Defendant. No VLT siteholder may remove or replace a VLT without the prior consent of the Defendant. No person may manufacture or supply a VLT in the province unless approval has been given by the Defendant.
7. Details of the Defendant's ownership of the physical property in VLTs, whether owned or leased, and if leased whether paid by fixed rental or percentage of profit, are unknown to the Plaintiff.
8. The Defendant is a business corporation driven by profit motive. The province is a 25% shareholder. The Defendant is constituted both as a VLT monopolist which allocates a small share of profits from VLTs to siteholders according to its sole discretion, and as a regulator and licensor of VLTs. It is in conflict of interest as its own regulator, but is subject to minimal oversight by the province, to which it remits enormous profits in the range of \$60-90 million annually. It is not formally subject to accountability under the *Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1, the *Public Tender Act*, RSNL 1990, c. P-45, the *Auditor General Act*, SNL 1991, c. 22, or the *Citizens Representative Act*, SNL 2001, c. C-14.1. The province nominates two members of the Defendant's board of directors, who are officials of the Department of Finance, and the Department of Tourism. The Defendant's board does not include an official from the Department of Health.

9. The legislative framework supports, and the Defendant itself claims, that the Defendant has been delegated management and control of lotteries, including VLTs, as a matter of public trust and confidence and for the benefit and health and safety of the public. This is so even though the Defendant is structured as a business corporation driven by profit motive, and it is reinforced by the reposing of regulatory responsibilities in the Defendant.

### **Deceptive Nature of VLTs**

10. The terms addicted gambler, pathological gambler and problem gambler are used herein as synonyms. Pathological gambling is a recognized mental disorder characterized by impaired control over gambling, preoccupation with gambling, negative consequences from the activity, and profound cognitive distortions regarding expectation and probability of winning. The theories of VLT deception and VLT addictive potential are intertwined and not severable, and the greater the deception as alleged herein, the greater the potential for addiction.
11. As a result of the deceptive nature of VLTs, addicted, pathological or problem gamblers have impaired control of gambling behavior despite harmful consequences of their behavior, and are fixated on the win they believe is due to them and which will solve their problems. Eventually, they just fixate on playing and wins become irrelevant. Pathological gamblers make up a disproportionately large percentage of regular VLT gamblers and are the source of a disproportionately large share of the Defendant's VLT revenues from this province.
12. VLTs are a form of continuous electronic gaming which differs from lotteries in that they are electronically programmed to create cognitive distortions of the perception of winning, which cognitive distortions are intended to keep the consumer engaged and losing money. VLTs are inherently deceptive, inherently addictive and inherently dangerous when used as intended.

13. All games of chance that give intermittent reinforcements, are exciting or pleasant, or provide an escape, are potentially addictive. VLTs are unlike other games of chance, in that they are designed to be inherently addictive and are inherently dangerous when used as intended. Problem gambling rates for VLTs reflect design features of VLTs, as to which the Defendant knows or ought to know.
14. Unlike other regulated gambling games, such as lotteries, where the odds of winning any and every prize are disclosed or easily determined, VLTs have hidden odds of the games, and players are left guessing about their chances of winning any and all prizes, whether video poker VLT games or line games. Line VLTs exploit hidden odds, in that VLTs have asymmetric virtual reels that are programmed to weight the distribution of symbols across the reels differently so that the visual reels that the player interacts with give a false impression of the odds of winning. Both poker and line VLTs are deceptive in that both the rules of the game and the odds of winning are hidden.
15. VLTs also have non-linear paytables, where the odds, hit frequency and payout amounts change depending on wager amount. This design feature encourages players to bet higher amounts and incur higher losses.
16. The difficulty of figuring out the odds is augmented by the variable prize structures used by VLTs and the resulting volatility of the games. The experience of this volatility and changing odds from non-linear paytables makes it impossible for the player to determine, with any accuracy, the true odds of winning during any given play session.
17. VLTs mimic on screen the mechanical reel slot machine, and have asymmetric virtual reels that are programmed to give a near miss effect by which the consumer is manipulated into believing that he or she almost won or is getting closer to a win. VLTs have variable prize structures that result in potent variable reinforcements that further reinforce this effect.

18. Like loaded dice, VLTs combine randomness with concealed asymmetry to cheat the player. The virtual reel mapping is programmed to generate both vertical and horizontal randomized near misses.
19. VLTs have video displays that utilize subliminal priming to deceive consumers and manipulate them into hyper-focusing and to create a dangerous dissociative mental state, wherein players cannot make rational decisions to continue to play or not, and impaired control is the natural and designed outcome.
20. The outcome of play is in fact the result of a random number generator, and is predetermined upon commencement of play, and is totally unconnected with what is happening on the video screen.
21. The presence of a “stop” button reinforces the illusion of a connection between the reels and the outcome of play by creating a greater illusion of control. The “stop” button is deceitful in that it provides no control over the outcome of play. The absence of a “stop” button removes only one level of cognitive manipulation, with the inherently addictive and inherently dangerous design of the VLT otherwise remaining intact and active.
22. VLTs allow bets from 5¢ to \$2.50. The Defendant does not disclose that the odds of winning are unaffected by the amount of the bet.
23. Although maximum bet is \$2.50, a consumer can lose \$2.50 approximately every six seconds, and more quickly with a stop button. The Defendant does not publish odds. Based on third party calculated odds of 270,000 to 1, a consumer would have to lose \$30,000 to win maximum prize of \$500. VLTs are enormously lucrative to the Defendant, and the consumer is doomed to financial losses over any consistent term of play.

24. In 2005, there were 2645 VLTs in 593 different liquor licensed establishments in Newfoundland and Labrador, which is the highest per capita number of VLTs in any province. Although regulations restrict installation of VLTs to five per licensed site, the Defendant has allowed site holders to multiply liquor licenses and sites within the same establishment in order to expand the number of VLTs.
25. The distribution of both machines and losses per person is concentrated disproportionately in low socio-economic areas and groups, and among young male adults, the elderly, those with mental disabilities, and those with physical disabilities. This socially inequitable distribution has been reinforced by the Defendant's policy of placing VLTs at sites of convenience such as bars, clubs and lounges throughout the province.
26. VLTs are so programmed, fixed and manipulative that they do not fit any reasonable definition of "slot machine", "fair game of chance" or the definition of "lottery scheme" in s. 207(4) of the Criminal Code of Canada. They more closely resemble sleight-of-hand trickery such as three-card monte, outlawed by the Criminal Code.
27. The Defendant has failed to prevent VLTs from being infiltrated by organized crime, and has concealed the extent of this infiltration from players. Many VLTs contain veiled source codes, known as Easter eggs, which permit criminals to access subroutines and jackpot the machines. Other VLTs have been hacked through the Defendant's central terminal and jackpotted.
28. The Plaintiff says that the Defendant knows or ought to know all of the foregoing as to the deceptive nature and addictive potential of VLTs, and that the resulting social and individual harms are not unexpected, but are known and expected harms, including suicide, attempted suicide, suicidal ideation, and addiction.

29. Although the Defendant knows or ought to know that VLT losses are concentrated among heavy problematic players, it has failed to implement easily available screening procedures to inhibit, halt and assist problem gamblers. It has instead used this knowledge to target problematic players for further exploitation.
30. The Plaintiff says that the Defendant knows or ought to know VLTs are inherently deceptive, inherently addictive, and inherently dangerous when used as intended, but they have embarked on a “responsible gaming strategy” with messages to consumers which place the onus of responsibility for control and the resulting harm from loss of control on consumers. The Defendant’s message strategy is part of a systematic, deceptive and unconscionable strategy to blame consumers for problem gambling and divert attention from the fact that problem gambling is a natural result of design features of the VLT itself.
31. The Defendant knows or ought to know that the deceptive design features which render VLTs inherently addictive and inherently dangerous can be eliminated such that VLTs can become a reasonably safe form of gambling and generate a reasonable stream of profit, with a stable or expanding consumer base not continually eroded by the casualties of addiction. The Defendant has chosen not to implement available safe design program technologies. For example, on or about March 27, 2007, the Defendant announced measures aimed at VLT reduction and promotion of responsible VLT gambling, such as slowing down the speed of play. The Plaintiff says that the Defendant programmed or designed many of the announced measures into VLTs in this province in 2001, but made a decision to not activate them until March 2007. The Plaintiff says that announced measures are cosmetic and VLTs still retain the essential characteristics by which they remain inherently deceptive and unsafe.
32. The Defendant has based its decisions to promote and supply VLT gambling on the revenue generating potential of VLTs, without ensuring that appropriate, vigorous and independent safety testing for deceptive and addictive features, processes and potentials was conducted, before offering the VLTs to consumers. The Defendant knows or ought

to know that reliance on testing laboratories may tend to ensure that their VLTs comply with gambling laws and standards, but does not ensure or attempt to ensure compliance with laws or standards at general law, including consumer protection law.

33. The Defendant's gambling prevalence data shows that in Newfoundland and Labrador, 9.7% of VLT players are at moderate risk and 8.6% are problem gamblers, for a rate of 18.3% of VLT players who are experiencing significant problems or are at significant risk for such problems. This compares with a problematic gambling rate of only about 3% for other forms of gambling.

#### **Deception and Addiction of Representative Plaintiff**

34. Greg Rice is a resident of Newfoundland and Labrador. He began using VLT line games in the province in 1992 and continues to use them. As early as 1994 Mr. Rice attempted to stop using VLT line games, but he has not been successful.

#### **Unauthorized by Criminal Code**

35. The Plaintiff states that matters of criminal law within the authority of Parliament, but not authorized by Parliament, cannot be authorized by a province. In purporting to exercise the management and conduct of lotteries, the Defendant is acting in violation of the intent of Parliament, which is that the conduct and management of a lottery scheme in the province be conducted by the government of the Province of Newfoundland and Labrador. Consequently, the Defendant's conduct and management of VLTs is not a permitted lottery pursuant to s. 207(1) of the *Criminal Code*, and is not authorized by the *Code*.
36. The Plaintiff also pleads that in placing VLTs at sites of convenience, such as bars, clubs and lounges owned by private sector siteholders, and in sharing substantial revenues with siteholders, the Defendant has unlawfully delegated the conduct and management of a

lottery scheme in the province, outside the government of a province, which delegation is not authorized by s. 207(1) of the *Code*.

37. The Plaintiff also pleads that VLTs are not lotteries or games of chance within the meaning of the *Criminal Code*. Rather, they are so unconnected with chance or skill and so manipulative and deceptive as to fall within the prohibition against “three-card monte”, and any other game of trickery and sleight-of-hand that is similar to it, contained in s. 206(1)(g) of the *Code*. Consequently, the Defendant’s conduct and management of VLTs is not a permitted lottery pursuant to s. 207(1) of the *Criminal Code*, and is not authorized by the *Code*.
38. The Defendant’s distribution of VLTs to sites of convenience in bars, clubs and lounges, has created a vast system of common gaming houses, which gaming houses are prohibited by s. 201(1) of the *Criminal Code*. Although s. 207(1) permits the government of a province to conduct and manage a lottery scheme, nothing in s. 207 authorizes a province or the Defendant to conduct and manage common gaming houses, and the Defendant’s conduct in this regard is not authorized by the *Criminal Code*.
39. Further, the definition of a “lottery scheme” contained in s. 207(4) excludes VLTs. Consequently, the Defendant’s purported management and control of VLTs is not a permitted lottery and is not authorized by the *Criminal Code*.

#### **Breach of Competition Act**

40. The Defendant knowingly or recklessly made false and misleading representations to the public. These representations included, but are not limited to, the following (the “Representations”):
  - (a) stating that its VLTs have theoretical payouts of 93%-95%, but failing to disclose that VLTs in Newfoundland and Labrador consistently retain between 7% and 5% of all sums deposited;

- (b) failing to disclose the serious risks of addiction, suicide, attempted suicide and suicidal ideation associated with use of VLTs;
  - (c) including or permitting to be included a “stop” button on VLTs although the “stop” button serves no function;
  - (d) failing to disclose at the point of sale that the “stop” button serves no purpose;
  - (e) concealing the number of symbols per reel, the weighting of symbols per reel, and the probability of winning each combination;
  - (f) concealing how the randomness of VLTs is generated;
  - (g) using animated spinning reels which do not represent the actual video reels that are stored in tables inside the computer;
  - (h) displaying asymmetric reels to create near misses in non-winning combinations;
  - (i) displaying a version of a game that may be different than the same game on other VLTs, but not disclosing the differences to the player; and
  - (j) displaying “wins” on the screen in a frequent and random reinforcement schedule, even though the net amount for a player continues to decline.
41. The Defendant’s Representations were material and affected the decision of the Plaintiff to play the Defendant’s VLTs.
42. As a result of the Representations of the Defendant, the Plaintiff suffered loss or damage. The particulars of this loss or damage include financial loss in the form of the consideration paid to play on the Defendant’s VLTs.
43. The Plaintiff states that the Defendant’s conduct in promoting, directly or indirectly, the supply or use of VLTs or its business interest, and in knowingly or recklessly making representations to the public that were false or misleading in material respects, is contrary to s. 52(1) and (1.1) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended, and the Plaintiff has a statutory cause of action pursuant to s. 36 of the *Competition Act* to recover an amount equal to the loss or damage proved to have been suffered, together with the full cost of investigation and of proceedings under s. 36.

44. The Plaintiff also relies on s. 52(1.1) of the *Competition Act* and pleads that it is unnecessary to show actual reliance on the misleading representations of the Defendant for the purpose of establishing a breach of s. 52(1) of the Act.

### **Breach of Contract**

45. The contract between the parties was to provide a safe, interactive and entertaining way to play games of chance with the opportunity to win small cash prizes in exchange for small frequent cash bets.
46. The Plaintiff says that the Defendant warranted to the Plaintiff and the Class Members that VLTs were of merchantable quality and fit for use. The Defendant breached the warranty to the Plaintiff and the Class Members 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.
47. In the alternative, should action on breach of implied warranty of fitness or merchantability not be available, the plaintiffs state that the Defendant breached an implied contractual term that it would use reasonable care and skill in its provision of VLT gaming. As a necessary incident of the implied duty to use reasonable care and skill, the Defendant 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. This the Defendant did not do.
48. The Defendant is the purported lawful delegate to conduct and manage lottery schemes (including VLT gaming) in this province, in accordance with laws enacted by the legislature of the province, and as permitted by Parliament. As such, the Defendant is charged with the fulfillment of public policy objectives including the safety and

protection of consumers of lottery scheme products or services including VLT gaming. The Plaintiff states that by reason of the exceptional public policy role of the Defendant, its contractual relations with consumers of VLT gaming are subject to an implied term of good faith.

49. The Plaintiff states that the 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.
50. The Plaintiff further states that in providing games of chance which were not safe but which were inherently dangerous, the Defendant committed fundamental breach of contract.
51. The Plaintiff says that due to the exceptional position of the Defendant as VLT monopolist, charged with a duty to act in the public interest, "state of the art" knowledge of the design features and effects of VLT games should be attributed to the Defendant.

**Statute of Anne, 1710**

52. The Plaintiff pleads the *Statute of Anne*, 1710, 9 Ann. C. 14 § 1 (Eng.), entitled an Act for the better preventing of excessive and deceitful Gaming, and in particular, Section II thereof. This provision was received into the law of this jurisdiction in 1832 and has not been repealed.

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

**Failure to Warn in Tort**

54. The Plaintiff says that due to the exceptional position of the Defendant as VLT monopolist and regulator, charged with a duty to act in the public interest, “state of the art” knowledge of the design features and effects of VLT games should be attributed to the Defendant.
55. The Plaintiff pleads that the Defendant is liable in tort of negligence for failure to warn of inherent danger. The Plaintiff “waives” this tort as further specified below.
56. At all material times, the Defendant knew or ought to have known that VLTs, when used as intended, are addictive and could cause suicide, attempted suicide and suicidal ideation and it owed a duty of care to warn the public of the risks of playing VLTs.
57. The Defendant breached its duty by failing to provide any warning or, alternatively, any adequate warning, of the risk of VLT addiction or of suicide, attempted suicide and suicidal ideation.
58. Any warnings that were provided by the Defendant were inadequate and ineffective in that they:
- (a) failed to warn of the actual and known risks;
  - (b) were insufficient to give consumers of VLTs and the public a true indication of the risks; and
  - (c) failed to make clear, credible, complete and current disclosure of the risks inherent in the ordinary use of VLTs and therefore did not allow for a free and informed decision to be made regarding their use.

### **Unjust Enrichment**

59. The Plaintiff states that there has been a deprivation of the Plaintiff and the plaintiff class and a corresponding enrichment of the Defendant, by reason of the breaches of the *Criminal Code of Canada*, the *Statute of Anne*, the *Competition Act*, tortious misconduct and breaches of contract described herein. This deprivation and corresponding enrichment is without juridical reason.
60. The Plaintiff claims a remedy in restitution on the basis that the interest of the Plaintiff in the safety of VLT gaming makes it just and equitable that the Defendant should retain no benefit from the breaches pleaded.

### **“Waiver of Tort”**

61. The Plaintiff pleads “waiver of tort” as a cause of action giving rise to the remedies of constructive trust, disgorgement and accounting, and that those remedies can be determined at trial of common issues without the involvement of any individual class member and after liability has been determined pursuant to waiver of tort.
62. The Plaintiff further states that there is a reasonable likelihood that s. 29 of the *Class Actions Act* will be satisfied and an aggregate assessment made if the Plaintiff is otherwise successful at the trial of common issues.
63. As a result of the Defendant’s conduct described herein, the Plaintiff and Class Members reserve the right to elect at or after the trial of the common issues to waive wrongs attracting a remedy in damages and to have damages assessed in an amount equal to the gross revenues earned by the Defendant, or the net income received by the Defendant or a percent of the proceeds from the sale of VLT gaming as a result of the Defendant’s conduct.

64. The Plaintiff and Class Members claim that such an election is appropriate for the following reasons, among others:
- (a) revenue was acquired in a manner in which the Defendant cannot in good conscience retain it;
  - (b) the integrity of gaming regulation and the marketplace would be undermined if the court did not impose an effective remedy;
  - (c) absent the Defendant's wrongful conduct, VLT gaming could not have been marketed nor would the Defendant have received any revenue from its use;
  - (d) the Defendant engaged in wrongful conduct by putting into the marketplace a gaming product which causes or has the potential to cause serious risk of injury, dependency and addiction; and,
  - (e) the Defendant has failed to fulfill its unique statutory responsibilities to promote and safeguard public health and safety.

### **Punitive Damages**

65. The Plaintiff pleads that the Defendant has acted in such a high-handed, wanton and reckless or deliberate manner, without due regard to public health and safety, as to warrant an award of punitive damages, in accordance with the goals of retribution, denunciation, and deterrence.
66. The Plaintiff pleads that an award of compensatory damages is inadequate to the goals of retribution, denunciation and deterrence, as is indicated by the following factors:

#### *Blameworthiness of Defendant's Conduct*

- (a) the conduct is planned and deliberate;
- (b) the intent and motive is to profit from sales;
- (c) the outrageous conduct has persisted over a lengthy period of time;
- (d) the Defendant has concealed or attempted to cover up its misconduct;
- (e) the Defendant is and has been aware that its conduct is wrong;

- (f) the Defendant has profited from its misconduct;
- (g) the interest violated by the Defendant is deeply personal to the Plaintiff and Class Members, specifically their bodily and mental integrity and their health;

*Vulnerability of Plaintiff*

- (h) the Plaintiff and Class Members were entirely vulnerable to abuse of power and knowledge by the Defendant;

*Proportionate to Harm Directed at Plaintiff*

- (i) the conduct is malicious and high-handed and could be expected to cause severe injury;

*Proportionate to Need for Deterrence*

- (j) the egregious conduct was known throughout the Defendant's management, which took no corrective action;
- (k) the conduct was a product of deliberate corporate policy or strategy;

*Proportionate to Other Penalties*

- (l) there have been no other penalties at law or alternatively, the penalties are inadequate to the objectives;

*Proportionate to Advantage Gained*

- (m) the Defendant must not financially profit from its outrageous conduct;

*Rational Deterrence*

- (n) the Defendant has been unimpressed by the size of previous awards in Canada, whether compensatory or punitive, and has made a rational decision to continue in its misconduct.

**Factors Relevant to Remedy**

67. The Plaintiff states that the following factors reflect on the reprehensibility of the Defendant's conduct, and are relevant to the issue of remedy, including punitive damages:

- (a) the conduct is planned and deliberate;

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

### **Willful Concealment**

68. The Plaintiff states that the Defendant has willfully concealed the cause or causes of action to which its conduct described herein gives rise, so as to postpone the running of any limitations which might otherwise apply.

### **Relief Requested**

69. The Plaintiff states that the moral quality of the Defendant’s conduct forms the fundamental reason for the Court’s intervention with remedies to sustain the integrity of the laws which the Court supervises. The only alternative to a class action is no action at all, with the unconscionable result that the Defendant will be allowed to continue its unlawful practices and keep its unlawful gains.

70. The Plaintiff also states that the total unlawful gain obtained by the Defendant from class members necessarily reflects the total loss suffered by the class, and is ascertainable from the business records of the Defendant, without resort to individualized inquiries.
71. The Plaintiff has pleaded the doctrine of fraudulent concealment, but also states that the Defendant has caused, and continues to cause, injury with respect to s. 6 of the *Limitations Act*, SNL 1995, c. L-16.1 and claims the following relief:
- (a) an order certifying the proceeding as a class proceeding;
  - (b) an order declaring that the Defendant's conduct or management of VLTs is not a permitted lottery and is not authorized pursuant to s. 207(1) of the *Criminal Code*;
  - (c) an order for an aggregate monetary award pursuant to s. 29 of the *Class Actions Act*;
  - (d) an accounting for and disgorgement of profits or revenues, or a constructive trust over same;
  - (e) damages equal to the total unlawful gain obtained by the Defendant from class members;
  - (f) an order directing the Defendant to pay an amount equal to the loss or damage proved to have been suffered because of the breach of the *Competition Act* plus an amount equal to the full cost of any investigation of the matter and of proceedings under s. 36;
  - (g) exemplary or punitive damages;
  - (h) treble the loss or damage pursuant to the *Statute of Anne*;
  - (i) a declaration or injunction restraining the Defendant from continuing the unconstitutional act or practice;
  - (j) a declaration or injunction restraining the Defendant from conduct contrary to s. 52(1) of the *Competition Act*; and,
  - (k) such other directions or relief that the court considers appropriate.

**AMENDED** at St. John's, in the Province of Newfoundland and Labrador, this 10<sup>th</sup> day of December, 2010.



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**CHES CROSBIE BARRISTERS**

Solicitors for the Plaintiff whose  
address for service is:

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*Per: Chesley F. Crosbie, Q.C.*

**TO: OTTENHEIMER BAKER**

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*Attention: Daniel W. Simmons*

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*Attention: Ian F. Kelly, Q.C.*

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*Attention: Daniel M. Boone*

**O'DEA EARLE**

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*Attention: Gregory F. Kirby*

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Solicitors for the Sixth Third Party

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*Attention: Thomas J. O'Reilly, Q.C.*