

2009 01 T-0732 CP  
 IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
 TRIAL DIVISION

<b>BETWEEN:</b>	<b>GREG RICE</b>	
		<b>PLAINTIFF</b>
<b>AND:</b>	<b>ATLANTIC LOTTERY CORPORATION INC. - SOCIÉTÉ DES LOTTERIES E L'ATLANTIQUE</b>	
		<b>DEFENDANT</b>
<b>AND:</b>	<b>VLC, INC.</b>	
		<b>FIRST THIRD PARTY</b>
<b>AND:</b>	<b>SPIELO MANUFACTURING ULC</b>	
		<b>SECOND THIRD PARTY</b>
<b>AND:</b>	<b>HI-TECH GAMING.COM LTD.</b>	
		<b>THIRD THIRD PARTY</b>
<b>AND:</b>	<b>IGT-CANADA INC.</b>	
		<b>FOURTH THIRD PARTY</b>
<b>AND:</b>	<b>INTERNATIONAL GAME TECHNOLOGY</b>	
		<b>FIFTH THIRD PARTY</b>
<b>AND:</b>	<b>TECH LINK INTERNATIONAL ENTERTAINMENT LIMITED</b>	
		<b>SIXTH THIRD PARTY</b>
<b>AND:</b>	<b>GTECH CORPORATION</b>	
		<b>SEVENTH THIRD PARTY</b>

<b>SUMMARY OF CURRENT DOCUMENT</b>	
Court File Number:	2009 01T 0732 CP
Date of Filing of Documents:	December 15, 2011
Name of Filing Party or Person:	Defendant
Application to which Document being filed relates:	Interlocutory application of the defendant under Rules 14.24 and 38
Statement of purpose in filing:	To amend the application issued January 26, 2010

**AMENDED INTERLOCUTORY APPLICATION (Inter Partes)**

The application of the defendant says that:

**A. Procedural history**

1. This action was commenced by a statement of claim issued on February 12, 2009 naming the estate of Susan Piercey, represented by Keith Piercey, as plaintiff. It was first amended on December 4, 2009.
2. This proceeding has been under case management before Mr. Justice Dymond.
3. In December 2009 the plaintiff issued an interlocutory application for certification of this proceeding as a class action with the plaintiff, the estate of Susan Piercey, as representative plaintiff for the class.
4. On January 26, 2010 the defendant issued this interlocutory application under Rules 14.24 and 38 claiming that the plaintiff estate and certain causes of action and claims, including causes of action under the *Competition Act* and the *Statute of Anne (Gaming Act), 1710*, should be struck from the amended statement of claim and that this proceeding should consequently be dismissed. The defendant requested that its application be heard and decided before the plaintiff's certification application.
5. On February 16, 2010 the plaintiff issued an interlocutory application for leave to amend the statement of claim to add Greg Rice as plaintiff.
6. By a decision dated April 23, 2010, Mr. Justice Dymond decided that the plaintiff's certification application, the defendant's application to strike and the plaintiffs' application to amend would be heard at the same time.
7. The defendant issued third party notices to the first to sixth third parties on May 6, 2010 and a third party notice to the seventh third party on May 28, 2010.
8. On or about November 10, 2010 the plaintiff, with the leave of the Court, filed a further amended statement of claim adding Greg Rice as plaintiff in substitution of the estate of Susan Piercey, represented by Keith Piercey.
9. The plaintiff's application for a stay of the third party claims was dismissed on April 28, 2011.

## **B. Defendant's Application under Rules 14.24 and 38**

10. In consequence of the amendment of the statement of claim and the substitution of the plaintiff, the defendant has amended this application to apply for orders under Rule 14.24 striking out portions of the further amended statement of claim, and under Rule 38 for determination of issues of law and fact, all as set out more fully below.

## **C. Incapacity of the Plaintiff as an Undischarged Bankrupt**

11. The plaintiff, Greg Rice, made an assignment in bankruptcy on October 11, 1996. He has failed to comply with conditions imposed for his discharge and his application for discharge from bankruptcy has been adjourned. He remains an undischarged bankrupt.
12. Pursuant to section 71 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 his property both at the time of his bankruptcy and acquired by him since then is vested in his trustee and the plaintiff has no capacity to deal with it.
13. His property, as defined in section 2 and 67(1) of the *Bankruptcy and Insolvency Act*, includes "things in action", "every description of property, whether real or personal, legal or equitable", and "every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property." His property that is vested in his trustee includes all claims made in this action in relation to money spent by him to play video lottery games.
14. The plaintiff, as an undischarged bankrupt, has no power to commence or continue this action for any claims related to his property, and all such claims made in the further amended statement of claim should be dismissed or struck.
15. In particular, the defendant requests an order under Rule 38 dismissing the claims made in the following portions of the further amended statement of claim:
  - (a) paragraphs 40 to 44 asserting a claim for breach of the *Competition Act*, R.S.C. 1985, c. C-34, and alleging that the plaintiff has suffered financial losses;
  - (b) paragraphs 45 to 51 asserting a claim of breach of contract;

- (c) paragraphs 52 and 53 asserting a claim under the *Gaming Act, 1710*, 9 Anne c. 19, (referred to as the Statute of Anne, 1710) for recovery of money;
  - (d) paragraphs 54 to 58 asserting a claim for failure to warn in tort;
  - (e) paragraphs 59 and 60 asserting a claim for unjust enrichment claiming restitution of money;
  - (f) paragraph 61 asserting "waiver of tort" as a cause of action claiming constructive trust, disgorgement and accounting;
  - (g) paragraphs 65 to 67 claiming punitive damages; and
  - (h) paragraphs 71(c) to (h), claiming remedies related to the property of the plaintiff that is vested in his trustee.
16. It is appropriate to determine under Rule 38 the question of whether the plaintiff has the capacity to bring this action for claims related to his property because:
- (a) the status of the plaintiff as an undischarged bankrupt is established by a search of the records of the Office of the Superintendent of Bankruptcy and the records of his bankruptcy proceeding in this Court appended to the affidavit of Matthew Walsh, and is not in dispute;
  - (b) there are no other matters of fact relevant to the determination of the issue that will be in dispute,
  - (c) the determination of the issue is a matter of law that can be addressed as fully on a preliminary application as at trial, and
  - (d) the determination of the issue will assist the resolution of the certification application by removing from consideration claims and causes of action for which the plaintiff has no chance of success at trial.

**D. The *Competition Act* and the *Gaming Act, 1710* do not apply to the Defendant**

**(i) Plaintiff's allegations regarding the *Competition Act* and the *Gaming Act, 1710***

17. In paragraphs 40 to 44 of the further amended statement of claim the plaintiff has alleged that the defendant's conduct was contrary to provisions of the *Competition Act*, and that the plaintiff has a statutory cause of action. In paragraph 71(f) the plaintiff seeks an order for damages for breach of the *Competition Act* and payment of investigation costs under that Act and in paragraph 71(j) the plaintiff seeks a declaration or injunction restraining the defendant from conduct contrary to s. 52(1) of the *Competition Act*.
18. In paragraphs 52 and 53 the plaintiff pleads the *Statute of Anne, 1710*, also known as the *Gaming Act, 1710*, and alleges that it applies in the province to allow a person who has lost money at gaming to sue for and recover it. In paragraph 71(h) the plaintiff seeks an order for treble damages pursuant to the *Gaming Act, 1710*.

**(ii) Defendant's position regarding the *Competition Act* and the *Gaming Act, 1710***

19. The plaintiff is bound by the determination by this Honourable Court in *Piercey v Atlantic Lottery Corporation*, 2008NLTD202, that the defendant is an agent of the Crown.
20. By section 17 of the *Interpretation Act*, R.S.C. 1985, c. I-21, no enactment is binding on the Crown except as mentioned or referred to in the enactment.
21. By section 12 of the *Interpretation Act*, R.S.N.L. 1990 c. I-19, no provision in an Act is binding on the Crown unless it is expressly stated in it that the Crown is bound.
22. The defendant, as an agent of the Crown, is not bound by the provisions of the *Competition Act*. Section 2.1 of the *Competition Act* makes that Act binding on corporate agents of the Crown in right of Canada or a province but only in limited circumstances. Section 2.1 does not subject the defendant to the *Competition Act* because the defendant, by managing or operating a video lottery in the province, is not engaged in commercial activities in actual or potential competition with other persons. The *Criminal Code*, R.S.C., 1985, c. C-46, the *Lotteries Act*, S.N. 1991, c. 53, and the *Video Lottery Regulations*, C.N.L.R. 760/96 give the defendant exclusive control over the management

and operation of video lotteries in the province, to the exclusion of any lawful competitors.

23. The *Gaming Act, 1710*, is not part of the law of the Province. If it were, it has no provisions that make it applicable to the Crown, and it cannot apply to the defendant as an agent of the Crown.

**(iii) This issue can be decided under Rule 38**

24. It is appropriate to determine under Rule 38 the question of whether the *Competition Act* and the *Gaming Act, 1710*, are binding on the defendant because:

- (a) the status of the defendant as an agent of the Crown has already been determined in the prior proceeding and is not in dispute;
- (b) the fact that the defendant, by managing or operating a video lottery in the province, is not engaged in commercial activities in actual or potential competition with other persons is established by reference to the *Criminal Code*, the *Lotteries Act*, and the *Video Lottery Regulations*.
- (c) there are no matters of fact relevant to the determination of the issue of whether the *Competition Act* and the *Gaming Act, 1710* are binding on the defendant that will be in dispute,
- (d) the determination of the issue of whether the *Competition Act* and the *Gaming Act, 1710*, are binding on the defendant is a matter of law that can be addressed as fully on a preliminary application as at trial, and
- (e) the determination of the issue will assist the resolution of the certification application by removing from consideration two causes of action that have no chance of success at trial.

**E. Orders Sought**

25. The defendant applies for an order under Rule 38 dismissing the claims made in the following paragraphs of the further amended statement of claim on the grounds that the plaintiff, an undischarged bankrupt, has no capacity to bring or maintain an action in relation to his property:

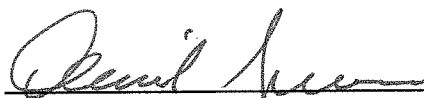
- (a) paragraphs 40 to 44 asserting a claim for breach of the *Competition Act*;
  - (b) paragraphs 45 to 51 asserting a claim of breach of contract;
  - (c) paragraphs 52 and 53 asserting a claim under the *Gaming Act, 1710*;
  - (d) paragraphs 54 to 58 asserting a claim for failure to warn in tort;
  - (e) paragraphs 59 and 60 asserting a claim for unjust enrichment;
  - (f) paragraph 61 asserting "waiver of tort";
  - (g) paragraphs 65 to 67 claiming punitive damages; and
  - (h) paragraphs 71(c) to (h), claiming remedies related to the property of the plaintiff that is vested in his trustee.
26. Alternatively the defendant applies for an order under Rule 14.24 striking those paragraphs.
27. The defendant applies for an order under Rule 38 determining, as points of law, or alternatively as points of mixed fact and law, that:
- (a) the *Competition Act* does not apply to the defendant as an agent of the Crown; and,
  - (b) the *Gaming Act, 1710*, referred to by the plaintiff as the *Statue of Anne, 1710*, cannot apply to the defendant as an agent of the Crown,
- and dismissing those claims.
28. Alternatively the defendant applies for an order under Rule 14.24 striking the following paragraphs of the further amended statement of claim for failure to disclose a reasonable cause of action against the defendant as an agent of the Crown:
- (a) paragraphs 40 to 44, which concern the *Competition Act* allegations;
  - (b) paragraphs 52 and 53, which concern the allegations related to the *Gaming Act, 1710*, referred to by the plaintiff as the *Statue of Anne, 1710*;

(c) the references to the *Competition Act* and the *Gaming Act, 1710*, referred to by the plaintiff as the *Statue of Anne, 1710*, in paragraph 59; and

(d) the relief claimed in paragraph 71(f), (h) and (j).

**Dated** at St. John's, in the Province of Newfoundland and Labrador, this 26th day of January, 2010.

**Amended** at St. John's, in the Province of Newfoundland and Labrador, this 15th day of December, 2011.



Daniel W. Simmons  
Ottenheimer Baker  
Solicitors for the Defendant  
P.O. Box 5457, 10 Fort William Place  
St. John's, NL A1C 5W4

To:  
Chesley Crosbie Q.C.  
Ches Crosbie Barristers  
Solicitors for the plaintiff  
169 Water Street, 4th floor  
St. John's, NL A1C 1B1