

IN THE SUPREME COURT OF NEWFOUNDLAND & LABRADOR
TRIAL DIVISION

BETWEEN:

THE ESTATE OF SUSAN PIERCEY, as
represented by KEITH PIERCEY, and KEITH
PIERCEY AND CATHERINE PIERCEY in their
own right

PLAINTIFFS

AND:

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

DEFENDANT

Brought under the *Class Actions Act*, S.N.L.2001, c. C-18.1

STATEMENT OF CLAIM

The Plaintiffs

1. The Plaintiffs Keith Piercey and Catherine Piercey are parents of Susan Piercey, deceased, and reside at 34 North Street, Corner Brook, in the Province of Newfoundland and Labrador, A2H 2L1. They bring a class action pursuant to the *Class Actions Act*, S.N.L. 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 Plaintiffs.
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 reels are programmed to generate an abundance of 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 during the spin animation.
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. 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.
23. 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.
24. 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.

25. The Plaintiffs say 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.
26. 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.
27. The Plaintiffs say 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.
28. 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 Plaintiffs say 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 Plaintiffs say that announced measures are cosmetic and VLTs still retain the essential characteristics by which they remain inherently deceptive and unsafe.

29. In Newfoundland and Labrador, at least 20% of VLT gamblers are experiencing significant problems or are at significant risk for such problems, compared with a problematic gambling rate of only about 3% for other forms of gambling.
30. 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.

Deception of Representative Plaintiff

31. Keith Piercey is father of Susan Piercey, and representative of her estate, and pleads the *Fatal Accidents Act* and the *Survival of Actions Act*. Keith and Catherine Piercey also sue for loss of guidance, care and companionship.
32. Susan Piercey was born on March 17, 1972 and was attending Memorial University of Newfoundland in St. John's when she began playing VLTs in 1995.
33. In 1992, at age 20, Susan Piercey was diagnosed with bipolar disorder, which was controlled with medication.
34. Keith Piercey first became aware that his daughter Susan had a VLT problem when he had a meal with her at a restaurant in St. John's, and she was given money to pay for the

meal. She left the table, but instead of paying for the meal, she spent the money on VLTs.

35. Over the ensuing years, Susan spent her tuition money, her income from a part-time job, money stolen from her grandmother, and money borrowed from a finance company, all to play VLTs and feed her addiction. She dropped out of university, and took on several jobs to feed her addiction, and still had no money left for the necessities of life. Her parents went to St. John's and brought her home, where she received counseling, but on July 28, 2003 she died of a drug overdose. Her death was a suicide caused by the deceptive and addictive features of VLTs.

Violation of Trade Practices Act

36. The Plaintiffs plead that the Defendant is under a duty to disclose all material facts regarding VLTs. The failure of the Defendant to disclose material facts, as alleged herein, creates a presumption of individual reliance for the purpose of maintaining an action under the *Trade Practices Act*.
37. The Plaintiffs state that the Defendant has committed breaches of s. 5(1) of the *Trade Practices Act*, namely unfair trade practices. These practices constitute representations, conduct or failure to disclose material facts that have the effect, or might reasonably have the effect, of deceiving or misleading a consumer, and include the practices prohibited by s. 7 and by the following sections of s. 5(1) of the *Act*:
- (a) a representation that the goods or services have sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that they do not have;
 - (b) a representation that the supplier has sponsorship, approval, status, affiliation or connection that he or she does not have;
 - (c) a representation that the goods or services are of a particular standard, quality or grade where they are not;

(o) a representation that the supplier is soliciting or communicating with consumers with a certain interest or purpose where he or she is not;

(w) a representation using exaggeration, innuendo or ambiguity as to a material fact.

38. The Plaintiffs state that the Defendant has committed unconscionable acts or practices contrary to s. 7 and s. 6(1) of the *Trade Practices Act*, considering the circumstances that the Defendant knew or ought to have known. These practices include knowledge by the Defendant of the matters prohibited by the following subsections of s. 6(1) of the *Act*:

(b) that the consumer was unable to receive a substantial benefit from the consumer transaction;

(d) that the terms and conditions of the consumer transaction were so one-sided, harsh or adverse to the consumer as to be inequitable;

(e) that the supplier used trickery or undue pressure in order to induce the consumer to enter into the consumer transaction;

(f) that the supplier took advantage of the extreme necessity or helplessness of the consumer or the inability of the consumer to protect his or her interests because of his or her physical or mental disability, his or her ignorance, illiteracy, age or emotional state, or his or her inability to understand the character, nature or language of the consumer transaction.

39. The Plaintiffs state that s. 5(1) and s. 6(1) of the *Trade Practices Act* do not provide an exhaustive list of acts or practices which are unfair or unconscionable, and adds that the Defendant is in overall breach of the *Act* in supplying a product or service which is designed to be inherently deceptive, inherently addictive, and inherently dangerous when used as intended, without any information or warning, and the true nature of which product or service it has concealed by misinformation.

Factors Relevant to Remedy

40. The Plaintiffs state 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

41. The Plaintiffs state 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

42. The Plaintiffs claim the following relief:
- (a) an order certifying the proceeding as a class proceeding;
 - (b) an order declaring the act or practice to be an unfair trade practice or unconscionable act or practice;
 - (c) an accounting for and disgorgement of profits;
 - (d) an injunction restraining the Defendant from continuing the unfair trade practice or unconscionable act or practice;
 - (e) a declaration that the Defendant holds all revenues derived from VLTs in this province in constructive trust for members of the class;
 - (f) costs of administering and distributing an aggregate monetary award; and,
 - (g) such other directions or relief that the court considers appropriate.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 20th day of April, 2007.

CHES CROSBIE BARRISTERS
 Solicitors for the Plaintiffs whose
 address for service is:
 169 Water Street, 4th Floor
 St. John's, NL A1C 1B1
Per: Chesley F. Crosbie, Q.C.

TO: THE DEFENDANT
 Atlantic Lottery Corporation Inc.
 30 Hallett Crescent
 St. John's, NL A1B 4C5

ISSUED at St. John's, in the Province of Newfoundland and Labrador, this 20 day of April, 2007.

Sgt. M. N. Nelligan
 Court Officer