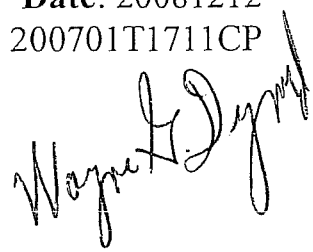
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

Citation: *Piercey Estate v. Atlantic Lottery Corporation Inc., 2008NLTD202*
Date: 20081212
Docket: 200701T1711CP



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 L'ATLANTIQUE	DEFENDANT

Before: The Honourable Mr. Justice Wayne G. Dymond

Place of hearing: St. John's, Newfoundland and Labrador

Issues:

Does the *Trade Practices Act*, RSNL 1990 c. T-7 apply to Atlantic Lottery Corporation for the purposes of creating a cause of action in a class action law suit? Is a Rule 38 Application to dismiss such an action an appropriate use of the Supreme Court Rules prior to a certification hearing under the *Class Actions Act* SNL 2001 c. C-18.1?

Appearances:

Chesley F. Crosbie, Q.C.	Appearing on behalf of the Plaintiffs
J. David Eaton, Q.C.	Appearing on behalf of the Defendant

Authorities Cited:

CASES CONSIDERED: **Miawpukek Band v. Ind-Rec Highway Services Ltd.** (1999), 172 Nfld. & P.E.I.R. 245 (NFCA); **Baxter v. Canada (Attorney General)** 2005CarswellOnt 2260 S.C.J.; **Anderson et al. v. The Attorney General of Canada**, 2008 NLTD 166; **Potter v. The Bank of Canada**, 2005 OJ 772; **Province of Bombay v. City of Bombay**, [1947] A.C. 58 (P.C.); **Alberta Government Telephones v. Canadian Radio-television and Communications Commission**, [1989] 2 S.C.R. 225; **The Lord Advocate v. Dumbarton District Council**, [1990] 2 A.C. 580 H.L.; **Just v. British Columbia**, 1989 CarswellBC 234 (S.C.C.); **Pritchett (Guardian ad litem of) v. Gander (Town)** (2001), 205 Nfld. & P.E.I.R. 45; **Bropho v. The State of Western Australia**, 1990 171 C.L.R.(1); **R. v. Eldorado Nuclear Ltd.**, [1983] 2 S.C.R. 551(SCC).

STATUTES CONSIDERED: *Trade Practices Act*, RSNL 1990 c. T-7; *Lotteries Act*, SNL 1991, Chapter 53; *Video Lottery Regulations, 760/96*; *Canada Business Corporations Act* (R.S., 1985, c. C-44); *Class Actions Act*, SNL 2001 c. C-18.1 (as amended); *Interpretation Act*, R.S.C. 1985 c. 1-23, s. 17; *Combines Investigation Act*, R.S.C. 1970, c. C-23; *Interpretation Act*, RSPEI 1988 c. I-8; *Interpretation Act*, RSBC 1996 c. 238.

RULES CONSIDERED: *Rules of the Supreme Court, 1986*

TEXT CONSIDERED: Liability of the Crown, 3d Edition, Hogg and Monahan, CarswellRef page 280, c. 11.3(e); **Federalism and Provincial Government Immunity** (1979), 29 U. of T. Law Journal 1, by Katherine Swinton; **Construction of Statutes**, Fifth Edition, 2008, Ruth Sullivan.

REASONS FOR JUDGMENT

DYMOND, J.:

INTRODUCTION

[1] The Atlantic Lottery Corporation Inc, (hereinafter referred to as "ALC") has taken application as the defendant resulting from a class action lawsuit instituted by the plaintiffs in an attempt to be certified as a class in a class action lawsuit against the applicant defendant, ALC.

[2] In the plaintiffs' statement of claim, the plaintiffs claim that the defendant has committed unconscionable acts or practices contrary to section 5(1) and section 7 of the *Trade Practices Act*, RSNL 1990 c. T-7.

[3] The amended statement of claim filed with the Court outlines at par. 46 their position:

> 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 designated 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.

[4] The product or service referred to is a scheme set up under the *Lotteries Act*, SNL 1991, c. 53, which is provincial legislation. Specifically, the amended statement of claim targeted the Video Lottery Terminal in this class action which has been specifically allowed under the *Video Lottery Regulations, 760/96* passed pursuant to section 5 of the *Lotteries Act*.

[5] The plaintiffs outlined the deceptive nature of VLTs in pars. 10 through to par. 30 in the amended statement of claim.

[6] Under the *Criminal Code*, section 206(1)(d) it is an offence to operate a game of chance. Section 206(1):

> 206. (1) Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years who
>
> ...
>
> (d) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed to be advanced, lent, given, sold or disposed of;

[7] The *Criminal Code* allows for an exception under section 207(1)(a) which states as follows:

> 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;

[8] The province of Newfoundland and Labrador has enacted such legislation in the *Lotteries Act* and the *Video Lottery Regulations* pursuant to the *Criminal Code* exemptions set out in section 207(1)(a) above.

[9] As far as video lotteries are concerned, which is the basis of the present class action, the core of the relief set out in the statement of claim deals with the VLTs. Section 3 of the *Video Lottery Regulations* allows government, or an agent of

government, to operate a video lottery scheme. The Act creates a monopolistic situation of this type of game of chance. Section 3 of the *Video Lottery Regulations* states as follows:

> 3. (1) A person shall not operate a video lottery in the province unless it has been approved by the corporation.

[10] In this case the corporation has been defined under 2(b) of the *Regulations* as Atlantic Lottery Corporation (hereinafter referred to as "ALC") as follows:

> 2. In these regulations
>
> ...
>
> (b) "corporation" means the Atlantic Lottery Corporation;

[11] In the province of Newfoundland and Labrador all video lottery schemes are approved and run by the Atlantic Lottery Corporation on behalf of the government of Newfoundland and Labrador. The Corporation is a federally incorporated company incorporated under the *Canada Business Corporations Act* (R.S., 1985, c. C-44). It was incorporated in 1976. It is registered to do business in Newfoundland and Labrador and in other provinces. The head office is located in Moncton, New Brunswick.

[12] The shareholders of ALC are made up of four shareholders, all holding one share each. The 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.

[13] All profits of ALC, after expenses, are divided between the shareholders on the basis of the percentage of monies spent on lotteries in each province. The Newfoundland share is held by the Government of Newfoundland and Labrador

through the Minister of Finance. The monies are added to the Provincial Consolidated Revenue Fund.

BACKGROUND TO THE PRESENT APPLICATIONS

[14] The plaintiffs are representative plaintiffs who have applied under the *Class Actions Act*, SNL 2001 c. C-18.1 (as amended).

[15] The plaintiffs have taken an interlocutory application as follows:

CERTIFICATION

1. An Order certifying this action as a Class action.

CLASS AND CLASS REPRESENTATIVE

2. An Order describing as a "Class":

   "Natural persons, resident in Newfoundland and Labrador, who, during the Class Period, paid the Defendant to gamble on VLT games, excluding video poker games and keno games, in Newfoundland and Labrador.

   The Class Period is the period from six years before the bringing of this action, up to the opt-out date set by the Court in this action.

   Excluded from the class are directors, officers and employees of the Defendant."

3. An Order appointing Keith Piercey, as representative for the Estate of Susan Piercey, and Jerome Mackey as the representative Plaintiffs of the Class.

4. An Order appointing the firm of Ches Crosbie Barristers as counsel to the Class ("Class Counsel").

NATURE OF THE CLAIM

5. An Order stating the nature of the claims asserted on behalf of the Class to be unfair trade practices and unconscionable trade practices contrary to the *Trade Practices Act,* R.S.N.L. 1990, c.T-7 (the "TPA").

RELIEF SOUGHT

6. An Order stating the relief sought by the Class members to be:

   (a) all issues of the Defendant's liability under the TPA; and

   (b) remedies available under the TPA.

[16] The plaintiffs also request the Court to set out the common issues in par. 7 of the interlocutory application for certification.

[17] As a general rule, the first step in any class action is to apply for certification. The *Act* provides for a case management judge to be appointed for the purposes of directing how the intended class action would proceed and set various time limits for filings between the parties. This is done through case management meetings whereby the plaintiff's counsel and the defendant's counsel meet with the case management judge to try and keep the case on a schedule.

[18] The *Class Action Act* contemplates certification as being one of the initial steps in the process. In the certification application the application judge does not have to make any finding as to whether the plaintiff's claim will be successful. The *Class Action Act*, sections 3(2) and (3) state as follows:

> (2) The member who commences the action shall apply to a judge of the court within the time period in subsection (3) for an order certifying the action as a class action and appointing the member as the representative plaintiff.
>
> (3) An application under subsection (2) shall be made
>
> (a) within 90 days after

(i) the day on which the defence was served, and

(ii) the day on which the time set in the Rules of the Supreme Court, 1986 for filing the defence expires, if a defence is not served,

whichever is later; or

(b) with leave from a judge of the court.

[19] In the present case the defendant has not filed a defence and has made a preliminary application for particulars, along with a further application pursuant to Rule 38 of the Supreme Court Rules.

[20] The general rule then is the hearing of certification applications as the first step. I agree with this in general terms. Reference: **Baxter v. Canada (Attorney General)** 2005CarswellOnt 2260 (S.C.J.). In that case the defendant, Attorney General of Canada, sought to join some 80 third parties to the action. The defendant argued that this should be considered before certification. The Court disagreed and held that the normal course is to do the certification application first.

[21] The case of **Carol Anderson, Allen Webber and Joyce Webber** (herein referred to as **Anderson et al. v. The Attorney General of Canada**, 2008 NLTD 166) is a Newfoundland Supreme Court decision released less than two months ago. In that case the issue was whether or not to hear and determine certain defence motions prior to, or following the certification hearing of a class action application. The trial judge in that case, at par. 8 makes the following comment:

> The very nature and purpose of class action proceedings is to hear the many, as one; rather than one after the other, in order to facilitate time and efficiency without compromising fairness. To that end the *Act* mandates that the certification hearing commence within the 90 day time period set out in section 3, subsection 3.

[22] In that case the preliminary application dealt with a demand for particulars pursuant to Rule 14.23 of the *Rules of the Supreme Court, 1986*. There was a further application to add parties.

[23] The trial judge in that case also referred to section 6 subsection (2):

> An order certifying an action as a class action is not a determination of the merits of the action.

[24] These arguments have been pressed by the plaintiffs in the present application by the defendant, ALC. In this present hearing there are two separate applications. The first application is for the providing of particulars by the plaintiffs to the defendant, which fits within the type of application dealt with in **Anderson et al. v. The Attorney General** cited above. I will deal with the particulars issue a little later in this decision.

[25] The second application is an application taken pursuant to Rule 38 of The *Rules of the Supreme Court, 1986*. This rule allows the Court to rule on certain questions of law which are not inconsistent with the *Class Actions Act*, i.e. where such a ruling would tend to more efficiently move the certification hearing along. In the **Baxter** decision referred to above, Winkler, J. admitted to some exceptions to the general rule. At par. 14 of the **Baxter** case he states:

> 14 Admittedly, there are instances where, as indicated in both Attis and Moyes, there can be exceptions to the rule that the certification motion ought to be the first procedural matter to be heard and determined. It may be appropriate to make an exception where the determination of a preliminary motion prior to the certification motion would clearly benefit all parties or would further the objective of judicial efficiency, such as in relation to a motion for dismissal under Rule 21 or summary judgment under Rule 20. Such motions may have the positive effect of narrowing the issues, focusing the case and moving the litigation forward. An exception may also be warranted where the preliminary motion is time sensitive or necessary to ensure that the proceeding is conducted fairly...

[26] Further, at par. 15, Winkler states:

> 15 However, there is an important distinction between Rule 20 and 21 motions that are brought by the defendant and those that are brought by third parties. In many cases, Rule 20 and 21 motions brought by the defendant have the potential to render the certification motion unnecessary if they are determined prior to certification, thereby furthering the objective of judicial economy. Rule 20 or 21 motions brought by third parties in relation to claims against these third parties do not have the same potential to render the certification motion unnecessary. The proceeding as between the plaintiff and defendant will be unaffected and the determination as to whether the action is a certifiable class proceeding must still be made.

[27] In the present application under Rule 38 it is the defendants that are asking the Court to determine whether the *Trade Practices Act* has any application to the defendant ALC in the circumstances. This is a question of law and the issue is whether it can be determined prior to certification.

[28] The plaintiffs take the position that first of all it should not be determined prior to the certification or, alternatively, it should be heard at the certification hearing. The plaintiffs claim that in order to make such a ruling, there are insufficient facts to ground the application.

[29] ALC, however, takes the contrary view. ALC relies on affidavit evidence on the record which it claims would enable the Court to make the necessary finding of fact and law.

[30] In relation to the present application, the Court has to consider whether Rule 38 of the *Rules of the Supreme Court* is an appropriate vehicle to deal with the issue raised in the application.

[31] The issue raised by the applicant is a question of law – specifically, whether the *Trade Practices Act* has any application to the defendant ALC in the circumstances alleged in the amended statement of claim.

[32] The basis of the plaintiffs' amended statement of claim pleads an alleged cause of action against the defendants based entirely on section 14(1) of the *Trade Practices Act*, RSNL 1990 c. T-7, as amended.

[33] The plaintiffs' action relies specifically on section 14(1) of the *Trade Practices Act* as providing the cause of action and seeks remedies pursuant to 14(2) of the *Trade Practices Act*. The plaintiffs seek certification on behalf of a class of persons who paid to gamble on VLTs since April of 2001.

[34] The defendant argues that the *Trade Practices Act* does not apply to or bind the Crown, or its agent ALC. If the *Trade Practices Act* does not apply, then there can be no cause of action because the cause of action is created by statute. This is the position of the defendant and the applicant to this application.

[35] This application by ALC is certainly unusual in that success at this stage of the proceedings would end the matter, there being no need to proceed with further case management or a certification application.

[36] The plaintiffs argue that there is insufficient agreed fact to proceed under Rule 38. One of the factual issues is whether ALC is an agent of the Crown. I will deal with this issue a little later in this decision.

[37] A case similar to the present case is the case of **Potter v. The Bank of Canada** 2005 OJ 772. In that case the defendant brought a preliminary motion for an order striking out portions of the statement of claim and for a declaration that the *Class Proceedings Act* was inapplicable to the action.

[38] In that case the plaintiffs, former employees of the defendant bank receiving a defined pension benefit, had brought a certification motion in which they sought a declaration that a pension plan/fund was subject to an irrevocable trust for the benefit of its members, and for a declaration that the defendant had no beneficial interest in any part of the fund and was responsible for payment of all expenses. They also brought a declaration that the payment of expenses from the fund constituted a breach of trust and claimed damages for breach of trust and contract.

[39] In the **Potter** decision the trial judge allowed the hearing of the application before certification and gave her reasons for doing so at pars. 16 and 17 of the decision:

> 16 If, as the Bank urges it to do, this Court were to hear the Bank's motion to strike first and to determine that potential class members cannot legally receive damages/equitable allocation/direct payments out of the Fund, that determination would be relevant in deciding whether a class proceeding would be preferable to some other procedure. If on the preliminary motion this Court were to declare the CPA to have no application, the Plaintiffs' proposed certification motion would be clearly inappropriate.
>
> 17 In that event, a great deal of time and expense would have been wasted in preparing for and arguing the certification motion.

[40] The plaintiffs in the present case take the position that it should be heard after or at the same time as the certification application. The motions judge in **Potter** also addressed that position at par. 18 of **Potter:**

> 18 If this Court were to hear the certification motion and the motion to strike together, the parties would find it necessary to make a plethora of alternative arguments dependent on whether the Plaintiffs would ultimately be allowed to pursue their claims for damages/equitable allocation/direct payments.

[41] For the above reasons I opted to hear the Rule 38 application prior to the certification application based on these cases that I have referred to above. If the Rule 38 application is not successful, there is no prejudice to the plaintiffs who

would be able to continue with the certification application at a later date. Any further preparation then would be exercised knowing that at least to the certification, the cause of action would be on a sound footing.

[42] However, a ruling against the plaintiffs would result in not throwing good money after bad – it would result in a better allocation of resources for both the plaintiffs and the defendants. Having decided to hear the Rule 38 application, the question is whether it is an appropriate vehicle for dealing with the issue before the Court.

IS RULE 38 THE MOST APPROPRIATE METHOD FOR DEALING WITH THE ISSUE?

[43] **Miawpukek Band v. Ind-Rec Highway Services Ltd.** (1999), 172 Nfld. & P.E.I.R. 245 (NLCA), a Court of Appeal decision, is authority for the various factors a Court must consider in a Rule 38 hearing. If the hearing has the potential to determine a preliminary issue, which could substantially dispose of the case, this is a factor in favour of proceeding. The defendant in the present application argues that the *Trade Practices Act* does not apply to ALC. ALC argues, therefore, there is no case to defend.

[44] Is there an evidentiary record capable of allowing the application judge to determine the issue? The plaintiffs' amended statement of claim sets out the history of the legislative scheme, under the *Lotteries Act* and the *Video Lottery Regulations* outlined above. The defendant has outlined the history of the creation of ALC, the corporate structure, and relies on the affidavit of Patrick Daigle with various schedules including shareholders' agreements and the various inter-provincial agreements to carry out the video lotteries scheme in the respective Atlantic Provinces. The Court has before it a letter from the former Minister of Finance authorizing ALC to act as its agent in the operation of the lottery schemes in Newfoundland and Labrador. There would appear to be a fully documented record for the Court to rely on.

[45] As to the third and fourth principles set out in the **Miawpukek Band** case, Green, J.A., as he then was, indicated that major factual issues can be determined from the record. There are no credibility issues, that I can see, that would impede a ruling on the points of law and the interpretation of statute law which is at the core of this application. In this case there may have to be some findings of fact, but upon review of the record, it does not impede the Court from making necessary finding of facts related to the issues before the Court.

[46] If the finding of a particular fact, or set of facts, do not resolve in anything other than a trial in another forum, then a case can be made for not proceeding with a Rule 38 application. However, if a finding of fact enables the Court to determine a point of law which has the ultimate potential of deciding a key trial issue, then there is further reason to proceed on a Rule 38 hearing. A preliminary determination as to whether ALC is an agent of the Crown, and if it is an agent whether it is bound by the *Trade Practices Act*, would resolve a major legal issue which would have to be dealt with at a certification hearing in any event.

[47] The plaintiffs' argue that even if the Court would find that ALC is a Crown agent, if the Crown agent acts outside the scope of its authority, ALC could still be liable. The plaintiffs argue that there is an insufficient record before the Court to make that determination, and as such, a Rule 38 application should not proceed at this time.

[48] This argument, of course, may well depend on the Court having to interpret the case law in this area. As such, the finding may be within the scope of a Rule 38 ruling. This will be examined in more detail later in this decision.

[49] Having reviewed the record before the Court, the briefs filed by counsel and listened to oral argument, I am satisfied on a balance of probabilities that the defendant has put forward sufficient record and argument that the six principles set out in **Miawpukek Band v. Ind-Rec Highway Services Ltd.** have been met so that the application presently before the Court is a reasonable way to proceed.

IS THE CROWN BOUND BY THE *TRADE PRACTICES ACT*?

[50] The *Trade Practices Act* does not specifically state that the *Trade Practices Act* binds the Crown. The House of Lords set the position at common law in the case of **Province of Bombay v. City of Bombay**, [1947] A.C. 58 (P.C.).

[51] The **Bombay** case raised a question whether the Crown was bound by a statute granting powers to municipalities. The Crown in the right of the Province of Bombay held land in the City of Bombay. The Crown claimed to be exempt from the *City of Bombay's Municipal Act*, which conferred power on an official of the City to lay water mains into, through, or under any land whatsoever within the City. The *Act* was silent as to whether this power was exercisable over lands held by the Crown. The Privy Council held that the Crown was exempt; the *Act* did not bind the Crown because it did not do so by express words or necessary implication.

[52] The Supreme Court of Canada approved the principles of **Bombay** in the **Alberta Government Telephones v. Canadian Radio-television and Communications Commission**, [1989] 2 S.C.R. 225 (SCC). In the **AGT** case the Court was dealing with an interpretation of section 16 of the Federal *Interpretation Act*, R.S.C. 1985 c. 1-23, s. 17. Section 16 of the *Interpretation Act*, at the time of the decision, read as follows:

> 17. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

[53] Chief Justice Dickson in the **AGT** case summarized the Court's interpretation of section 16 of the Federal Act at par. 130 of the AGT case:

> In my view, in light of PWA and Eldorado, the scope of the words "mentioned or referred to" must be given an interpretation independent of the supplanted common law. However, the qualifications in *Bombay*, supra, are based on sound principles of interpretation which have not entirely disappeared over time. It

> seems to me that the words "mentioned or referred to" in s. 16 are capable of encompassing (1) expressly binding words ("Her Majesty is bound"), (2) a clear intention to bind which, in *Bombay* terminology, "is manifest from the very terms of the statute", in other words, an intention revealed when provisions are read in the context of other textual provisions, as in *Ouellette*, supra, and, (3) an intention to bind where the purpose of the statute would be "wholly frustrated" if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced. These three points should provide a guideline for when a statute has clearly conveyed an intention to bind the Crown.

[54] The **Bombay** principles, which the Supreme Court of Canada adopted in AGT, has been reviewed and upheld by the House of Lords in 1990 in the case **The Lord Advocate v. Dumbarton District Council**, [1990] 2 A.C. 580 H.L. That case was released one year after the AGT case.

[55] The AGT case makes it clear that if there is to be any reversal of the **Bombay** rule in Canada the change must come from the legislature rather than the courts. Reference: **Liability of the Crown**, 3d Edition, Hogg and Monahan, CarswellRef page 280, c. 11.3(e).

[56] The *Interpretation Act*, RSNL 1990 I-19, sets out a similar provision to the Federal *Interpretation Act*. Section 12 is the relevant section:

> No provision in an Act is binding on the Crown or affects the Crown or the Crown's rights or prerogatives unless it is expressly stated in it that the Crown is bound by it.

[57] Section 12 of the Newfoundland *Act* is very similar to the wording that was in the Federal *Act* before it was amended in 1967-68. The 1952 *Act* stated:

> *Interpretation Act* R.S.C. 1952 c. 158 s. 16

> No provision or enactment in any act affects, in any manner whatsoever, the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby.
>
> 1967-68 amendment, s.16
>
> No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogative in any manner, except only as therein mentioned or referred to.

[58] The language used in the Newfoundland *Interpretation Act* is more restrictive than the 1967-68 amendment in that it states, "unless it is expressly stated."

[59] Nowhere does The *Trade Practices Act* state that the *Act* applies to the Crown. If the Court accepts the extension of the common law as set out in the **AGT** case referred to in par. 53 above, could it be implied from the reading of the whole *Act* that the *Trade Practices Act* applies to the Crown. The *Act* cannot be said on a reading of the whole of the *Act* that the legislature intended to include the Crown as being bound by the *Trade Practices Act* to it.

[60] Although the Crown is not mentioned in the legislation, there is a reference in section 16(3) where the director takes an action on behalf of a consumer in the public interest. It states that any monies awarded against the consumer is recoverable from the consumer and is not recoverable from the director or the province. Section 16(3) of the *Trade Practices Act* states:

> (3) In an action taken under this section,
>
> (a) money paid the director, excluding costs awarded, shall be paid by the director to the consumer;
>
> (b) money awarded against the consumer is recoverable from the consumer and is not recoverable from the director or the province; and

(c) the costs of the action as awarded by the court shall be paid to or paid by the director.

[61] It cannot be said that at the time the *Trade Practices Act* was enacted there was an implied intent to have the Crown bound by the *Trade Practices Act*. Under the second principle in **AGT**, Chief Justice Dickson used the words "a clear intent to bind," where actual words binding the Crown are not present.

[62] Under the third principle in **AGT** could it be said that looking at the purpose of the *Act* in question, the *Trade Practices Act,* would the *Act* be wholly frustrated if the government were not bound?

[63] The plaintiffs take the position that in modern government, government through agencies and corporations are interfering more and more with the consumer and, as such, it makes sense to have the governments responsible for their own actions or actions of its agents.

[64] The test, however, is not whether it would be convenient or desirable to have the *Trade Practices Act* apply to the Crown, where there is no express or implied intent, but rather would the statute operate and fulfill its purpose even if the Crown were not bound.

[65] The *Trade Practices Act* was originally put in place to protect consumers from unfair trade practices. Legislation does fulfill its objectives in that it protects consumers from consumer transactions provided by suppliers. It was directed towards private enterprise. It is not difficult to make the argument that government is the supplier and through its agents carries out consumer transactions by providing services. The various government departments provide health care services, inspection services, etc.

[66] It is not that government or the Crown services do not fit within the definition of services and consumer transactions, the question is whether the act is functional even if the Crown, through government, is not expressly or impliedly covered by the *Act* in question, in this case the *Trade Practices Act.*

[67] As Chief Justice Dickson stated in **AGT** referred to above, the test to be applied is whether the purpose of the statute would be wholly frustrated if the government were not bound. His words were, "...if an absurdity (as opposed to simply an undesirable result) were produced," it cannot be said that over the past twenty years the purposes of the *Trade Practices Act* have been frustrated.

[68] What we have is an undesirable result because a large portion of consumer transactions which are carried out by the Crown may not be covered by the *Trade Practices Act.*

[69] As pointed out in the **AGT** case, Chief Justice Dickson made it clear that if the common law has to be amended, it should be done by Parliament and not the Courts. It would be very simple to state clearly that the *Trade Practices Act* applies to the Crown. To date this has not been done, nor does there appear to be a willingness on the part of government to make this happen. This is clearly a policy decision for government to make.

[70] The plaintiffs further argue that the Courts have continually expanded the common law in the area of tort reform. The plaintiffs cite cases such as **Just v. British Columbia**, 1989 CarswellBC 234 (S.C.C.). In that case the Court extended liability to the Crown, through the Department of Highways, for not taking proper care in road maintenance. In that case rocks fell on a vehicle causing injury to the occupants. The Court in that case distinguished the difference between having a duty of care based on operational decisions as opposed to policy decisions. The Court held that governments had no duty of care where the actions arose from a policy decision. However, the manner and quality of government highways inspections, or lack thereof, could give rise to a breach of the duty of care to the public and hold the Crown liable. The Newfoundland Court of Appeal in the case

of **Pritchett (Guardian ad litem of) v. Gander (Town)** (2001), 205 Nfld. & P.E.I.R. 45 (NLCA) discussed the **Just** decision and the Court reviewed the expanding liability of the Crown in the area of common law tort.

[71] The plaintiffs argue that the *Trade Practices Act*, in its attempt to protect consumers, has created a statutory tort. I do not accept that classification in the context of the *Trade Practices Act*. The cause of action under section 14 is created by the *Act* itself. The *Act* allows for prosecution for breaches of the *Act*. It creates an action for consumers, but the action is not derived from the common law doctrine of a duty of care as in the case of tort law, contract law and the common law generally. The common law is a law which is properly situated for interpretation and for the Courts to expand the law and give the laws an interpretation which could be inclusive over various classes of person who may or may not be bound by the developing law.

[72] However, the cause of action which is the basis of the amended statement of claim in this class action was created by, and is the result of, the statute under which it was commenced, i.e. the *Trade Practices Act*.

[73] This is not to say that there is not an appetite for reform in this area of statutory interpretation. Australia has seen fit to extend the common law interpretation of **Bombay** in a recent decision **Bropho v. The State of Western Australia**, 1990 171 C.L.R.(1). That case dealt with a Western Australia statute protecting Aboriginal heritage sites against disturbances and applied to a statutory Crown agent which was seeking to develop certain Crown lands. In that case the Australian High Court developed a commercial exemption on the basis that it concluded the **Bombay** exemption is no longer applicable in the contemporary context, and the activities of the government reach into almost all aspects of commercial, industrial and developmental and instrumentalities to compete to have commercial dealings on the same basis as private enterprise. Reference: **Bropho**, page 19.

[74] Chief Justice Dickson made it clear in the Supreme Court of Canada case of **AGT** that the creation of a commercial activity exception was a matter for Parliament rather than the courts. Reference: **AGT**, page 300. In that situation Dickson referred to Chief Justice Laskin in **PWA** at par. 164 of **AGT** when he stated:

> Yet, seven years later, Laskin C.J. in PWA, supra, was firmly of the view that there is no commercial exception to Crown immunity.

[75] Dickson, C.J. concludes at par. 165:

> In any event, assessment of the desirability of a commercial exception is for Parliament to make, if so inclined, as was the case with the *State Immunity Act*, supra, in respect of sovereign immunity.

[76] It would appear that the **Bombay** rule and its exceptions is the present state of the law in Canada as set out in the **AGT** case. England and New Zealand have taken the same position as the Canadian position, whereas Australia has seen fit to expand the rule to a more commercial activity exception.

[77] Based on the present state of the law in Canada and an interpretation of the Newfoundland *Interpretation Act*, the Crown is not bound by the *Trade Practices Act.*

If the *Trade Practices Act* does not apply to the Crown, could it apply to the Atlantic Lottery Corporation?

[78] At the beginning of this decision I outlined the various provisions of the *Criminal Code*, the *Lotteries Act* and the *Video Lottery Regulations* setting out the legislative history in the evolution of the business of lotteries in Newfoundland and Labrador and how this has developed. The corporation, as defined in section 2(b) of the *Video Lottery Regulations*, is the Atlantic Lottery Corporation. It is an

independent corporation, as noted earlier, which was incorporated under the *Business Corporations Act*.

[79] In the affidavit of Patrick Daigle reference is made in par. 9 to a letter from the Minster of Finance authorizing the Atlantic Lottery Corporation to act on its behalf in the organization and management of video lotteries in Newfoundland and Labrador. There is little doubt but there has been express authority given to ALC to act as an agent of the Government of Newfoundland and Labrador as it relates to VLTs as early as 1990.

[80] The *Criminal Code* only allows provincial governments to operate video lotteries and gives them authority to pass legislation and regulations for so doing.

[81] The plaintiffs are not pleading illegality of common law which could be considered unlawful at common law and, as such, Crown immunity may not follow. In this case the activity complained of is a statutory breach. Does the statute therefore apply to the Crown agent? I find as a fact, for the purposes of this application, that ALC is an agent for the Crown to operate and manage video lottery terminals in the province of Newfoundland and Labrador. I think this is clear from the record and also clear from the legislation and the documentation provided in the affidavit of Daigle, as well as in the certification application provided by the plaintiffs.

[82] ALC is accountable to the Government of Newfoundland and Labrador pursuant to the terms of the Unanimous Shareholders Agreement attached to the affidavit of Mr. Daigle at Tab I.

[83] The issue as to whether Crown immunity flows to a Crown corporation or a private corporation under a federal or provincial corporations act was the subject of a decision by the Supreme Court of Canada in the case of **R. v. Eldorado Nuclear**

Ltd., [1983] 2 S.C.R. 551 (SCC) (hereinafter referred to as **Eldorado Nuclear**). This was a majority decision of the Court delivered by then Chief Justice Dickson.

[84] In **Eldorado** the Crown was charged with a violation of the *Combines Investigation Act*, R.S.C. 1970, c. C-23. The charge was conspiracy with others to unduly lessen competition in the production or sale of uranium products in Canada. The argument before the Court was that as agents of the Crown they were immune from prosecution under section 32(1)(c) of the *Combines Investigation Act*.

[85] The case is not dissimilar from the present case where the plaintiff is alleging misrepresentation under the *Trade Practices Act*. If the allegations of the plaintiff are correct, and for the purposes of argument one assumes that they are, the director could take a prosecution against ALC for breaches of the *Trade Practices Act*.

[86] The defence of **ALC** then would be similar to the argument of **Eldorado** that the *Combines Investigation Act* does not apply due to Crown immunity and the *Trade Practices Act* does not apply to **ALC** for the same reason. Why this is possible if an illegal act has been committed was put to the Court in **Eldorado**. Chief Justice Dickson's answer as set out on page 564 of the **Eldorado** case is as follows:

> The maxim that the Queen can do no wrong is a legal fiction which, at common law, serves the purpose of preventing the Queen from being impleaded in her own courts. There is, however, no comparable maxim that an agent of the Queen can do no wrong.
>
> The conclusion that a Crown agent is personally responsible for an unlawful act still leaves the question whether the act is unlawful. Where the unlawfulness or the wrongfulness of the act arises without any recourse to a statute, the Crown's immunity from statute, as expressed in s. 16 of the *Interpretation Act*, is irrelevant. If, for example, the agent commits a tortious act, it is the common law which characterizes it as unlawful. There is no immunity that the agent can claim.

> Where the only source of the unlawfulness is a statute, however, the analysis is entirely different. Reference to a statute is necessary for criminal responsibility in Canada, apart from contempt of court, because s. 8 of the *Criminal Code* precludes any conviction for an offence at common law. If a person commits an act prohibited by statute, and the Attorney General seeks to prosecute for violation of that statute, the preliminary question that must be asked is whether that person is bound by the statute. If not, the person simply does not commit a violation of the statute. The situation is not that the person is immune from prosecution even though there has been an unlawful act; rather, that there has been no unlawful act under the statute...

[87] In the **Eldorado** case the majority of the Courts found that both **Uranium Canada** and **Eldorado** agreements relating to the sale and supply of uranium fell within the corporate objectives of the two companies. Although **Eldorado** was free from government day-to-day activities, this did not mean it was not acting on behalf of the government. The test of control came down to the following; Dickson, C.J. states at p. 574:

> The question is not how much independence the person has in fact, but how much he can assert by reason of the terms of appointment and nature of the official...

[88] Atlantic Lottery Corporation, through its objects, had full control over the operation and management of the lotteries for Atlantic Canada, including video lotteries in Newfoundland. This included the marketing and promoting the use of lottery schemes. As stated by Dickson, C.J., where the Crown agent acts within the scope of the public purpose, for which it is statutorily empowered to pursue, it is entitled to Crown immunity from the operation of the statute, because it is acting on behalf of the Crown.

[89] In **Eldorado**, Dickson, C.J. took a broad view of the actions of the agent in determining whether the agent was carrying out the objectives of the Corporation.

[90] As set out in the **AGT** case at page 300, Dickson quotes from an article **Federalism and Provincial Government Immunity** (1979), 29 U. of T. Law Journal 1, by Katherine Swinton at pages 28-29:

> There is no doubt that when a provincial government acts, whether through a government agency, a crown corporation, or a commercial corporation, it does so in the provincial public interest and it engages in activity of government. This is clearest when the activity is carried out in a government department or through a crown agent, but equally so when a province buys into a commercial corporation. The primary purpose in doing so may be to generate revenue for the public purse, and although the corporation's activities seem remotely connected with the public interest, there is established a governmental link between the firm and the government. More commonly, a provincial government will have reasons additional to profit-making which lead to involvement in corporate activity. The reason for government involvement in many of these activities, such as transportation or resource development, is to meet specific public policy objectives, with profit-making at most a secondary motivation.
>
> In trying to draw a line between what is governmental and what is proprietary, one fast becomes fixed in a quagmire of political and economic distinctions with no hope of reasoned separation.

[91] This was the rationale for Chief Justice Dickson to conclude that if a commercial exemption is to be created, it is best created by Parliament and not the Courts.

[92] Two provinces in Canada – British Columbia and Prince Edward Island – under section 14(1) of their respective *Interpretation Acts* have reversed the presumption of Crown immunity by declaring that unless the act of the legislature specifically claims that the Crown or Her Majesty is not bound by a particular statute, the Crown will be automatically bound. This has the result of reversing the common law rules set out earlier and places the burden on the Crown or its agent to show they are not bound by a particular statute.

[93] The *Interpretation Act,* RSPEI 1988 c. I-8, section 14(1) states as follows:

> Unless an Act otherwise specifically provides, every Act and every regulation made thereunder, is binding on Her Majesty.

[94] The *Interpretation Act,* RSBC 1996 c. 238, section 14(1) states as follows:

> Unless it specifically provides otherwise, an enactment is binding on the government.

[95] Unfortunately for the plaintiffs, the Province of Newfoundland and Labrador has not reversed the onus. ALC as Crown agent, who I find was acting within the bounds of its authority as interpreted by the Supreme Court of Canada in **AGT** and in **Eldorado**, is entitled to Crown immunity and the *Trade Practices Act* does not apply to its actions. This is based on the interpretation given in the **AGT** case and the **Eldorado** case dealing with section 16 of the Federal *Interpretation Act* as set out above.

[96] Because the Newfoundland *Act* does not apply to ALC's actions, there is no unlawful act and the cause of action arising from the *Trade Practices Act* pursuant to the amended statement of claim of the plaintiffs, does not set out any enforceable cause of action against the defendant ALC. The case cannot be distinguished from the **Eldorado** case. See **Con struction of Statutes**, Fifth Edition, 2008, Ruth Sullivan as follows:

> An agent does not step outside the ambit of Crown purposes simply because it does something that is contrary to a statute or regulation. Clearly the scope of a Crown agency cannot be narrowed by legislation from which the agent is immune. So long as its conduct is authorized by its constituting instrument, the agent acts for the Crown and enjoys its presumed immunity from legislation. If the Crown is not subject to a particular Act or regulation, neither is the agent; both are free to act contrary to legislation from which they are immune.
>
> This point is illustrated in *Eldorado*, where two Crown corporations were accused of conspiring to lessen competition contrary to the *Combines Investigation Act*. The Court found (a) because the *Combines Investigation Act* did not purport to bind the Crown, the presumption of immunity set out in the federal *Interpretation*

> *Act* was not rebutted; (b) because the defendant corporations were agents of the Crown for all their purposes, they too could claim immunity from the *Combines Investigation Act*; and (c) because making marketing arrangements with other suppliers was within the scope of the powers conferred on the defendants, they did not exceed the scope of their Crown agency when they entered the arrangements. The fact that these arrangements were anti-competitive and contrary to the *Combines Investigation Act* was irrelevant because the Act did not apply to them.

[97] Because I have ruled in favour of the defendant's application, I do not find it necessary to have to proceed to the second application dealing with particulars at this time.

[98] In ruling as I have, I am aware of the impact that this ruling will have on the potential plaintiffs' claim.

[99] It will also allow counsel to focus on what, if any, future steps should or should not be taken in the proposed claim by the respective clients. The defendant is entitled to costs in the cause.

Wayne G. Dymond

WAYNE G. DYMOND
Justice