

The Long Waive Goodbye: SCC rejects waiver of tort, expands motion to strike

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Author: [Mary Paterson](#)

In *Atlantic Lottery Corp. Inc v Babstock* (2020 SCC 19) the Supreme Court struck all claims underlying a proposed class action about fraud and problem gambling. *Atlantic Lottery* bolsters defendants' ability to weed out class action claims at the motion to strike stage. The Court also signalled a potential departure from existing jurisprudence on breach of contract, which may be important given the current economic uncertainty facing parties.

Key takeaways:

- **Waiver of tort** — All nine judges of the Supreme Court held that "waiver of tort" is not an independent cause of action. Waiver of tort is usually seen as a remedy (see below), but the plaintiffs proposed to make it a separate cause of action — essentially, a negligence-like claim based on the defendant's wrongdoing and gain rather than the plaintiff's loss. This view was conclusively rejected.
- **Remedy of disgorgement** — The Supreme Court also affirmed that disgorgement of benefit (formerly called waiver of tort) is available as a remedy for other causes of action, such as tort or breach of contract. In disgorgement of benefit, the plaintiff forgoes compensation for its own losses but instead asks that the defendant give over any profit it gained from wrongful conduct. The five-judge majority concluded that disgorgement was not available to the plaintiffs in this case.
- **Breach of contract** — The majority struck the plaintiffs' claim for breach of contract, even though all elements of the cause of action were made out, because it concluded that only nominal damages were available to the plaintiffs. This effectively imposes a new remedy requirement that plaintiffs must establish to advance a breach of contract claim — a departure from prior contract law.
- **Motions to strike** — Compared to some recent Supreme Court cases, *Atlantic Lottery* endorses a higher threshold that plaintiffs must satisfy on motions to strike. The threshold standard of "no reasonable cause of action" used to be exceeded when all elements of a cause of action were made out; however, now "reasonable" appears to have an expanded

meaning, allowing the Court to strike claims even when all elements of a well-established cause of action have been pled. This expanded view of motions to strike is good news for defendants seeking to defeat claims at an early stage of proceedings.

Facts

The defendant, Atlantic Lottery Corporation (ALC), is a corporation constituted by the governments of the four Atlantic Provinces to provide gambling activities to the public on behalf of the Crown. The plaintiffs brought this proposed class action on behalf of consumers who had used video lottery terminals (VLTs) operated by ALC.

A VLT is an electronic gambling machine. Many gambling games are available through a VLT, most prominently a game modelled on traditional slot machines; the screen displays three or more reels of symbols that appear to spin when activated. The player presses a “stop” button, whereupon the reels stop spinning and wins if the machine “lines up” matching symbols on the reels when the spinning stops. However, the probability of winning a given game is established by software within the VLT. In other words, the plaintiffs alleged that no matter when the “stop” button is pushed, the outcome is predetermined.^[1]

The plaintiffs alleged that VLTs deceptively misrepresent the probability of winning, and that ALC misrepresented the dangers associated with playing VLTs. The plaintiffs sought to certify a class action claiming, among other things, “waiver of tort” (as a novel cause of action), breach of contract, and unjust enrichment. Importantly, the plaintiffs sought disgorgement of ALC’s profits rather than compensation for damages suffered by the class.

The plaintiffs moved to certify the proposed class action. Separately, ALC brought a motion to strike the plaintiffs’ claims. Both motions were addressed together on appeal. The plaintiffs were successful at trial and on appeal, and the claims were certified to proceed as a class action.

Brown J., writing for a five-judge majority of the Supreme Court, struck all claims as disclosing no reasonable cause of action and denied certification. Karakatsanis J., writing for four judges in a strong dissent, would have struck the claim for waiver of tort but upheld certification for breach of contract and unjust enrichment.

Waiver of tort

“Waiver of tort” is an archaic term that describes when a plaintiff forgoes compensation for damages the plaintiff suffered, but instead seeks disgorgement of the benefit the defendant obtained through wrongful conduct.

Waiver of tort was usually seen as a remedy only — i.e., a form of compensation that may be available after the plaintiff established that the defendant committed a wrong (see discussion below). However, some courts questioned whether waiver of tort could be a standalone cause of action. The plaintiffs advanced such a novel claim here, proposing that waiver of tort be recognized as a negligence-like cause of action based on the defendant’s wrongdoing and consequent gain, rather than the defendant’s wrongdoing and the plaintiff’s resultant loss.

All nine judges of the Supreme Court firmly put this issue to bed: waiver of tort is not an independent cause of action. Plaintiffs cannot manufacture a claim “from thin air” by simply alleging a defendant engaged in wrongful conduct and then claiming the benefits without pleading any other cause of action. Both the majority and the dissent struck the plaintiffs’

claim for waiver of tort.

The remedy of disgorgement

While the Supreme Court conclusively rejected waiver of tort as an independent cause of action, the Court also affirmed that the *remedy* of disgorgement remains available in exceptional circumstances.

The traditional remedy in tort and contract is damages for loss or expectation damages. In tort, damages for loss put the plaintiff in the same position as if the defendant had not committed the tort. In contract, expectation damages put the plaintiff in the same position as the plaintiff would be if the counterparty had performed its contractual obligations.

Brown J., for the majority, distinguished between two additional types of monetary remedies grounded in the defendant's gain rather than the plaintiff's loss:

- **Restitution:** A gain-based remedy for unjust enrichment. Restitution compensates a plaintiff for its loss where, due to the defendant's wrongful conduct, the defendant has obtained a corresponding gain.
- **Disgorgement:** A gain-based remedy available for various causes of action. Disgorgement prevents a defendant from profiting from wrongful conduct by transferring the defendant's gain to the plaintiff, even if the plaintiff has not suffered a corresponding loss. The majority emphasized that disgorgement is an "exceptional remedy," available where "at a minimum, other remedies are inadequate." Its availability should be assessed on a contextual basis. While the majority opined that "future legitimate interests protected by a gain-based award [should] resemble those interests that have been protected in the past," Brown J. did not elaborate on what characterizes such interests, or what principles should determine if disgorgement is available in new circumstances.^[2] It will remain for future courts to assess when disgorgement is appropriate.

The majority held that disgorgement was not available to the plaintiffs in this case.

Breach of contract

The role of contract damages is to put the plaintiff in the same position as if the contract had been performed, as discussed above. However, the *Atlantic Lottery* plaintiffs' claim for breach of contract sought only non-compensatory damages: that is, they sought disgorgement, punitive damages and nominal damages, rather than compensation for loss.

The majority of the Supreme Court struck the plaintiffs' breach of contract claim solely because of the type of damages sought. Brown J. held that disgorgement and punitive damages were not available in this case, and nominal damages were not sufficient to support a breach of contract claim.

This result is surprising because under general theories of contract law — and under the previous standard for motions to strike — the type of damages sought should not have impacted whether the plaintiffs' breach of contract claim could proceed. Historically, plaintiffs did not have to prove they had suffered damages to claim breach of contract. To survive a motion to strike, the plaintiffs merely had to plead that a contract existed and that the defendant breached it.

However, in striking the *Atlantic Lottery* plaintiffs' breach of contract claim, the majority of the Supreme Court appeared to endorse a contrary view. Brown J. held that no "reasonable cause of action" (emphasis in original) for breach of contract could exist on a claim for nominal damages alone — in other words, the remedy itself became a constitutive element of the cause of action. While the impact of this holding has yet to be determined, one possible reading of the majority judgment is that the Supreme Court has made proof of loss a necessary element in a breach of contract claim. This may be a positive development for defendants in breach of contract suits.

Notably, in this period of considerable economic uncertainty, Brown J. chose in *obiter* to endorse the theory of efficient breach — a doctrine that has uncertain acceptance in Canadian law.^[3] "Efficient breach" endorses the view that a party may voluntarily breach a contract and elect to pay damages if they would suffer greater economic loss by fulfilling their obligations. In contrast, with some scattered exceptions, Canadian jurisprudence has generally held that a functional commercial sphere requires confidence that parties will satisfy their freely undertaken contractual obligations. Indeed, such confidence is a fundamental buttress to freedom of contract.

Wider acceptance of efficient breach may have negative implications for commercial certainty, particularly in light of the COVID-19 pandemic, which has disrupted many assumptions about economic efficiency. Parties should carefully scrutinize liquidated damages clauses to ensure they are adequately protected if a contractual counterparty elects to breach.

Motions to strike

As noted above, *Atlantic Lottery* came to the Supreme Court via a motion to strike. On a motion to strike, the court will consider whether the plaintiff's claim should move forward to a trial, or whether the claim should be struck (removed) from the pleadings as disclosing "no reasonable cause of action." For the purposes of a motion to strike, all facts in the plaintiff's claim are assumed to be true and no evidence is considered.

The majority in *Atlantic Lottery* endorsed a higher standard for motions to strike than that seen in previous cases, continuing the process of raising the bar that has been in effect for some years.^[4] Previously, the standard endorsed by the Supreme Court was whether a claim disclosed "no reasonable prospect of success." For a well-established cause of action like breach of contract, this standard was generally satisfied when the plaintiff pleaded all the elements required to make out the cause of action. However, as noted above, the plaintiffs' breach of contract claim met this standard. Nevertheless, Brown J. endorsed an expanded view of the word "reasonable" to strike the plaintiffs' claim for breach of contract based solely on the available remedies.

It is not wholly clear how parties should understand Brown J's stress on the word "reasonable" in the phrase "no reasonable cause of action," and litigants must await the interpretation of this standard by lower courts. If a cause of action is well-established, and all requirements of the cause of action are made out, on what basis can a court strike the claim? Nevertheless, this is unquestionably a higher standard than the Court has employed in recent cases — particularly in the recent decision of *Nevsun Resources v Araya*,^[5] where the Court refused to strike a novel claim, but instead sent it back to be tried based on a full evidentiary record.

Notwithstanding the tension in recent Supreme Court jurisprudence, the standard for motions to strike in *Atlantic Lottery* is good news for defendants seeking to defeat claims at

an early stage of proceedings. *Atlantic Lottery* demonstrates that even well-established causes of action may now be challenged during motions to strike.

[1] Statement of Claim at para 21; *Atlantic Lottery Corp Inc v Babstock*, 2018 NLCA 71 at para 95.

[2] See *Atlantic Lottery* at paras 56-58.

[3] *Atlantic Lottery* at para 56.

[4] See Gerard Kennedy and Mary Angela Rowe, *Tanudjaja v Canada (Attorney General): Distinguishing Injusticiability and Deference on Motions to Strike* (2015) 44 Adv Q 391.

[5] 2020 SCC 5.