IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Haghdust v. British Columbia Lottery Corporation,* 2014 BCSC 1327

Date: 20140716
Docket: S105520
Registry: Vancouver

Between:

Hamidreza Haghdust and Michael Lee

Plaintiffs

And

British Columbia Lottery Corporation

Defendant

Before: The Honourable Mr. Justice Savage

Reasons for Judgment

Counsel for the Plaintiffs:	P.R. Bennett M.W. Mounteer
Counsel for the Defendant:	R.J. Kaardal S.P. Ramsay B.B. Olthuis
Place and Date of Trial:	Vancouver, B.C. May 5-9, 2014
Place and Date of Judgment:	Vancouver, B.C. July 16, 2014

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I. Introduction

[1] This is a summary trial application in a class proceeding in which the plaintiff class seeks recovery of jackpot prizes they won when they gambled at various casinos operated on behalf of the defendant, the British Columbia Lottery Corporation ("BCLC"). The jackpot prizes were withheld because the plaintiff class were participants in the BCLC's Voluntary Self-Exclusion Program (the "VSE Program").

[2] Gambling is problematic for some people. Expert evidence defines pathological gambling as that involving a person gambling sums beyond what they can afford. The VSE Program involves a patron approaching gaming staff with a request to self-exclude. The patron signs a voluntary self-exclusion form (the "VSE Form"). The VSE Program participant is required to cash out any accumulated loyalty rewards. There can be no quick change of heart as the patron is escorted from the gaming establishment.

[3] Although the VSE Program has operated since the late 1990s, BCLC only commenced withholding jackpots from VSE Program participants in April 2009. This followed a meeting of the BCLC Board of Directors (the "Board") on October 30, 2008 (the "October 2008 Board Meeting") where BCLC says the Board approved the *Rules and Regulations Respecting Jackpot Entitlement for Individuals Who are Voluntarily Self-Excluded or Prohibited from Entering BC Gaming Facilities* (the "Jackpot Entitlement Rules"). Prior to that time, a VSE Program participant caught gambling in violation of their self-exclusion would simply be taken aside, spoken to, and then paid the jackpot. The plaintiff class is defined as:

> All residents of British Columbia who were refused payments by the BCLC of monies they had won playing games of chance at a B.C. gaming facility because they had signed a Voluntary Self-Exclusion Form provided by the BCLC to exclude themselves from the gaming facilities for a set period of time.

[4] The representative plaintiff, Hamidreza Haghdust, was denied two jackpot prizes totalling approximately $35,000. The representative plaintiff, Michael Lee, was denied a single jackpot prize of $42,484.67. Both plaintiffs say they lost considerable

sums wagering in BCLC establishments as undetected VSE Program participants. Both plaintiffs signed their VSE Forms prior to BCLC adopting the Jackpot Entitlement Rules, although both were aware of those rules. Mr. Haghdust signed his VSE Form in November 2007. Mr. Lee signed his VSE Form in April 2007.

[5] The exact size of the plaintiff class and total value of the claim is unknown. The plaintiff class says that some 427 jackpot prizes were forfeited due to the winner being a VSE Program participant and estimates that the total amount in issue is less than $1.5 million. BCLC did not dispute these figures. This appears to represent significant undetected gaming by VSE Program participants given house favoured odds. The representative plaintiffs' assertions regarding their losses support this inference.

[6] The plaintiff class and BCLC agree that the Jackpot Entitlement Rules are difficult to enforce. North American gamblers are generally not required to provide identification on entering gaming establishments. As a result, some VSE Program participants can and do enter gaming establishments undetected and win prizes, as the representative plaintiffs did. BCLC has some initiatives in place to try to detect VSE Program participants before they enter gaming establishments, although those procedures are clearly imperfect.

[7] Only the collection of large prizes or certain special prizes requires the production of identification. Identification is required to collect a jackpot of over $10,000 as a result of initiatives and legislation concerned with money-laundering: *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c.17, ss.6-6.1, *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, s. 42. Identification may also be required to collect lesser prizes according to the specific initiatives of individual gaming establishments; however there is no uniform practice for prizes under $10,000. VSE Program participants have been denied prizes that required the production of identification to collect since April 1, 2009.

[8] The members of the plaintiff class may be subject to differing legal analyses depending on both the date of their individual enrolment in the VSE Program and the date they were denied a jackpot prize. I will endeavour to make it clear through these reasons where this is the case.

[9] A brief chronology of relevant events is attached as Schedule "A".

II. Relevant Context

A. BCLC's Statutory Powers

[10] The BCLC was originally incorporated under the *Company Act* as a corporation without share capital, consisting of not more than nine directors appointed by the Lieutenant Governor in Council. It was continued under section 2 of the *Lottery Corporation Act*, R.S.B.C. 1996, c. 279, which was subsequently replaced by the *Gaming Control Act*, S.B.C 2002, c.14 [*GCA*] when it received royal assent on April 11, 2002. The *GCA* was amended in a manner relevant to the issues in this proceeding by *Bill 20 - 2010 Miscellaneous Statutes Amendment Act (No. 3), 2010*, S.B.C. 2010, c. 21, ss. 108-109 [*Bill 20*], which received royal assent on June 3, 2010.

[11] BCLC is, for all purposes, an agent of the government: s. 3(1) of the *GCA*. The Minister of Finance is BCLC's fiscal agent: s. 3(2) of the *GCA*. Indeed, the minister may issue written directives to BCLC on matters of general policy with which BCLC must comply: s. 6 of the *GCA*. Management of BCLC is assigned to the Board: s. 4(1) of the *GCA*. The Board may delegate any power or duty to a person employed by BCLC: s. 4(1)(c) of the *GCA*. Section 4 of the *GCA* reads:

> **4** (1) The directors must manage the affairs of the lottery corporation and may
>
> (a) exercise the powers conferred on them under this Act,
>
> (b) exercise the powers of the lottery corporation on behalf of the lottery corporation, and
>
> (c) delegate the exercise or performance of any power or duty conferred or imposed on them to a person employed by the lottery corporation.

(2) A resolution in writing, signed by all the directors, is as valid as if it had been passed at a meeting of directors properly called and constituted.

(i) BCLC's general mandate and rule-making powers

[12] BCLC's current mandate is set out in section 7 of the *GCA*:

> **7** (1) The lottery corporation is responsible for the conduct and management of gaming on behalf of the government and, without limiting the generality of the foregoing,
>
> (a) may develop, undertake, organize, conduct, manage and operate provincial gaming on behalf of the government, either alone or in conjunction with the government of another province,
>
> (b) [Repealed 2010-21-90.]
>
> (c) subject to first receiving the written approval of the minister, may enter into agreements, on behalf of the government of British Columbia, with the government of Canada or the governments of other provinces regarding the conduct and management of provincial gaming in British Columbia and in those other provinces,
>
> (d) subject to first receiving the written approval of the minister, may enter into the business of supplying any person with operational services, computer software, tickets or any other technology, equipment or supplies related to the conduct of
>
> (i) gaming in or out of British Columbia, or
>
> (ii) any other business related to gaming,
>
> (e) may enter into agreements with persons, other than registered gaming services providers, respecting provincial gaming or any other business related to provincial gaming,
>
> (f) subject to subsection (1.1), may enter into agreements with registered gaming services providers for services required in the conduct, management or operation of provincial gaming,
>
> (g) may set rules of play for lottery schemes or any class of lottery schemes that the lottery corporation is authorized to conduct, manage or operate,
>
> (h) may monitor the operation of provincial gaming or horse racing and the premises and facilities in which provincial gaming or horse racing is carried on,
>
> (i) must monitor compliance by gaming services providers with this Act, the regulations and the rules of the lottery corporation, and
>
> (j) must do other things the minister may require and may do other things the minister may authorize.
>
> …
>
> [emphasis added]

[13] With a couple of exceptions that are not germane to the issues in this proceeding, this mandate was the same throughout the period in question.

[14] BCLC's current rule-making powers are set out in s. 8 of the *GCA*:

> **8** (1) The lottery corporation may make rules for the purposes of this Part, including but not limited to rules
>
> (a) requiring and governing books, accounts and other records to be kept by registered gaming services providers, including but not limited to establishing time schedules for the retention of those books, accounts and other records,
>
> (b) limiting and regulating the sale of lottery tickets of the lottery corporation by persons other than the lottery corporation and prescribing the fees, commissions and discounts in the sales,
>
> (c) governing the manner of selecting prize winners under a lottery scheme or any class of lottery schemes conducted and managed by the lottery corporation,
>
> (d) imposing conditions and establishing qualifications for entitlement to prizes in a lottery scheme or any class of lottery schemes conducted and managed by the lottery corporation,
>
> (e) respecting the handling of money and money equivalents received from players of games of chance by the lottery corporation, licensees and gaming services providers,
>
> (f) governing the holding and disbursement of money received from players of games of chance by the lottery corporation, licensees and registered gaming services providers, and
>
> (g) respecting security and surveillance at gaming facilities or classes of gaming facilities.
>
> (2) If a rule of the lottery corporation is inconsistent with or conflicts with this Act or a regulation made by the Lieutenant Governor in Council, this Act or the regulation prevails.
>
> [emphasis added]

[15] The rule-making powers were the same throughout the period in question here.

(ii) BCLC's right to refuse entry and request a person to leave

[16] Prior to the enactment of *Bill 20,* s. 92 of the *GCA* gave the BCLC the statutory right, in certain circumstances, to request that a person leave a gaming facility immediately and to refuse a person entry to a gaming facility for a specified period. This right could be exercised on a belief that the person's presence on the

premises of a gaming facility is "undesirable", although that term is not defined. Until June 3, 2010, s. 92 of the *GCA* read:

> **92** If the lottery corporation or a person acting on its behalf has reason to believe that the presence of a person on the premises of a gaming facility is undesirable, the lottery corporation or person acting on its behalf may
>
> (a) request the person to leave the premises of the gaming facility immediately, or
>
> (b) by written notice delivered to the person, forbid him or her to enter the premises of the gaming facility at any time during a period specified in the notice.
>
> [Emphasis added]

[17] Prior to the enactment of *Bill 20*, s. 93 of the *GCA* specified the consequences of being requested to leave and the effect of s. 92(b) notice:

> **93** (1) A person must not
>
> (a) remain on the premises of a gaming facility after he or she is requested to leave by a gaming services provider in a gaming facility, the lottery corporation or a person acting on behalf of either of them,
>
> (b) enter the premises of a gaming facility within 24 hours after he or she is requested to leave, or
>
> (c) enter the premises of the gaming facility at any time during the period specified in a written notice referred to in section 92 (b) that has been delivered to the person in accordance with section 92 (b).
>
> (2) If a person requested under section 91 (2) or 92 (a) to leave the premises of a gaming facility does not leave the premises in accordance with the request, the gaming services provider, the lottery corporation or a person acting on behalf of either of them may remove the person or cause the person to be removed by the use of no more force than is necessary.
>
> [Emphasis added]

[18] *Bill 20* amended s. 92 of the *GCA* by adding the words underlined below:

> **92** If the lottery corporation or a person acting on its behalf has reason to believe that the presence of a person on the premises of a gaming facility is undesirable or that the person on the premises is a participant in a voluntary self-exclusion program, the lottery corporation or person acting on its behalf may
>
> (a) request the person to leave the premises of the gaming facility immediately, or
>
> (b) by written notice delivered to the person, forbid him or her to enter the premises of the gaming facility at any time during a period specified in the notice.

[Emphasis added]

[19] *Bill 20* amended s. 93 of the *GCA* by adding s. 93(3) which provides statutory disentitlement to prizes in specified circumstances:

> **93** (1) A person must not
>
> (a) remain on the premises of a gaming facility after he or she is requested to leave by a gaming services provider in a gaming facility, the lottery corporation or a person acting on behalf of either of them,
>
> (b) enter the premises of a gaming facility within 24 hours after he or she is requested to leave, or
>
> (c) enter the premises of the gaming facility at any time during the period specified in a written notice referred to in section 92 (b) that has been delivered to the person in accordance with section 92 (b).
>
> (2) If a person requested under section 91 (2) or 92 (a) to leave the premises of a gaming facility does not leave the premises in accordance with the request, the gaming services provider, the lottery corporation or a person acting on behalf of either of them may remove the person or cause the person to be removed by the use of no more force than is necessary.
>
> (3) A person is not entitled to any prize or winnings as a result of the person's participation in gaming at a gaming facility if written notice referred to in section 92 (b) has been delivered to the person in accordance with section 92 (b).
>
> [Emphasis added]

[20] Although not necessarily germane to the principles of statutory interpretation at play in this proceeding, BCLC specifically sought the amendments through correspondence with the ministry, a request which was initially declined: see Schedule "B", correspondence dated June 2, 2008, from Michael Graydon to Derek Sturko, and reply dated July 30, 2008, from Mr. Sturko to Mr. Graydon.

(iii) Offences

[21] The parties agree that rules passed under s. 8 of the *GCA* have the force of law. This is because the *Interpretation Act*, R.S.B.C. 1996, c. 238 stipulates that any rule enacted "…in execution of a power conferred under an Act…" is a "regulation" and that "… [a] regulation made under the authority of an enactment has the force of law": s. 1 (*sv* "enactment", "regulation"), s. 41(2) of the *Interpretation Act*. .

[22] Section 97(2)(d) of the *GCA* makes it an offence to contravene section 93(1). Section 98(3) of the *GCA* provides for a fine of not more than $5,000 for offences under section 97(2)(d). Thus, if validly enacted, the parties agree that a breach of the rules at issue here may give rise to offences under the *GCA* for which a penalty of up to $5,000 might be imposed. .

B. Voluntary Self-Exclusion

(i) Generally

[23] Self-exclusion is a commonly used component of responsible gaming programs. Self-exclusion is a feature of other North American jurisdictions where gaming is permitted. Dr. Robert Ladouceur is a psychologist with expertise in the psychology of gambling. Dr. Ladouceur prepared an expert report on behalf of BCLC that is in evidence. His report says at 3-4:

> Self-exclusion is frequently utilized by the gambling operators to assist gamblers in minimizing the impact of harmful patterns of gambling behaviours. The program allows individuals who acknowledge that they have a problem with gambling to sign a voluntary agreement to ban themselves from entering one or multiple specified gaming venues. The main goal is to help [the] patron to refrain from entering a gambling venue, based on their voluntar[y] commitment.
>
> It should be emphasized that self-exclusion does not constitute a formal treatment intervention, but rather represents an opportunity for immediate assistance in limiting further financial losses by imposing a barrier to direct access to gambling venues. A voluntary request for self-exclusion demonstrates that individuals accept to some degree that their gambling is excessive and causing harm, recognize a need to take personal responsibility to address the issue, and demonstrate motivation to become active participants in the process. In brief, we can say that self-exclusion is a service used by individuals who have developed a gambling problem and realize that they need some personal and active commitment to restrain their gambling habits.

(ii) BCLC's VSE Program

[24] BCLC first implemented a VSE Program of its own initiative in late 1998 or early 1999, before the *GCA* came into force. As indicated on the representative plaintiffs' VSE Forms, BCLC designed the VSE Program for persons who feel it is in their own best interests not to participate in gambling.

[25] The General Manager of the Gaming Policy and Enforcement Branch ("GPEB"), which is an office of the provincial government, "may establish public interest standards for gaming operations, including but not limited to … advertising, types of activities allowed and policies to address problem gambling at gaming facilities": ss. 22(1), 27(2)(d) of the *GCA*.

[26] The General Manager issued the *Responsible Gambling Standards for the BC Gambling Industry* (the "Responsible Gambling Standards") in July 2005, which were updated in February 2010. Among other things, they require BCLC:

a. to continue its [VSE Program];

b. to "[e]nsure policies and practices are in place so that all customers requesting VSE are treated with respect"; and

c. to "[e]nsure policies and practices are in place to monitor premises for self-excluded customers and appropriate security procedures are designed to reduce the ability of excluded players to re-enter the venue".

BCLC researched the concept of a jackpot ineligibility rule following an industry forum in 2007. BCLC's security staff were particularly in favour of adopting such a rule, on the basis that it would reduce the incentive for VSE enrolees to violate their self-exclusion.

(iii) Joining the VSE Program

[27] Persons wishing to enrol in the VSE Program can do so at a gaming facility, at BCLC's corporate offices in Vancouver and Kamloops or, exceptionally, at an off-site location. Where the enrolment takes place at a gaming facility, it is conducted by security staff employed by the facility's service provider. It does not take place on the gaming floor, but rather in a separate registration room.

[28] A prospective enrolee fills out a VSE Form in order to self-exclude. The parties agree that the VSE Form is not a contract at law and, accordingly, does not give rise to reciprocal contractual obligations. This court has held that to be so: *Ross v. British Columbia Lottery Corporation*, 2014 BCSC 320 at paras. 349-56, 486.

[29] The VSE Forms signed by the representative plaintiffs in 2007 were, on their face, for a three-year period. The Jackpot Entitlement Rules were not in place at that time. The VSE Forms therefore made no reference to jackpot ineligibility in cases where self-excluded patrons won jackpots. The representative plaintiffs signed identical VSE Forms, a copy of which is attached as Schedule "C" The introduction to that VSE Form states:

> The Voluntary Self-exclusion Program is designed by [BCLC] for people who feel it is in their best interest not to participate in gambling. By signing Part I of this form you are voluntarily agreeing to be refused entry to certain gaming facilities other than in the course of your employment in the Province of BC. If you sign Part II of this form, your name and contact information will be sent to a Problem Gambling Counsellor as described in Part II. You may choose to sign Part I alone or both Part I and Part II.
>
> [Emphasis added.]

[30] Part I of that VSE Form then states:

> Self Exclusion Notice
>
> 1. I request that I be refused entry (Self-exclusion) to any Casino, Community Gaming Centre with slot machines and the gaming floor of Race Tracks.
>
> 2. I request that I be refused entry from entering into or in any way trespassing upon any BC gaming facility for any reason whatsoever as of the date hereof for the period noted below. I understand that my self-exclusion shall expire after the expiration time indicated.
>
> Expiry Date:
>
> 3. I agree that I cannot modify, revoke, withdraw or rescind this self-exclusion agreement prior to its expiry. In the event I wish to have the period for self-exclusion extended, I must give written notice to BCLC, Attention: Manager Security and Surveillance, 74 West Seymour Street, Kamloops, BC, V2C 1E2, prior to the expiry date referred to in 2 above.
>
> 4. I have requested self-exclusion and BCLC hereby notifies me as per Section 92 (b) of the *Gaming Control Act* (BC) that I am forbidden to enter any BC gaming facility during the term of this self-exclusion. I understand that if I attend any gaming facility, during the term of this self-exclusion and I am identified by BCLC or facility staff I will be requested to leave the gaming facility. If I refuse to leave the gaming facility upon request or enter a selected gaming facility during the period of self-exclusion or at any other time when I am prohibited from doing so, I will be removed and may be subject to proceedings under the *Gaming Control Act* (BC) including a fine of up to $5000.
>
> 5. I acknowledge that this is a voluntary Self-exclusion Program offered by BCLC and neither BCLC, any of its Gaming Facility Service Providers or any of the officers, directors, agents or employees of either of the forgoing

> are responsible for any breach of this self-exclusion or for failure to enforce this self-exclusion.
>
> I hereby release and discharge BCLC, its Gaming Facility Service Providers and their respective officers, directors, agents and employees from any liability or claims including claims for financial loss related to this self-exclusion (including my failure to comply with the self-exclusion) or the Self-exclusion Program (including the Referral portion set forth on Part II of this form).
>
> 6. As part of my self-exclusion, I consent to my picture and description being circulated to all Gaming Facility Service Providers mentioned above.
>
> By signing this form I acknowledge I have been read the form and understand it
>
> [Emphasis added.]

(iv) The Jackpot Entitlement Rules

[31] BCLC says it enacted the Jackpot Entitlement Rules following the October 2008 Board Meeting. The Jackpot Entitlement Rules that BCLC says it enacted read:

> RULES AND REGULATIONS RESPECTING JACKPOT ENTITLEMENT FOR INDIVIDUALS WHO ARE VOLUNTARILY SELF-EXCLUDED OR PROHIBITED BY BCLC FROM ENTERING BC GAMING FACILITIES
>
> British Columbia Lottery Corporation (“BCLC") is authorized by and as agent for the Government of British Columbia to conduct, manage and operate lottery' schemes pursuant to the *Gaming Control Act* of the Province of British Columbia (the “Act”).
>
> INTERPRETATION
>
> 1. In these Rules and Regulations:
>
> a. “VSE Individual” means a participant in BCLC's Voluntary Self-Exclusion program which enables individuals to voluntarily self-exclude from BC gaming facilities for a set period of time;
>
> b. "Prohibited Individual" means a person whom BCLC has prohibited from entering a BC gaming facility in accordance with the Act;
>
> c. “Jackpot Prize” means any gaming facility prize for which identification is requested in order to claim the prize.
>
> d. "Gaming Facility" has the same meaning as it has in s.1 of the Act.

ENTITLEMENT

1. No VSE Individual shall be eligible to receive a Jackpot Prize.
2. No Prohibited individual shall be eligible to receive a Jackpot Prize.
3. BCLC shall not pay or deliver any Jackpot Prize to a VSE Individual, even if a VSE individual would otherwise qualify as a winner of a Jackpot Prize.
4. BCLC shall not pay or deliver any Jackpot Prize to a Prohibited Individual, even if a Prohibited Individual would otherwise qualify as a winner of a Jackpot Prize.
5. BCLC incurs no liability to the extent that it pays or delivers a prize, including a Jackpot Prize, to a VSE Individual or a Prohibited Individual in error.

[Emphasis added]

III. Common Issues

A. Dropped Issues

[32] The common issues have been narrowed from those initially certified. The plaintiff class is not proceeding with the unconscionability claim and BCLC is no longer relying on the waiver provision. The common issues have been amended as necessary to reflect this.

B. An Additional Issue

[33] The plaintiff class applies to amend the common issues to include as a further issue whether the Jackpot Entitlement Rules were validly enacted. BCLC opposes this amendment, noting that the question of whether the Jackpot Entitlement Rules were validly enacted is not a certified common issue.

[34] BCLC says I should refuse to certify this additional common issue, arguing that the plaintiff class has no standing to attack how the Jackpot Entitlement Rules were enacted. They also submit that the validity of the Jackpot Entitlement Rules has no bearing on their alternative argument that the Jackpot Entitlement Rules were incorporated into the gaming contracts pursuant to BCLC's jurisdiction under section 7 of the *GCA.*

[35] In my view BCLC's arguments do not go to whether the amendment proposed is appropriate as a common issue. Clearly the validity of the Jackpot Entitlement

Rules is an appropriate common issue. As I see no prejudice to the BCLC, and none was alleged, I allow the amendment.

C. Issues to be decided

[36] Incorporating the changes described above, the common issues to be decided can be summarized as:

(a) Can the plaintiff class challenge the enactment of the Jackpot Entitlement Rules?

(b) Were the Jackpot Entitlement Rules validly enacted?

(c) Do the Jackpot Entitlement Rules constitute a penalty which is *ultra vires* BCLC's rule-making authority?

(d) Are the Jackpot Entitlement Rules unenforceable against class members who enrolled in the VSE Program prior to their enactment?

(e) Do the Jackpot Entitlement Rules conflict with s. 93(3) of the *GCA*?

(f) Does signing a VSE Form constitute s. 92(b) notice?

(g) Does illegality bar the plaintiff class from recovering?

(h) Is BCLC liable for breach of contract?

IV. Discussion and Analysis

(a) Can the plaintiffs challenge the enactment of the Jackpot Entitlement Rules? The Indoor Management Rule

[37] BCLC says there is a well-established line of jurisprudence to the effect that third parties cannot attack the regularity of corporate actions. In other words, the plaintiffs have no standing to ask the Court to adjudicate this matter: *Michigan Central Railroad Co. v. Wealleans* (1895), 24 S.C.R. 309 at 319; *Port Darlington Harbour Co. v. Dilling* (1975), 11 O.R. (2d) 307, 1975 CanLII 539 (H.C.J.); *Sabre Inc.*

v. International Air Transport Association, 2011 ONSC 206 at para. 126. This has been described as the "indoor management rule".

[38] The plaintiff class say that the principles set out in the jurisprudence cited by BCLC are directed at private corporations, and have no application to a statutory entity such as BCLC.

[39] BCLC is a Crown corporation; therefore every BC citizen has standing to challenge the regularity of its proceedings. In any event, the members of the plaintiff class are more than just BC citizens, they are individuals directly impacted by the Jackpot Entitlement Rules. Or more strongly, they are individuals with legal interests directly affected by the Jackpot Entitlement Rules. Their direct, personal interest in the Jackpot Entitlement Rules is sufficient to establish private interest standing. Alternatively, they meet the requirements for public interest standing.

[40] In my view the decision of Goepel J., as he then was, in *Barbour v. University of British Columbia*, 2009 BCSC 425 at paras. 38-41, is apposite here:

> [38] The answer to this question requires a consideration of the law of *ultra vires* as it applies to corporations. Historically, the presumption of common law was that corporations created by or under a statute have only those powers which are expressly or impliedly granted to them. To the extent that a corporation acted beyond its powers, its actions were *ultra vires* and invalid: *Communities Economic Development Fund v. Canadian Pickles Corp.*, [1991] 3 S.C.R. 388, 85 D.L.R. (4th) 88 ("*Canadian Pickles"*).
>
> [39] The doctrine of *ultra vires* was first applied to memorandum companies incorporated under business corporation statutes in *Ashbury Railway Carriage & Iron Co. v. Riche* (1875), L.R. 7 H.L. 653. The House of Lords affirmed the applicability of *Ashbury Railway* to corporations created by special act in *Baroness Wenlock v. River Dee Co.* (1885), 10 App. Cas. 354 (H.L.). Lord Watson held that the powers of a statutory corporation are limited by the purposes of the corporation as set out in the special act at 362-63:
>
> > Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of the opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions.

> [40] Section 30 of the *Business Corporations Act* S.B.C. 2002, c. 57 ("*B.C.A.*"), abolishes the doctrine of *ultra vires* for British Columbia corporations incorporated under that legislation. The *B.C.A.* does not apply to UBC (*U.A*., s. 3(4)).
>
> [41] The doctrine of *ultra vires* continues to apply to corporations created by special act for public purposes: *Canadian Pickles* at para. 32.

[41] Although the result in *Barbour* was reversed on appeal, that was because of a retroactive statutory amendment: 2010 BCCA 63 at para. 32.

[42] BCLC is plainly not a private corporation. BCLC "is a corporation without share capital": s. 2(3) of the *GCA*. It is a statutory body pursuing a public purpose, namely to conduct and manage gaming on behalf of the government: s. 7(1) of the *GCA*. The *Business Corporations Act*, S.B.C. 2002, c. 57 does not apply to BCLC: s. 2(4) of the *GCA*.

[43] Instead, BCLC is a Crown corporation and a "government corporation": *Financial Administration Act*, R.S.B.C. 1996, c.138, s.1. It is for all purposes an agent of the government: s. 3(1) of the *GCA.* In *Bury v. Saskatchewan Government Insurance* (1990), 86 Sask. R. 182, [1991] W.W.R. 47(QB) at 57, aff'd (1990), 91 Sask. R. 39, [1991] 4 W.W.R. 1 (C.A.), Macleod J. gave an individual standing to challenge a decision by the provincial Crown insurance corporation as being *ultra vires* the corporation saying:

> In my view each applicant individual is sufficiently connected to Saskatchewan as a resident of the province (a citizen) to qualify that individual to bring the action under the public interest rule of standing in the circumstances of this case. Saskatchewan Government Insurance is a Crown corporation. It is owned wholly by Her Majesty the Queen in Right of Saskatchewan. In any private corporation, a shareholder would have the right to require that the company conduct its affairs in accordance with its governing constitution. Similarly, in a Crown corporation, while the citizens of the province do not have shares as such, they have a public interest in requiring that the corporation conduct its affairs in accordance with the constitution of the corporation. …

[44] There is another, more important reason why the cases on corporate governance can have no application here. The Jackpot Entitlement Rules are said by BCLC to have the force of law. The power to enact rules in this context is a legislative power to enact laws, the breach of which may give rise to an offence

under the *GCA*. As persons directly affected and subject to those laws, the plaintiff class has standing to challenge their validity. In my view, the indoor management rule can have no application in this context.

(b) Were the Jackpot Entitlement Rules validly enacted?

(i) The October 2008 Board Meeting

[45] Prior to the October 2008 Board Meeting a package was circulated to the Board in which it was stated:

> 7 f. Approval of the Rules and Regulations Respecting Voluntary Self-Exclusion Program
>
> Purpose
>
> Approve BCLC's Rules and Regulations Respecting Voluntary Self-Exclusion Program ("BCLC Rules and Regulations - VSE") to:
>
> a) primarily, entitle BCLC to lawfully impose specific conditions to withhold major prizes won by voluntarily self-excluded players ("VSE Players") and pay the prizes to a third party.
>
> Background
>
> *Statutory Authority*
>
> The *Gaming Control Act* (BC) bestows rule making authority on BCLC with respect to setting rules of play [s.7(1)(g)], governing prize winner selection [s.8(1)(c)] and imposing conditions and establishing qualifications for prize entitlement [s.8(1)(d)]. Therefore, adopting BCLC Rules and Regulations - VSE is an exercise of this statutory rule-making authority and it has long been accepted that only BCLC's Board can approve such adoptions.
>
> *Adoption of BCLC Rules and Regulations - VSE*
>
> BCLC proposes adoption of BCLC Rules and Regulations - VSE where they will strengthen the integrity of BCLC's conduct of lottery gaming. In addition, assisting VSE Players in keeping their promise to themselves by removing an incentive for VSE Players to gamble; namely, the incentive of winning.
>
> Financial Impact
>
> The financial impact is speculative. BCLC will now have the right to withhold and distribute major prizes to a third party in circumstances where BCLC could not previously withhold and distribute major prizes to a third party but it is not possible to predict the resulting financial impact, if any.
>
> Strategic Plan Impact
>
> The proposed adoption of BCLC Rules and Regulations - VSE will provide BCLC with enhanced implementation of its integrity policies. For example, BCLC will now have a legal right to withhold and distribute a major prize from a VSE Player to a third party. This fits with the BCLC value and goal of being

> socially responsible in all of our activities including having a positive impact on communities as we operate our business.
>
> …
>
> Management Recommendation
>
> That based on the recommendation of management, the Board approves the adoption of BCLC's Rules and Regulations - VSE as proposed in the attached draft.

[46] Through inadvertence, however, an incorrect set of rules entitled "Rules and Regulations Respecting Voluntary Self-Exclusion Program" that made no reference to jackpot entitlement was attached to this package. A BCLC affiant deposes that the Jackpot Entitlement Rules had not actually been drafted by the October 2008 Board Meeting.

[47] The plaintiff class introduced in evidence part of the examination-for-discovery of Mr. Paul Smith, BCLC's Director of Corporate Responsibility. Mr. Smith confirmed that the only rules and regulations before the Board at the October 2008 Board Meeting were the incorrect rules, which made no reference to jackpot entitlement.

[48] The following Board resolution is recorded in the minutes for the October 2008 Board Meeting (the "Board Resolution"):

> f. Approval of the Rules and Regulations Respecting Voluntary Self-Exclusion Program (VSE)
>
> Michael Graydon and [redacted for privilege] provided a summary with respect to the proposed adoption of the VSE [sic] and confirmed that adoption of the proposed Rules and Regulations would provide BCLC with enhanced implementation of its integrity policies.
>
> Following consideration and discussion in this session, on motion duly made and seconded, the Board then considered, discussed and approved the following resolution:
>
> WHEREAS management is seeking Board authorization to adopt the Rules and Regulations Respecting Voluntary Self-Exclusion Program in accordance with the Gaming Control Act (BC).
>
> NOW THEREFORE BE IT RESOLVED THAT:
>
> 1. The proposed Rules and Regulations Respecting Voluntary Self-Exclusion Program as presented to the Board are hereby approved; and

> 2. Any authorized officer is hereby authorized to take any other action required to carry out the foregoing resolution including executing all documents, making all filings and taking all action necessary to give effect to the foregoing resolution.
>
> [Emphasis added]

[49] BCLC explains the situation in Constance Ladell's late filed affidavit:

> 4. I recall that the package of materials circulated to the Board in advance of the October 2008 meeting contained as an attachment a set of rules and regulations that were not the rules in respect of VSE prize disentitlement (the "Attachment"). The Attachment was included in the board package due to administrative error.
>
> 5. As of the date of the 30 October 2008 board meeting, no document had yet been drafted to reflect the proposed rules and regulations regarding prize disentitlement in respect of individuals who had voluntarily self-excluded.
>
> 6. At the 30 October 2008 board meeting Mr. Graydon and I explained to the Board that the Attachment had been included in the board package in error, that the Board should disregard the Attachment, and that the principles underlying the proposed rules and regulations were being verbally presented. Mr. Graydon and I then together verbally presented the rationale and concept of the rules and regulations for prize disentitlement from VSE enrolees, as described below at paragraph 7, to the Board. As part of that presentation I explained that the proposed rules and regulations were not yet drafted, and that the drafting process would occur after the Board approved the introduction of such rules and regulations as verbally presented at the meeting.
>
> 7. At the 30 October 2008 Board meeting the Board approved the proposed rules and regulations that Mr. Graydon and I verbally explained, and also approved BCLC to proceed with drafting and introducing those rules and regulations. The proposed rules and regulations that Mr. Graydon and I verbally explained were rules and regulations that would permit BCLC to disentitle participants in the VSE program from prizes if they were identified in gaming facilities in breach of their self-exclusion commitment.
>
> 8. For greater certainty, the Board did not consider or approve the incorrect Attachment that was included in the Board package. The Board gave approval to BCLC to proceed with introducing VSE prize disentitlement rules and regulations as verbally presented by myself and Mr. Graydon, which were the ones described in paragraphs 6 and 7 of my affidavit, above.
>
> [Emphasis added]

[50] Mr. Graydon, BCLC's president and CEO, is also an affiant. He deposed that he recalled the October 2008 Board Meeting because the circulated package of materials "inadvertently did not contain the correct draft [rules]". He further deposed

that “After the resolution was passed, BCLC developed and ultimately, as I understand it, on April 1, 2009 implemented the [Jackpot Entitlement Rules]”.

(ii) Did the Board approve the Jackpot Entitlement Rules?

[51] There is no evidence that the Jackpot Entitlement Rules were approved by the Board at any time other than the October 2008 Board Meeting. The plaintiff class says that the Board never expressly approved the Jackpot Entitlement Rules at the October 2008 Board Meeting. Rather, they say the Board Resolution approved a set of rules that, notwithstanding its title, did not refer to the VSE Program or jackpot entitlement.

[52] BCLC says the evidence clearly establishes that the Board Resolution approved the Jackpot Entitlement Rules. BCLC admits that the package of materials circulated to the Board in advance of that meeting contained incorrect draft rules. However, BCLC says the evidence is clear that the Board did in fact consider “the withholding of major prizes from voluntarily self-excluded players”.

[53] Although the Board Resolution says “The proposed Rules and Regulations Respecting Voluntary Self-Exclusion Program as presented to the Board are hereby approved”, BCLC’s affidavit evidence is that no proposed rules yet had been drafted. This suggestion is hard to reconcile with the documentary evidence. This form of resolution is singularly appropriate for a specific set of rules and regulations. The resolution uses the definite article “The” and refers to the “proposed” rules capitalizing each term in the title to the rules, signifying a specific set of rules. This title is also identical to the title of the incorrectly attached rules.

[54] Without the late filed affidavit of Ms. Ladell, the only interpretation I could realistically give to the evidence is that the Board Resolution approved a set of rules and regulations that did not include any reference to jackpot ineligibility. Further, the actual Jackpot Entitlement Rules that BCLC argues were approved “in principle” by the Board Resolution contain four defined terms, with five provisions regarding entitlement to prizes. While these rules are not complex, I cannot conclude on the evidence here that the actual Jackpot Entitlement Rules were expressly or impliedly

approved by the Board at the October 2008 Board Meeting through the Board Resolution recorded in the minutes to that meeting.

[55] At best the Board approved in principle the general notion of a jackpot ineligibility rule. This is an insufficient basis for me to conclude that the Board approved the Jackpot Entitlement Rules. In my view, the substantive development, drafting, and enactment of the Jackpot Entitlement Rules must have occurred after the October 2008 Board Meeting and was not carried out by the Board.

[56] That said, the Board has the power to delegate "the exercise or performance of any power": s. 4(1)(c) of the *GCA*. The question thus becomes whether the Board (a) must expressly delegate the power to enact rules, and if so, (b) whether there is sufficient evidence here that the Board did in fact delegate the power to draft the Jackpot Entitlement Rules.

(iii) Must the Board expressly delegate its rule-making authority?

[57] BCLC says the *GCA* makes it unnecessary for the Board to delegate any authority to BCLC. BCLC argues that proof of delegation is not required as it is express in s. 4(1)(c) of the *GCA* that the Board can delegate the exercise of its powers. In such a situation, proof of sub-delegation is not required as it can be presumed that an official was granted the sub-delegated authority. BCLC says the only exception to this rule would be in the event the legislation required a formal process for an act of sub-delegation. In this case, BCLC submits the *GCA* provides no express process for the sub-delegation of power. As such, BCLC argues that a presumption of delegation operates.

[58] Alternatively, BCLC asks me to find that there was actual delegation from the evidence of Ms. Ladell but with emphasis on the form of the Board Resolution. BCLC argues that the Board Resolution delegates authority to BCLC's officers to take whatever actions are necessary to give effect to the approval of the Jackpot Entitlement Rules.

[59] The plaintiff class says that there was no proper delegation of the power to make the Jackpot Entitlement Rules. They argue that the Legislature's intent, in granting the Board the power to enact binding rules, could not have been for the Board to adopt an unstructured, undefined rule-making procedure, whereby the Board enacts some rules and then staff others, with no apparent direction as to which rules must be approved by the Board, who can amend those rules, and when a rule becomes binding. The plaintiff class argues that without a board resolution approving the specific Jackpot Entitlement Rules, or a resolution delegating the power to enact those rules to a BCLC staff member, the Jackpot Entitlement Rules were never properly enacted and are unenforceable.

[60] The plaintiff class challenges BCLC's assertion that the Board Resolution delegated the task of developing the Jackpot Entitlement Rules. First, they say the Board Resolution approved a set of rules that did not address the VSE Program. Second, they say an authorization to take all actions "necessary to give effect" to a set of approved rules cannot be read as a sub-delegation to enact those rules. Rather, it was a sub-delegation of the power to undertake mechanical or day-to-day actions. The plaintiffs say any broader reading is illogical and creates absurdities. The plaintiffs say that while the Board's failure to properly enact the Jackpot Entitlement Rules may have been inadvertent, it is not trivial.

[61] In places BCLC seems to be arguing that the *GCA* constitutes a complete delegation of powers from the Board to BCLC staff, therefore rendering it unnecessary for the Board to actually conduct <u>any</u> specific delegation of its authority to enact rules and regulations to staff. I do not interpret the legislation that way.

[62] Section 4(1) provides that the "directors must manage the affairs of the lottery corporation". In my view, in the context of the *GCA* as a whole, that means that BCLC's affairs <u>will</u> be managed by the directors, including those matters listed in ss. 7 and 8 of the *GCA*, <u>unless</u> the Board has delegated its power to do so.

[63] While section 4(1) contains a "may" as well as a "must", the "may" is in my view permissive, in that BCLC is not required to do all of the things it can do under

ss. 7 and 8 of the GCA. That is, BCLC can determine that it will not be involved in, say, horse race gambling.

[64] Further, there is nothing in the evidence before me that supports the notion that there has been a *holus bolus* statutory subdelegation of authority from the Board to BCLC generally. In fact, it seems clear that as a matter of general practice, the enactment of rules and regulations deliberately went before the Board for approval, and the Board was required to approve those rules and regulations by resolution, which was noted in the Board Meeting minutes.

[65] The principle of *delegatus non potest delegare* is trite law; a body granted statutory authority must exercise that authority itself, absent an express or implied power to subdelegate the exercise of that authority. In this case, s. 4(1)(c) of the *GCA* expressly empowers the Board to delegate the exercise of any of its powers, including the power to make rules under ss. 7 or 8 of the *GCA*.

[66] The plaintiff class says that under s. 4 of the *GCA*, the Board must expressly subdelegate its rule-making powers and there is no evidence it did so. BCLC says that no evidence of subdelegation is required because of the “Carltona Doctrine” which acts as a presumption of regularity for subdelegated authority.

[67] In my opinion the authorities establish that for the exercise of certain powers, an express act of subdelegation is required. The cases cited by BCLC focus specifically on ministerial powers and administrative actions. In my opinion, the enactment of the Jackpot Entitlement Rules is a legislative action for which evidence of subdelegation is required.

[68] In *International Forest Products Limited v. Her Majesty the Queen in Right of the Province of British Columbia*, 2006 BCSC 233, Cohen J. states at paras. 291, 294:

> [291] An argument put forward by the Crown is that the District Manager has been delegated only an administrative power. The parties agree that there is usually an implied authority to subdelegate administrative powers: …
>
> …

> [294] It is not always easy to distinguish between legislative and administrative powers. In *Bari III*, *supra*, Wong J. accepted the following definition from S.A. de Smith and J.M. Evans, *De Smith's Judicial Review of Administrative Action*, 4th ed. (London: Stevens & Sons, 1980) at p. 71:
>
> > A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be readily defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expendiency or administrative practice.
>
> [Emphasis added]

[69] Adopting the distinction cited by Cohen J., I think it is clear that enacting the Jackpot Entitlement Rules is a legislative action and, as such, requires express subdelegation to be validly enacted.

(iv) Did the Board delegate enacting the Jackpot Entitlement Rules?

[70] Ms. Ladell's affidavit states that as of the October 2008 Board Meeting, no document had yet been drafted to reflect the proposed Jackpot Entitlement Rules. She deposes that the package of materials circulated to the Board in advance of this meeting contained a set of rules and regulations but that this inclusion was an administrative error.

[71] Ms. Ladell further deposes that she explained this error at the October 2008 Board Meeting, asked the Board to disregard the attachment, and verbally presented the principles underlying the proposed rules and regulations. She says she explained that the drafting process would occur after the Board approved the introduction of the rules in principle.

[72] The Board Resolution (which I repeat for ease of reference) states :

> Following consideration and discussion in this session, on motion duly made and seconded, the Board then considered, discussed and approved the following resolution:
>
> WHEREAS management is seeking Board authorisation to adopt the Rules and Regulations Respecting Voluntary Self-Exclusion Program in accordance with the Gaming Control Act (BC).

> NOW THEREFORE BE IT RESOLVED THAT:
>
> 1. The proposed Rules and Regulations Respecting Voluntary Self-Exclusion Program as presented to the Board are hereby approved; and
>
> 2. Any authorised officer is hereby authorised to take any other action required to carry out the foregoing resolution including executing all documents, making all filings and taking all action necessary to give effect to the foregoing resolution.
>
> [Emphasis added]

[73] It seems this form of resolution is typically used to signify Board approval of an already drafted set of rules and regulations which are either attached to the package circulated to the Board in advance or presented to the Board at the meeting.

[74] For example, the same form of resolution was used to approve amendments to "Jackpot Entitlement Rules and Regulations" at the Board meeting of July 23, 2010 (the "July 2010 Board Meeting"). That resolution reads:

> Following consideration and discussion in this session and on motion duly made and seconded, the Board then considered, discussed and unanimously approved the following resolution.
>
> WHEREAS Senior Management is seeking Board authorization to amend the Jackpot Entitlement Rules and Regulations in accordance with the authority granted under the *Gaming Control Act* (BC).
>
> NOW THEREFORE BE IT RESOLVED that
>
> 1. The proposed amendments to Jackpot Entitlement Rules and Regulations as presented to the Board are hereby approved; and
>
> 2. Any authorized officer is hereby authorized to take any other action required to carry out the forgoing resolution including executing all documents, making all filings and taking all action necessary to give effect to the forgoing resolution.

[75] Interestingly, that resolution arose concerning an item of business described in the minutes for the July 2010 Board Meeting as follows:

> d. Approval of Amendments to the Jackpot Entitlement Rules and Regulations
>
> Terry Towns reported that the existing rules and regulations respecting voluntary self-exclusion and prize entitlement (Jackpot Entitlement Rules and Regulations) have been amended to be consistent with the June 2010 changes to the *Gaming Control Act* (BC) and to enhance the existing Jackpot

> Entitlement Rules and Regulations to disentitle prizes claimed through gambling on PlayNow.com by individuals who have voluntary self-excluded or are provincially barred from BCLC gaming facilities.

[76] However, Terry Towns' affidavit says these minutes misdescribe what actually occurred at the July 2010 Board Meeting. Based on the evidence regarding the October 2008 and July 2010 Board Meetings, it seems that the documentary evidence does a poor job of reflecting what actually happens at a Board Meeting.

[77] Considering the Board Resolution from the October 2008 Board Meeting specifically, in my opinion the examples given of "executing all documents" and "making all filings" must inform the interpretation of the broader phrase "taking all action necessary to give effect to the foregoing resolution".

[78] Of course, when a rule or regulation is approved there are certain things consequent upon that event. In the legislative context what comes to mind includes filing with the appropriate authority (e.g., the registrar of regulations), publication (e.g., in the British Columbia Gazette) or such other actions as might be appropriate for the type of rule or regulation to be enacted (a useful publication referencing these steps is B.G. Nash's, *Legislation*, 3rd Ed., Crown Publications, Victoria, B.C.). In my opinion a fair interpretation of paragraph 2 of the Board Resolution is that the formalities associated with promulgating a resolution are delegated to "any authorized officer" as opposed to the power to develop and draft the substance of the rule or regulation.

[79] The resolution also refers to any "authorized officer". A delegation of power under s. 4(1)(c) of the *GCA* must be "to a person employed by the lottery corporation". Thus, the Board Resolution must refer to any officer of the lottery corporation. BCLC officers are surely identifiable persons. In this case, however, BCLC identifies no one as the officer or officers who are delegated this authority.

[80] BCLC says that it is a big Crown corporation with over 900 employees doing a variety of functions. BCLC says it is therefore impractical for the Board to approve all of BCLC's functions. The rule making authority is one such function and BCLC

argues that it makes sense that it should be exercised by BCLC employees as opposed to the Board.

[81] I disagree. I do not see how it is impractical or inappropriate for the Board of Directors of a large Crown corporation to carry out, as the evidence suggests the BCLC Board generally does, the approval of rules and regulations regarding its operations which carry the force of law.

[82] BCLC says, based on Ms. Ladell's affidavit, the Board approved in principle the adoption of a rule of jackpot disentitlement to VSE Program enrolees. The Jackpot Entitlement Rules are not, however, entirely consistent with that general principle. Because of the definition of "Jackpot Prize", the Jackpot Entitlement Rules only disentitle VSE Program participants from collecting a subset of the prizes they win ("Jackpot Prize" means any gaming facility prize for which identification is requested in order to claim the prize). .

[83] Despite Ms. Ladell's affidavit, the Board Resolution simply does not say what BCLC says it was intended to say. Nor do the Jackpot Entitlement Rules adhere to what BCLC says was approved "in principle" at the October 2008 Board Meeting. The Jackpot Entitlement Rules do not disentitle VSE Program participants from collecting any prizes they win, or even prizes for which identification is required, rather it disentitles them from collecting prizes for which identification is requested in order to claim the prize.

[84] As discussed earlier, there is a statutory requirement based on money laundering legislation that identification is required for prizes over $10,000. However, practices for requesting identification for smaller prizes varies depending on the particular gaming facility operator. Identification may be requested for certain kinds of games but there is no requirement that gaming facilities operators be consistent when they request identification in order to claim a prize under $10,000. .

[85] In the circumstances, I am not persuaded that an express act of delegation by the Board of its rule-making power is shown in the evidence. In so finding, I am

mindful that the court cannot and should not create requirements for the subdelegation of statutory authority where none are specified by in the enabling statute. The *GCA* says nothing beyond restricting delegation to employees about how the Board must subdelegate its powers. As I interpret the authorities, however, as the enactment of the Jackpot Entitlement Rules is a legislative act, BCLC bears the burden of showing that they were validly enacted. Where it is argued that the rule-making power was delegated by the Board, BCLC must evidence an express act of delegation.

[86] Determining whether that burden has been met is not a matter of this Court imposing a procedural requirement that does not occur in the legislation. Rather it involves examining the evidentiary record to determine if there is in fact evidence of subdelegation.

[87] The evidence here does not disclose to whom powers were subdelegated, how they were subdelegated, when the subdelegated powers were exercised, or by whom the subdelegated powers were exercised. In my view, subdelegation has not been established in those circumstances. I do not suggest that any particular method must be used for subdelegation to occur, only that there must be evidence of how and to whom the Board's rule-making powers were subdelegated, and when and how those powers were exercised. This is not a difficult evidentiary burden but in this case the evidence falls short of establishing any of those matters.

[88] In light of the foregoing findings, I conclude that the Jackpot Entitlement Rules were not validly enacted. They are therefore unenforceable.

(v) Are the Jackpot Entitlement Rules saved by incorporation into the gaming contract?

[89] BCLC says that even if the Jackpot Entitlement Rules were invalidly enacted under s. 8 of the *GCA*, they are incorporated into the gaming contract pursuant to BCLC's jurisdiction under s. 7(1)(g) of the *GCA* to "set rules of play for lottery schemes". BCLC argues that the Jackpot Entitlement Rules are also enforceable as

"private law" rules of the game rather than just as "public law" rules with the force of law.

[90] BCLC says that the Jackpot Entitlement Rules are part of the published rules of the game, which a person accepts upon tendering payment to participate. BCLC says s. 7 of the *GCA* goes to BCLC's private capacity to promulgate rules of play that form part of the terms of the gaming contract. The plaintiffs all admit to having knowledge of the Jackpot Entitlement Rules before tendering the wagers that won the prizes they now seek entitlement to.

[91] BCLC offers jurisprudence that describes the private law contractual nature of wagering.

[92] In *Tal v. Ontario Lottery Corporation/Loto 6/49 OLG*, 2011 ONSC 644 at para. 43, Stinson J. notes that wagering involves a form of contract:

> [43] … It is well established that the general law of contract applies to lotteries played in Canada. This is because a contractual relationship is formed between the lottery organization that runs a lottery game and the players who play the game. This relationship is formed as follows: (i) a lottery organization makes an offer to the public to play a lottery game, the terms of which are contained in the written rules that govern the game in question; and (ii) a member of the public accepts the offer, and agrees to its terms as set out in the rules for the lottery game, by purchasing a ticket for the game (the purchase price of the ticket is consideration for obtaining a chance to win a prize). The terms of the resulting agreement are found in the written rules that govern the lottery game: [citations omitted].
>
> [Emphasis added]

[93] Where a physical ticket is not issued, the terms of the offer are governed by the rules and regulations regarding play. In *Hardie v. British Columbia Lottery Corporation*, 1995 CanLII 1149 (B.C.S.C.) at para. 17, aff'd 1997 CanLII 2686 (B.C.C.A.), Hunter J. states:

> [17] Lottery winners are bound by the legislation and its Rules and Regulations to which they agreed when they purchased lottery tickets. The "Lotto 6/49 Game Conditions" which the parties agree constitute part of the Lottery Rules and Regulations address the issue of unclaimed prize money, not by setting up a category entitled "unclaimed prizes", but by defining the winners and what their share of the Pool will be.

[94] A player's monetary bet serves as an acceptance of the rules and regulations regarding play, and forms a binding 'unilateral' contract: *Wong v. Saskatchewan Gaming Corp.*, 2001 SKCA 47, aff'd 2000 SKQB 450; *Oleschuk v. Casino Nova Scotia*, [2004] NSJ No. 524 at para. 3.

[95] The plaintiff class says the same restrictions apply to BCLC's statutory power to "set rules of play" under s. 7 of the *GCA* as apply to its power to make rules pursuant to s. 8 of the *GCA*. They say that rules of the game created under s.7 also have the force of law; they are not "private" as BCLC asserts. They say that BCLC failed to properly enact the Jackpot Entitlement Rules, be it under s. 7 or s. 8. They say the Jackpot Entitlement Rules are invalid either way and do not have the force of law.

[96] The plaintiff class says the posting of the Jackpot Entitlement Rules in gaming facilities does not incorporate them into the gaming contract. If they were not validly enacted as part of BCLC's power to enact rules of play under s. 7 of the *GCA*, they cannot form part of a gaming contract between BCLC and a VSE Program participant.

[97] I agree with the plaintiffs' position. To find otherwise would, in my opinion, be an incorrect interpretation of the *GCA*.

[98] Section 8(1)(d) of the *GCA* empowers BCLC to impose conditions and establish qualifications for entitlement to prizes. That is the essence of the Jackpot Entitlement Rules. I have already found that the Board did not approve these rules. I have also found that enacting these rules is a legislative action that requires express subdelegation by the Board to be carried out by a BCLC employee. There was no such subdelegation of the power to enact the Jackpot Entitlement Rules.

[99] Just because the plaintiffs admitted knowing of their ineligibility to claim prizes prior to wagering does not change the nature of the act by BCLC to establish that ineligibility. It is still a general rule in the nature of a legislative action. It would create an absurdity to allow BCLC to do through s. 7 what it cannot do through s. 8(1)(d).

(c) Do the Jackpot Entitlement Rules constitute a penalty which is *ultra vires* BCLC's rule-making authority?

The Parties' Positions

[100] The plaintiff class says that the Jackpot Entitlement Rules, which cause VSE participants to forfeit their winnings, impose a penalty that falls outside the rule-making powers conferred on BCLC by the *GCA.* They argue that the plain purpose of the Jackpot Entitlement Rules is to impose a punishment through the forfeiture of winnings in order to deter VSE participants from gambling during the term of their self-exclusion. The plaintiff class says the law is settled that the power to make rules and regulations does not include the power to impose a penalty or forfeiture. They say power to penalize must be expressly conferred by statute and will not be implied from the general power to make regulations.

[101] The plaintiff class examines the development of the Jackpot Entitlement Rules as evidence that they were enacted to serve a deterrent function and thus constitute a penalty. They also examine the administration of the Jackpot Entitlement Rules as evidence that they were considered penal. The plaintiffs also say the inclusion of s. 93(3) in the Offences and Penalties section of the *GCA* demonstrates that the Jackpot Entitlement Rules are a penalty.

[102] The plaintiff class argues that the Jackpot Entitlement Rules do not fit comfortably within the authority of s. 8(1)(d) of the *GCA* given to BCLC for "imposing conditions and establishing qualifications for entitlement to prizes in a lottery scheme". This provision, they say, is for making rules that apply to the gaming public generally.

[103] The plaintiff class also argues that BCLC's argument is inconsistent with the *GCA*'s penalty scheme, which intended that a person would be subject to a fine of no more than $5,000 for entering a gaming facility when prohibited from doing so. They say the enactment of s. 93(3) of the *GCA* clearly shows that the Jackpot Entitlement Rules were *ultra vires*.

[104] The plaintiff class argues that just because the Jackpot Entitlement Rules promote the objectives of the VSE program does not render them *intra vires*. The Jackpot Entitlement Rules are still designed to deter breaches of the VSE Program through forfeiture, and are thus a penalty.

[105] The plaintiff class reviews documents they say constitute an admission by BCLC that they did not have the authority to withhold winnings and that doing so constituted a penalty.

[106] BCLC says the Jackpot Entitlement Rules are imposed prior to a breach of the *GCA*. The alleged "penalty" is the loss of an opportunity to claim a prize. The representative plaintiffs admit they had notice of this consequence before they wagered. BCLC says this shows they are simply rules of the game and not a penalty.

[107] BCLC says regulations benefit from a presumption of validity and where possible must be construed in a manner rendering them *intra vires*. They are not *ultra vires* by simply identifying some aspect that might in some circumstances be considered penal. BCLC argues that it cannot reasonably be said that the purpose of the Jackpot Entitlement Rules is to punish. Rendering a VSE participant ineligible as a result of their self-exclusion is not, properly considered, a penal purpose. Further, BCLC submits that any rule with deterrence as a goal is not *ipso facto* penal.

[108] BCLC says that VSE Program participants have no "entitlement" to the jackpots. Rather, the Jackpot Entitlement Rules simply render the VSE Program participants ineligible to receive the jackpot under the authority of s. 8(1)(d) of the *GCA*. In that sense, the Jackpot Entitlement Rules do not take anything away from the VSE Program participants. As such, BCLC says they are not a penalty and the principle that a delegating body will be presumed not to have conferred penalty-making powers has no application.

Analysis

[109] I agree that a general power to make rules and regulations does not include the power to impose a penalty. Rather, the power to penalize must be expressly conferred by statute and will not be implied from the general power to make regulations to further the objects of the statute. As stated in *Keough v. Memorial University of Newfoundland* (1980), 26 Nfld & P.E.I.R. 386, [1980] N.J. No. 185 (S.C.T.D.) at para. 33:

> [33] … The law is abundantly clear that if Parliament intends to confer upon a subordinate body the right to enact penal regulations, the legislation purporting so to do must say so explicitly and with absolute clarity. To put it another way, the power to make regulations does not include the power to impose penalties or create offences unless such power is expressly given.

[110] I also agree with BCLC's assertion that regulations benefit from a presumption of validity and, where possible, must be construed in a manner rendering them *intra vires*. The Supreme Court of Canada states in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 at para. 25:

> [25] Regulations benefit from a presumption of validity (…). This presumption has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations, rather than on regulatory bodies to justify them (…); and it favours an interpretative approach that reconciles the regulation with its enabling statute so that, *where possible*, the regulation is construed in a manner which renders it *intra vires* (…).
>
> [Italics in original]

[111] The essence of the dispute is whether the Jackpot Entitlement Rules constitute a penalty or not. The plaintiff class characterizes the effect of the Jackpot Entitlement Rules as the <u>forfeiture</u> of winnings. BCLC characterizes the Jackpot Entitlement Rules as rendering VSE Program participants <u>ineligible</u> to receive winnings when they gamble during their self-exclusion, thus meaning there are no winnings for them to forfeit.

[112] I find the differing characterizations of the Jackpot Entitlement Rules unhelpful in determining whether the Jackpot Entitlement Rules are *intra vires*. Primary guidance must be derived from the language conferring the rule-making powers in

s. 8 of the *GCA*. Section 8(1)(d) clearly conveys on BCLC the authority to make rules "imposing conditions and establishing qualifications for entitlement to prizes".

[113] The plaintiff class argues that the Jackpot Entitlement Rules "do not fit comfortably" within the authority of this provision because they do not apply to the gaming public generally. They also suggest that rules made under this provision must "impose a condition or qualification which can be satisfied" in order to claim a prize. The plaintiff class seems to suggest that BCLC cannot render certain persons, or a class of persons, ineligible to claim prizes even before a wager is made.

[114] With respect, I see nothing in the wording of this provision that suggests that rules establishing entitlement to prizes must have this particular "character". Rather, the ambit of this provision appears to confer a broad authority to establish rules that generally establish qualifications for prizes.

[115] I see it as unnecessary to determine whether in fact the Jackpot Entitlement Rules constitute a penalty. The Jackpot Entitlement Rules establish that if you are a VSE Program participant, you are not entitled to claim jackpot prizes. Whether this constitutes a penalty or not, in my view it clearly falls within the ambit of what the legislature intended to grant BCLC the authority to do under s. 8(1)(d) of the *GCA*.

(d) Are the Jackpot Entitlement Rules unenforceable against class members who enrolled in the VSE Program prior to their enactment?

The Parties' Positions

[116] The plaintiff class says that even if valid and *intra vires*, the Jackpot Entitlement Rules cannot be applied retrospectively to VSE Program participants who enrolled in the VSE Program prior to their enactment. They say this is because a legal relationship formed between BCLC and a VSE Program participant upon enrollment in the VSE Program, and thus the Jackpot Entitlement Rules should not be construed as in any way altering this relationship. The plaintiff class says this legal relationship includes the fact that participants cannot withdraw from the VSE Program during the self-exclusion period. The plaintiff class cites evidence that

BCLC was concerned about whether it could retroactively change the terms of the VSE Program.

[117] The plaintiff class argues that a participant's rights and obligations under the VSE Program were fixed at the time they enrolled, and that BCLC cannot exercise its rule-making power to prejudicially affect those vested rights and obligations. They say this is particularly so because the VSE Program is voluntary, so BCLC can only enforce the terms of the VSE Program which the participants agreed to. They say BCLC cannot unilaterally change the terms of the VSE Program without the consent of the VSE Program participants. Put another way, the plaintiff class says that either the Jackpot Entitlement Rules cannot apply to the individuals who enrolled prior to April 1, 2009, or those individuals' agreement to participate in the VSE Program cannot be enforced against them.

[118] The plaintiff class says that while it may not be a contractual relationship, enrollment in the VSE Program clearly altered the participants' rights or entitlements in a significant manner. The plaintiff class even says it altered their legal position in an irrevocable manner, and that the BCLC has no statutory authority to reach back in time and retrospectively alter the terms upon which they agreed to irrevocably alter their legal position. They say it is irrelevant that this creates two classes of VSE enrolees.

[119] BCLC says the VSE Form is not a contract. As it provides a VSE Program participant with no legal rights, BCLC says no legal rights were affected when the Jackpot Entitlement Rules were enacted. BCLC submits that law is not retroactive or retrospective when it has immediate application, as the Jackpot Entitlement Rules did. Plus, BCLC says it would create an absurdity for the Jackpot Entitlement Rules to split VSE participants into two classes with different rights.

Analysis

[120] The terms "retrospective" and "retroactive" as used by the parties in argument are sometimes confusing. The different ways that legislation may be applied is

described in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ontario: LexisNexis Canada Inc., 2008) at 668-669:

> Legislation may be applied so as to:
>
> 1. change the past legal effect of a past situation (a “retroactive” application)
>
> 2. change the future legal effect of a past situation (a “retrospective” application)
>
> 3. change the future legal effect of an on-going situation (an “immediate” application)
>
> 4. change the future legal effect of a future situation (a “future” application)
>
> 5. take away or diminish a protected expectation of interest (interference with “vested, accrued or accruing rights”)
>
> 6. preserve a protected expectation or interest (this entails the “survival” of the former law)

[121] Legislation that is exclusively prospective applies only to events occurring after the legislation comes into effect. It is likely to make the legal consequences of those events different from what they would have been if the events had occurred before the legislation came into effect. Legislation that is either retrospective or retroactive changes the legal consequences of events which occurred before the legislation came into effect. Retrospective legislation changes the effect of those events after the legislation comes into effect. Retroactive legislation changes the effect of those events from the time when the events occurred.

[122] For legislation to have retrospective or retroactive application, it must alter the legal effect of a past situation. That is clearly not the case with the Jackpot Entitlement Rules. They do not purport to have any application to the relationship between a VSE Program participant and BCLC prior to their enactment on April 1, 2009. Rather, they purport to apply to the relationship between VSE Program participants and BCLC from the date of enactment going forward. The Jackpot Entitlement Rules are in no way “a clear attempt to reach into the past” as the plaintiff class submits. In my opinion the Jackpot Entitlement Rules, if validly enacted, are prospective in application.

[123] That said, the Jackpot Entitlement Rules do change the terms of the VSE Program from April 1, 2009, onwards. The plaintiff class' argument is better described as asserting that the Jackpot Entitlement Rules cannot alter this relationship for those VSE Program participants who enrolled prior to April 1, 2009. This is not a question of whether the Jackpot Entitlement Rules are retroactive, retrospective, or prospective. Rather, it is a question of whether the Jackpot Entitlement Rules can alter the established terms of the relationship. In other words, are the terms of that relationship a "vested right"?

[124] There is a presumption that the legislature does not intend legislation to be applied in circumstances where it interferes with vested rights. Dickson J. wrote in *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 S.C.R. 271 at 282:

> … The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction: … The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation. …

[125] In the specific context of regulations, *Sullivan on the Construction of Statutes*, 5th ed states at 727:

> It is presumed that the legislature does not intend to delegate a power to legislative retroactively, retrospectively or to interfere with vested rights. As Southin J.A. put it in *Casamiro Resource Corp. v. British Columbia (Attorney General)*, [1991] B.C.J. No 1097, 80 D.L.R. (4th) 1 (B.C.C.A.), such a delegation would be out of keeping with Canadian notions of decent legislative behaviour.

[126] In practice, this means two things: (1) regulations and other forms of delegated legislation are presumed to only apply prospectively and not to interfere with vested rights; and (2) delegated legislation that claims to have retroactive application or to interfere with vested rights is presumed to be invalid. Both presumptions are rebuttable.

[127] The plaintiff class argues that the Jackpot Entitlement Rules irrevocably alter the legal position of those VSE Program participants who enrolled prior to April 1, 2009. BCLC argues that no legal rights are affected by the Jackpot

Entitlement Rules, as participation in the VSE Program does not give rise to contractual relations.

[128] The first question to answer in determining whether the Jackpot Entitlement Rules apply to those VSE Program participants who enrolled prior to April 1, 2009, is whether enrollment in the VSE Program gave participants certain "vested rights" which cannot be altered by BCLC's rule-making authority

[129] On the question of when a right is vested, Bastarache J. wrote in *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530 at para. 37:

> … an individual must meet two criteria to have a vested right: (1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement (…).

[130] *Sullivan on the Construction of Statutes*, 5th ed states at 712-713:

> To determine what is a vested or accrued right, the courts focus sometimes on the common law presumption and sometimes on the language of the Interpretation Acts. Regardless of focus, the central problem is the same. The court must decide whether the particular interest or expectation for which protection is sought is sufficiently important to be recognised as a right and sufficiently defined and in the control of the claimant to be recognised as vested or accrued.
>
> Some vested rights are easily recognised. Property rights, contractual rights, and rights to damages or other common law remedies are well established categories. So are defences and immunities from suit. For the most part, these are "private law" rights with a respectable common law pedigree; their importance is taken for granted. …
>
> Outside these traditional categories, it can be difficult to predict when a given interest or expectation will be recognised as a vested or accrued right. There is a vast range of claims that may be made by members of the public for statute-based benefits, authorisations, exemptions, remedies, orders and the like. The methods of establishing and enforcing those claims follow no fixed pattern. Some entitlements depend on matters within a claimant's control, while others depend on the actions or choices of others. In each case, the court must decide whether at the moment of repeal the individual's statutory claim was sufficiently developed, and sufficiently in his or her possession, to count as a vested right.
>
> [Emphasis added]

[131] In this case, the plaintiff class seeks the right to continue their participation in the VSE Program according to the terms that existed when they enrolled. More specifically, they seek the right to claim jackpot prizes when they gamble in breach of their voluntary self-exclusion. I would not describe this as a "term" of the VSE Program before April 1, 2009; rather, it is simply a matter not within the parties' express contemplation at the time of enrollment in the VSE Program.

[132] At first glance, it would appear that the VSE Form creates a contractual relationship between a VSE Program participant and the BCLC. However, Truscott J. found in *Ross v. British Columbia Lottery Corporation*, 2014 BCSC 320 at paras. 486-487 that the VSE Form is not a contract at law, a position both parties endorse here. BCLC is mandated by the Responsible Gambling Standards to provide the VSE Program, although it is unclear exactly what that program must include (*Ross* at para. 490-491).

[133] As such, the "vested rights" asserted by the plaintiff class do not fall into any traditional category of "private law" rights. Rather, the plaintiffs seek the right to continue to be governed by a particular scheme in which they are a voluntary participant.

[134] Albeit in the context of tax legislation, Dickson J. wrote in *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 S.C.R. 271 at 282-83:

> …It is perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights, … No one has a vested right to continuance of the law as it stood in the past; …

[135] On this comment, *Sullivan on the Construction of Statutes*, 5th ed states at 717:

> What Dickson J. says of tax legislation applies to all legislation. Once the government undertakes to regulate a matter to protect the interests of particular groups or the public at large, individuals who organise their affairs on the assumption that "promised" advantages will not be withdrawn do so at their own risk.

[136] I would not describe the right that the plaintiff class seeks to assert as a "promised advantage", or even an "antecedent right". Rather, the plaintiffs seek to characterize and preserve a "right" that seems an anathema to the very purpose of the VSE Program.

[137] The plaintiff class argues that while the VSE Form may not have been a contractual relationship, it clearly altered the VSE Program participants' rights in a significant manner. In particular, they assert that participants irrevocably agreed to be excluded from gaming facilities during the exclusion period. Yet here they seek the preservation of a right to collect jackpot prizes if they breached their voluntary exclusion, were not detected at a gaming facility by BCLC, and won a jackpot. The right the plaintiff class asserts is so manifestly contrary to the purpose of the VSE Program in which they enrolled that I cannot consider it a vested right with which the Jackpot Entitlement Rules are presumed not to interfere.

[138] Even if the plaintiffs' asserted right is a "vested right", I would find the presumption against the Jackpot Entitlement Rules interfering with it to be rebutted. Where the rights sought to be preserved are part of the mischief at which the legislation is aimed, the presumption is readily rebutted. This point was made by Cameron J.A. in *National Trust Co. v. Larsen* (1989), 61 D.L.R. (4th) 270 at 278:

> …it is manifestly clear that the change in the law was remedial, not in the sense of concerning remedy, though it is that too, but in the beneficial sense of correcting an imperfection in the prior law. … that being so I think it fair to say the amendment might more readily be construed as having been intended to encroach upon the right in issue than would otherwise be the case.

[139] The plaintiff class cites evidence that they say shows BCLC's concern about whether it could retroactively change the terms of the VSE Program. I view this evidence differently. In my opinion, this shows BCLC's clear intention to change the terms of the VSE Program for those already involved. Such evidence goes to rebutting the presumption that legislation is not intended to interfere with vested rights, though I have already found that the interests at issue were not "vested rights" in respect of which the presumption would operate anyway.

(e) Do the Jackpot Entitlement Rules conflict with s. 93(3)?

The Parties' Positions

[140] The plaintiff class says that even if the Jackpot Entitlement Rules are enforceable, they cannot be enforced after the enactment of s. 93(3) of the *GCA* on June 3, 2010, to the extent that the Jackpot Entitlement Rules conflict with s. 93(3) of the *GCA*. The plaintiff class says the Jackpot Entitlement Rules are clearly inconsistent with s. 93(3) of the *GCA*, which requires s. 92(b) notice for a prize to be withheld, whereas the Jackpot Entitlement Rules provide that a jackpot prize can be withheld from any VSE Program participant regardless of whether they were given s. 92(b) notice.

[141] The plaintiff class says that it is settled law that regulations cannot exceed the provisions of the statute under which they are made. They cite *Yu et al. v. Attorney General of British Columbia*, 2003 BCSC 1869 at para. 97, which notes that if regulations constitute an attempt to add to or amend a statute, they will be held *ultra vires*. The plaintiff class says the Jackpot Entitlement Rules exceed the provisions of s. 93(3) of the *GCA* and are therefore inconsistent with it. The plaintiff class cites evidence that BCLC acknowledged the need to, and indeed intended to, amend the Jackpot Entitlement Rules to be consistent with s.93(3) of the *GCA*, although this was never actually done.

[142] BCLC says there is clearly a difference between the Jackpot Entitlement Rules and s. 93(3) of the *GCA*, but that there is no operational conflict between them. Rather, BCLC says there is a presumption of coherence in statutory interpretation, whereby legislative provisions are meant and should be interpreted to work together.

Analysis

[143] I agree that there is a difference between the Jackpot Entitlement Rules and s. 93(3) of the *GCA*. I cannot, however, agree with the plaintiff class' position that the Jackpot Entitlement Rules exceed s. 93(3) of the *GCA*. The Jackpot Entitlement Rules operate in tandem with the VSE Form. The VSE Form contains a "Self-

Exclusion Notice". The provisions of s. 93(3) and 92(b) refer to "written notice". Thus, while there is a difference between the Jackpot Entitlement Rules and s. 93(3) the *GCA*, I agree with BCLC's position that there is no operational conflict between them.

(f) Does signing a VSE Form constitute s. 92(b) notice?

[144] From its enactment to June 3, 2010, s. 92 of the *GCA* provided:

> **92** If the lottery corporation or a person acting on its behalf has reason to believe that the presence of a person on the premises of a gaming facility is undesirable, the lottery corporation or person acting on its behalf may
>
> (a) request the person to leave the premises of the gaming facility immediately, or
>
> b) by written notice delivered to the person, forbid him or her to enter the premises of the gaming facility at any time during a period specified in the notice.

[145] On June 3, 2010, s. 92 of the *GCA* was amended to read:

> **92** If the lottery corporation or a person acting on its behalf has reason to believe that the presence of a person on the premises of a gaming facility is undesirable or that the person on the premises is a participant in a voluntary self-exclusion program, the lottery corporation or person acting on its behalf may
>
> (a) request the person to leave the premises of the gaming facility immediately, or
>
> b) by written notice delivered to the person, forbid him or her to enter the premises of the gaming facility at any time during a period specified in the notice.
>
> [Amendment underlined]

[146] From 2002 until July 2010, the VSE Form stated:

> I have requested self-exclusion and BCLC hereby notifies me as per Section 92(b) of the *Gaming Control Act* (BC) that I am forbidden to enter any B.C. gaming facility during the term of this self-exclusion. I understand that if I attend any gaming facility, during the term of this self-exclusion and I am identified by BCLC or facility staff I will be requested to leave the gaming facility. If I refuse to leave the gaming facility upon request or enter a selected gaming facility during the period of self-exclusion or at any other time when I am prohibited from doing so, I will be removed and may be subject to proceedings under the Gaming Control Act (BC) including a fine of up to $5000.

[147] After July 2010, the VSE Form stated:

> Pursuant to the provisions of section 92(b) of the *Gaming Control Act* (the "Act") this document constitutes WRITTEN NOTICE to you that, as a person who is a participant in a voluntary self-exclusion program entered into with the British Columbia Lottery Corporation, you are hereby forbidden, pursuant to section 93(1)(c) of the *Act*, from entering the premises of any gaming facility within the Province of British Columbia at any time during the period of your self-exclusion.

The Parties' Positions

[148] The plaintiff class says the VSE Form signed by the VSE Program participants upon their enrollment does not constitute delivery of notice pursuant to s. 92(b) of the *GCA*. BCLC says it does. This is a, if not the, critical issue in this proceeding. There is no suggestion that any class member received s. 92(b) notice other than by signing the VSE Form.

[149] The plaintiff class says this is a significant issue for two reasons. First, the loss of the entitlement to win prizes under s. 93(3) of the *GCA* is only triggered upon delivery of s. 92(b) notice. Second, delivery of s. 92(b) notice is a necessary requirement for BCLC's defence of illegality. The plaintiffs say that if no such notice was delivered, the plaintiffs' presence at the gaming facilities was not unlawful.

(i) Is this issue determined by Truscott J. in Ross?

[150] BCLC argues that *Ross* already decided that the VSE Form constitutes notice under s. 92 of the *GCA*. In particular, BCLC relies on Truscott J.'s statement that the VSE Program would be toothless without the power to ban.

[151] The plaintiff class says the question of whether the VSE Form constitutes proper notice under s. 92 of the *GCA* was never before Truscott J. as all parties accepted that the VSE Form constituted s. 92(b) notice. In fact, the plaintiff class says it is clear that the VSE Program operated before s. 92 was enacted, thus the VSE Form itself is sufficient authority for BCLC to exclude VSE Program participants.

(ii) The proper approach to interpreting s. 92(b) of the Act

[152] The plaintiff class says that just because the VSE Form expressly purports to be providing s. 92(b) notice, does not make it so. For it to constitute valid s. 92(b) notice it must comply with the requirements of s. 92 of the *GCA*.

[153] The plaintiffs caution that the purpose of s. 92 is patently not to support the VSE Program. Rather, s. 92 was intended to apply to all types of potentially undesirable people, not just VSE Program participants. They say there is no evidence that s. 92 was in any way enacted specifically to support the VSE Program or that the enactment of s. 92 was necessary to support the VSE Program. As such, the plaintiff class says the VSE Program's goals should not govern the interpretation of s. 92 of the *GCA*. They say that BCLC wrongly equates the interpretation of s. 92 with the delivery of the VSE Program.

[154] The plaintiff class says that BCLC wrongly proposes that s. 92(b) must extend to the VSE Form because BCLC decided to construct its VSE program in the form of a s. 92(b) notice. They say this reasoning has no merit, in logic or in law. Rather, they say the meaning and scope of s. 92(b) is a matter of statutory interpretation, having regard to the text of the provision, as well as its context and purpose.

[155] The plaintiff class similarly argues that BCLC wrongly equates the authority to issue a s. 92(b) notice with the general ability to control access to and the use of gaming facilities. Rather, they say that s. 92 defines the circumstances when BCLC can render a person eligible for prosecution for a criminal offence for entering a gaming facility.

(iii) What are the prerequisites for s. 92(b) notice?

[156] The plaintiff class argues that three conditions must be satisfied in order for notice to be issued in accordance with s. 92(b): (1) The notice can only be issued to a person who is or was on the premises of a gaming facility; (2) BCLC must have reason to believe that that person's presence on the premises is <u>currently</u> undesirable (or, since the amendment, that the person is <u>already</u> a participant in a

VSE program); and (3) the written notice issued must forbid the person from entering that particular gaming facility. The plaintiff class says this construction of s. 92 is sensible and reasonable given that s. 92 provides the foundational elements for criminal liability under s. 97 of the *GCA*. The plaintiff class says this interpretation is the same before and after the June 3, 2010, amendment. They also say the VSE Form does not comply with any of these three conditions and thus cannot constitute s. 92(b) notice.

1. Does notice require an undesirable "on premises" event?

[157] The plaintiff class submits that the plain language of s. 92 shows that for notice to be given there must be a person on premises that BCLC believes is undesirable, or a participant in the VSE Program. They say that signing the VSE Form does not meet this requirement. The plaintiff class says the two options available to BCLC under s. 92(a) and (b) of the *GCA* support the fact that the person must be on premises; BCLC cannot have the option of asking someone to leave under s. 92(a) if they are not on the premises in the first place.

[158] In contrast, BCLC says s. 92(b) notice can be given at the time someone enrols in the VSE Program by completing the VSE Form, irrespective of where they are when they enrol, and simply by virtue of their status as VSE Program enrolees. BCLC says that s. 92(b) stipulates nothing about where the notice is to be given. BCLC says there are policy reasons why this should be so.

[159] BCLC says that s. 92(b) contains no language limiting BCLC's discretion to determine the circumstances around whether a person's presence is undesirable. Specifically, BCLC says that a person need not be currently present at a gaming facility before their presence can be deemed undesirable. In other words, BCLC is not required to "catch" the person on site before being allowed to deliver s. 92(b) notice.

[160] BCLC argues that there is no distinction to be drawn between "current" and "future" undesirability. That is to say, BCLC submits that a person's presence at a gaming facility can be rendered undesirable as soon as they express an intention to

enroll in the VSE Program. BCLC further argues that the language of s. 92 extends to include persons whose future attendance at a gaming facility is undesirable.

[161] The plaintiff class says there is no merit to BCLC's contention that the present-tense phrasing of s. 92 bears no legal significance. They also argue that there is no merit to BCLC's suggestion that a statute must be interpreted as "always speaking".

2. What is the scope of "premises"?

[162] The plaintiff class says that at the time of enrollment, the VSE participants were not present "on the premises of a gaming facility" within the meaning of s. 92. They say a "gaming facility" is limited to the casino gaming floor, which is not where VSE Forms are ever completed. Rather, the VSE Forms are completed at the casino's security office, at one of BCLC's office locations or at casino locations after hours.

[163] On the other hand, BCLC says that the word "premises" encompasses the entire grounds or appurtenances of a gaming facility, which is often where the VSE Form is signed. BCLC says it would be an absurdity to interpret the word "premises" any more narrowly.

3. What is the proper scope of s. 92(b) notice?

[164] The plaintiff class says that the plain language of s. 92(b) provides that notice may be issued forbidding a person to enter "the gaming facility" not "any gaming facility". They say. 92(b) does not permit BCLC to issue a broad notice of prohibition such as is contained in the VSE Form. The plaintiff class argues that the key interpretative issue is the legislature's use of "the gaming facility" instead of "a gaming facility" in s. 92 of the *GCA*.

[165] BCLC responds that the use of singular as opposed to plural, i.e. "a gaming facility" instead of "gaming facilities" is not semantically significant. In essence, BCLC says the notice of prohibition is properly effected in one document for all provincial gaming facilities.

(iv) What effect did the 2010 amendment to s. 92 have?

[166] The plaintiff class says the amendment supports their interpretation of the proper scope of s. 92(b) notice, i.e. limited to a prohibition in respect of the gaming facility where any person is caught attending in violation of their participation in the VSE Program.

[167] In contrast, BCLC says the amendment was merely intended to signal that a person enrolling in the VSE Program is, *ipso facto*, someone who should receive notice of prohibition. In other words, they say it confirms BCLC's long-standing practice.

[168] The plaintiff class says that there is no merit to the assertion that the amendment "did not intend to affect any substantive change to the law". Rather, they say that correspondence between BCLC and the Deputy Minister clearly shows the amendments were the result of a BCLC request for statutory authority that BCLC recognized it did not have.

[169] The plaintiff class says there is no legal or logical basis for straining the phrase "is a participant in the voluntary exclusion program" to include a person in the act of "enrolling" in the VSE program.

(v) What effect did the enactment s. 93(3) have on prior s. 92(b) notice?

[170] BCLC says the clear language of s. 93(3) shows there is no retrospectivity in its operation. Rather, it applies from that point on to anyone who has received s.92(b) notice at any time beforehand. BCLC argues that s. 93(3) does not require BCLC to deliver a fresh s.92(b) notice to those given notice before s.93(3) was enacted. BCLC says it would be contrary to the scheme and object of the Act for there to be two classes of VSE Program participants who've received s. 92(b) notice. BCLC says those VSE Program participants given s. 92(b) notice prior to the enactment of s.93(3) have no "vested rights".

Analysis

[171] The key question in resolving this issue is the proper interpretation of s. 92 of the *GCA*.

[172] I agree with the plaintiff class that Truscott J.'s decision in *Ross* is not determinative of this issue. While *Ross* does state that the VSE Form constituted effective s. 92(b) notice, the issue in that case was factual, not legal. The proper interpretation of s. 92 of the *GCA* was therefore not among the myriad of issues which Truscott J. was asked to consider in that case.

[173] The principle of judicial comity relied upon by BCLC is "a guide for one trial court judge examining an issue which had already been considered and decided by another judge of the same court": *John Carten Personal Law Corporation v. British Columbia (Attorney General)* (1997), 40 B.C.L.R. (3d) 181 (C.A.) at para. 7 (emphasis added). It cannot be said that the proper interpretation of s. 92 was an issue considered and decided by Truscott J. in *Ross*. That task, then, falls to me.

[174] For ease of reference, I reproduce s. 92 of the *GCA* here:

> **92** If the lottery corporation or a person acting on its behalf has reason to believe that the presence of a person on the premises of a gaming facility is undesirable or that the person on the premises is a participant in a voluntary self-exclusion program, the lottery corporation or person acting on its behalf may
>
> (a) request the person to leave the premises of the gaming facility immediately, or
>
> (b) by written notice delivered to the person, forbid him or her to enter the premises of the gaming facility at any time during a period specified in the notice.
>
> [underlined portions added by amendment effective June 3, 2010]

[175] In my view, interpreting s. 92 to require a person's physical presence at a gaming facility as a pre-condition to the issuance of any written notice strains the ordinary meaning of the provision's text. Section 92 requires a belief that it is undesirable for a person to be on the premises of a gaming facility. There is no indication from the plain meaning of the words that the requisite belief can only be

formed after a person is present in a gaming facility. There is also no indication this is how the Legislature intended the provision to be understood. One can believe it "is undesirable" for a person to be somewhere without requiring the person to be physically there. Put another way, s. 92 simply requires reason to believe that it would be undesirable at any point in time that the person be present at a gaming facility. It is immaterial whether the person is, was, or will ever be in a gaming facility.

[176] Further, interpreting s. 92 to require a person's physical presence at a gaming facility is contrary to s. 92's purpose within the scheme of the *GCA*. I reject the plaintiff class' assertion that s. 92's purpose is to define who is eligible for prosecution under the *GCA;* that is the operative effect of s. 92, not its purpose. Section 92 is clearly designed to grant BCLC the authority to exclude certain people from gaming facility premises. It would be puzzling if a provision intended to grant the authority to exclude persons from a certain place first required a person's presence in exactly that place before the power to exclude could be exercised.

[177] The plaintiff class' next major contention is that s. 92(b) notice can only be issued on a facility-by-facility basis due to the use of the definitive article in the section. That is, because s. 92(b) says that the written notice will "forbid him or her to enter the premises of the gaming facility", written notice can only pertain to a single facility.

[178] Following from the reasoning above, I do not think that the use of the definite article in s. 92(b) confines written notice to excluding a person from a single facility. A fair and liberal interpretation of s. 92, which best animates s. 92's purpose of affording BCLC control over who can attend its gaming facilities, does not favour this interpretation. I read s. 92 to allow written notice to specifically refer to one gaming facility, not to mandate it. There is nothing in the text of the section that precludes the written notice from specifying a ban from multiple, or even all, gaming facilities in the province.

[179] This interpretation also fits best with my finding that s. 92 does not require a person to be physically present at a gaming facility for BCLC to hold the belief that

their presence at a gaming facility is undesirable. It would be unreasonably restrictive to interpret s. 92 to require the belief about a person's undesirability to be in relation to a particular gaming facility only. Interpreting s. 92 this way would link a person's undesirability to a particular gaming facility. This does not mesh with either the plain wording of s. 92 or its purpose within the scheme of the *GCA*.

[180] Section 28(3) of the *Interpretation Act* supports this interpretation: "[i]n an enactment words in the singular include the plural, and words in the plural include the singular." Thus, s. 92(b) must be read as capable of forbidding a person from entering "the gaming facility" or "the gaming facilities". The specific facility or facilities in respect of which the exclusion operates is left to the individual notice.

[181] Written notice pursuant to s. 92(b) of the *GCA* can be issued whenever BCLC or a person acting on its behalf has reason to believe a person's presence at a gaming facility is undesirable. The concept that is of operative importance is the reason to believe a person's presence in a gaming facility is undesirable. Section 92 does not limit that belief to a person who is or was in a gaming facility. Further, written notice issued pursuant to s. 92(b) may bar a person from one, several, or all gaming facilities depending on the text of the notice, which will be based on the reason for believing that person's presence in a gaming facility is undesirable.

[182] The plaintiff class urges me to find that s. 92 only included the authority to issue written notice forbidding entry to gaming facilities to VSE Program participants after the enactment of *Bill 20*; that is, when the words "or that the person on the premises is a participant in a voluntary self-exclusion program" were added to the section. They say this was the Legislature's recognition that the authority did not exist as s. 92 was previously worded. Put another way, the plaintiff class says that by adding the above phrase, the Legislature recognized that a person's presence in a gaming facility could not be "undesirable" simply based on the fact that they were a VSE Program participant.

[183] I cannot accede to this submission.

[184] As discussed above, I find it clear that the pre-*Bill 20* wording of s. 92 allowed BCLC to issue written notice to any person whose presence they determined to be undesirable. The word "undesirable" is undefined by the *GCA*. It must, then, be ascribed its plain meaning. There is no reason to surmise that, prior to *Bill 20*, the undesirability of a person's presence on a gaming facility could not have been predicated on their status as a VSE Program participant. In my opinion, the presence of a self-admitted problem gambler in a gaming facility, after that person took steps of his or her own volition to curb that gambling problem, falls squarely within the plain-language meaning of the word "undesirable".

[185] The question that necessarily arises is, why was s. 92 amended to specifically include VSE Program participants as a specified class of people to whom written notice could be issued, if VSE Program participants could have been issued written notice under the previous wording of s. 92? The plaintiff class' position is that the phrases must be given separate spheres of meaning and each word in s. 92 given specific effect in order to avoid a tautology.

[186] The presumption against tautology in legislation can be rebutted. *Sullivan on the Construction of Statutes*, 5th ed writes at 214:

> The presumption can also be rebutted by suggesting reasons why in the circumstances the legislature may have wished to be redundant or include superfluous words. Drafters sometimes anticipate potential misunderstandings or problems in applying the legislation and, in an effort to forestall these difficulties, resort to repetition or the inclusion of unnecessary detail. …Repetition is not an evil when it serves an intelligible purpose. When tautologous words are deliberately included in legislation for reasons such as these, the courts say they are added *ex abundanti cautela*, out of an abundance of caution, and the presumption against tautology is rebutted.

[187] I note, as well, the description of a "common drafting dilemma" in *Sullivan on the Construction of Statutes*, 5th ed at 242:

> A drafter who relies on broad general language, not qualified or illustrated by specifics of any sort, runs the risk of the courts refusing to give effect to the language because it is not precise or explicit enough.

[188] I surmise that s. 92 was amended to provide greater clarity regarding BCLC's authority to control who may enter its premises. This proceeding buttresses the legislature's purpose in doing so. While I have concluded that the previous version of s. 92 encapsulated most, if not all, VSE Program participants, others may have interpreted the legislation differently. The amendment to s. 92 was animated by the Legislature's concern that BCLC have the powers necessary to effectively enforce its VSE Program. In my view, the change to s. 92 was not designed to expand BCLC's powers over who it may exclude from gaming facilities, but rather to provide greater clarity by making it abundantly clear that s. 92 definitely applies to VSE Program participants.

[189] In my view, the legislation anticipates problems in the way "undesirable" is interpreted. As evidenced by the plaintiff class' own argument, there were people who thought, even if incorrectly, that the meaning of undesirability in s. 92 was limited to a person physically present at a gaming facility and whose presence was *immediately* undesirable at that *specific* gaming facility. While that is not the case, as discussed above, the legislation clarifies the wording of s. 92.

[190] The final issue is whether written notice issued prior to the enactment of s. 93(3) of the *GCA* constitutes effective notice for the purpose of that section, which disentitles anyone issued s. 92 notice from collecting winnings.

[191] This issue is duplicative of the argument already discussed regarding the temporal application of the Jackpot Entitlement Rules. The same legal principles apply when evaluating the temporal application of s. 93(3) and there is no need to repeat them here. Suffice it to say that, on the same principles already articulated, I find that people issued valid notice pursuant to s. 92 of the *GCA* had no vested rights and thus s. 93(3) applied from the point of its enactment to anyone subject to valid written notice issued pursuant to s. 92. This, as discussed above, included anyone who had signed a VSE Form.

[192] It follows, then, that the VSE Forms constitute valid written notice as required by s. 92(b) of the *GCA*.

(g) Does illegality bar the plaintiff class from recovering?

The Parties' Positions

[193] The plaintiff class admits that the *ex turpi causa* principle is a defence to an otherwise valid claim and operates to deny recovery for what would otherwise be a valid cause of action. They say BCLC bears the burden to show that the plaintiff's contractual right to recover should not be enforced by reason of their illegal conduct. They say it is clear that the *GCA* does not make it unlawful for VSE Program participants to gamble. The plaintiff class says BCLC must establish that requiring BCLC to meet its contractual obligations owed to the plaintiff would undermine the integrity of the justice system.

[194] The plaintiff class says the defence of illegality does not preclude them recovering their jackpot prizes for two basic reasons. First, they say it is not necessary to deny VSE Program participants their jackpots in order to affirm the legislative object behind the prohibition against VSE Program participants entering gaming facilities. Second, they say applying the defence of illegality would impose a penalty on them that is wholly disproportionate to that provided in the *GCA* for their unlawful conduct in entering the facility. This argument about disproportionality is premised on the $5,000 maximum fine that could be levied under s. 93(1)(c) of the *GCA* and its relationship to the size of some of the jackpot winnings at issue here.

[195] The plaintiff class also argues that denying VSE Program participants their winnings will only serve to exacerbate the very problem that the prohibition is intended to prevent, namely the financial difficulties and resulting ills that result from problem gambling. The plaintiff class concludes by arguing about the limited temporal scope of the denial of jackpot prizes to date, and also BC's unique status in Canada in denying VSE participants their prizes.

[196] BCLC relies on *Ross*, where the plaintiff was barred from recovery in unjust enrichment by the equitable maxim "he who comes into equity must come with clean hands". BCLC says the common law doctrine of *ex turpi causa non oritur actio* is the common law formulation of the same concept. BCLC says the plaintiff class seeks

damages for breach of a contract on account of bets placed while they were illegally on the gaming facility premises, in violation of their voluntary and statutory prohibition from attending the gaming facilities.

[197] The plaintiff class says *Ross* has not resolved this issue. First, they say that in *Ross* the plaintiff sought an equitable remedy whereas here they seek damages for breach of contract. Second, they say that in *Ross* the plaintiff rested her claim on proving unlawful conduct whereas here their claim does not rest on proof of unlawful conduct. The plaintiff class submits that equitable clean-hands doctrine therefore has no application. Rather, they say it is BCLC who raises unlawful conduct as a defence to the plaintiff class' contractual right to the prizes. Therefore the modern doctrine of illegality applies, which requires a consideration of all the circumstances.

Analysis

[198] The doctrine of *ex turpi causa non oritur actio*, or the illegality doctrine, holds that a person is not permitted to found a cause of action on his or her own illegal conduct. The traditional application of this doctrine held that where a contract sought to be enforced was expressly or impliedly prohibited by statute, the contract was void *ab initio* and therefore could not be enforced: *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7 at para 21.

[199] Strict application of the doctrine eventually led to harsh and inequitable results, and a modern doctrine of illegality developed in response. The historical development of the courts' treatment of the effect of statutory illegality on the validity of contracts was thoroughly canvassed by Robertson J.A. in *Still v. M.N.R.* (1997), [1998] 1 F.C. 549, [1997] F.C.J. No. 1622 (C.A.). .

[200] At the end of his overview, Robertson J.A. concludes that the classical model of the doctrine of illegality that led to contracts being voided for any breach of statute had lost its force, is swept away by a new era in which relief would be granted or refused on a more principled basis: *Still* at para 42. He articulated the modern approach to the illegality doctrine at para. 48:

> [48] In conclusion, the extent to which the precepts of the common law doctrine of illegality are ill-suited to resolving the issue at hand provides the impetus for this Court to chart a course of analysis which is reflective of both the modern approach and its public law milieu. In my opinion, the doctrine of statutory illegality in the federal context is better served by the following principle (not rule): where a contract is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party when, in all of the circumstances of the case, including regard to the objects and purposes of the statutory prohibition, it would be contrary to public policy, reflected in the relief claimed, to do so.

[201] In *Lotusland Estates Ltd. v. Ali and Ali*, 2002 BCSC 131, Taylor J. summarized the modern approach in *Still* at para. 44:

> In *Still* the Court observed that where an agreement is illegal due to the operation of a statute, the effect of the illegality may differ upon a consideration of:
>
> (1) the relative merits of the parties;
>
> (2) the purpose of the statute and the policy upon which it is founded;
>
> (3) whether the statute contains the consequences of the illegality; and,
>
> (4) whether a voiding of the agreement results in a de facto penalty that is disproportionate to the breach itself.

[202] I also note that in *Still*, Robertson J.A. highlighted an analytical difference between a contract that is illegal to form and a contract that is performed by one of the parties in a manner prohibited by statute: *Still* at para. 22. In the latter case, courts are more likely to avoid invalidating the contract: See also *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298 at para. 67.

[203] BCLC argues that the finding in *Ross* that the plaintiff was barred from pursuing her unjust enrichment claim on the basis of the “clean hands” doctrine is determinative of this issue. I disagree.

[204] While the “clean hands” maxim and the *ex turpi causa* doctrine are both broadly concerned with the effect of a claimant’s behaviour on their ability to recover damages, the *ex turpi causa* doctrine is specifically concerned with the effect of breaching a statute. The modern approach to the illegality doctrine mandates a different approach than simply determining whether a claimant comes to court with “clean hands” in the eyes of equity. Furthermore, the finding in *Ross* was specific to the plaintiff’s claim that BCLC had been unjustly enriched by the wagers she placed in contravention of her voluntary self-exclusion. This is wholly different than the plaintiff class’ claim in this case that they are entitled to their winnings. Whether that claim is barred by the defence of illegality must be determined in accordance with the principles outlined above.

[205] As BCLC correctly argued, the gaming contracts themselves here are not illegal. A person can legally exchange money with the government in consideration for a chance to win more money. Rather, the issue is whether those otherwise legal contracts are so tainted by the plaintiff class’ illegal behaviour -- in the form of being on the premises of a gambling facility contrary to the *GCA* -- such that it would undermine the integrity of the justice system to give those contracts effect.

[206] The first consideration in determining whether or not the gaming contract is void for illegality is the relative merit of the parties. To be sure, the plaintiff class cannot be said to be blameless. They knew from their VSE Forms that they were not supposed to be in gaming facilities and that this prohibition was tied to the *GCA*. It is reasonable to assume that they knew, or at least should have known, they were violating the *GCA* by being on the premises of a gambling facility. To some extent, the blameworthiness that attaches to this conduct should be mitigated by the fact that the plaintiff class are admitted problem gamblers, and addiction is recognized to have a negative impact on a person’s ability to make rational decisions. Nonetheless, the plaintiff class knew their behaviour was illegal.

[207] However, BCLC is also not blameless. An assessment of the parties’ relative power and bargaining positions is relevant to the parties’ respective merit: *William E.*

Thomson Associates Inc. v. Carpenter (1989), 61 D.L.R. (4th) 1, [1989] O.J. No. 1459 (C.A.) at para. 30. In this regard, BCLC is a large quasi-corporate entity with a total monopoly over the provision of the very thing with which the plaintiff class struggle. Gamblers are ferried to its facilities and receive loyalty rewards. BCLC is undoubtedly in a more powerful position than the plaintiff class.

[208] I also note that there is authority for the proposition that the *ex turpi causa* doctrine should be used sparingly when the person seeking to rely on it has received full consideration for the contract: *LaFoncière, Compagnie d'Assurance de France v. Perras*, [1943] S.C.R. 165 at 178. I find it relevant that BCLC received consideration from the plaintiff class as a result of the plaintiff class' behaviour that BCLC complains of. There is no evidence of exactly how much money BCLC received from the plaintiff class, but it is safe to say that it was likely significant from the plaintiff class' perspective at least. It seems unjust to allow BCLC to keep all of the wagers made pursuant to the contract they say is tainted by illegality while simultaneously barring the plaintiffs from recovering their winnings.

[209] The plaintiff class makes a similar argument regarding the policy concerns of the *GCA* and, more specifically, the VSE Program. They say that the purpose underlying both is to prevent financial losses to VSE Program participants and, therefore, to deny the plaintiff class the financial benefit of a jackpot win would be counterproductive to that purpose. This argument is not without merit; however, it ignores the aspects of the VSE Program and *GCA* that are intended to dissuade problem gamblers from placing bets in the first place. Certainly, rewarding people who violate their VSE Program commitments with jackpots is anathema to any public policy concerns about dissuading gambling by those people in the first instance.

[210] The final two considerations are whether the *GCA* includes consequences for the breach and whether voiding the gaming contract would result in a de facto penalty that is disproportionate to the statutory breach. Section 98(3) of the *GCA* prescribes a maximum $5,000 penalty for unlawfully being on the premises of a gaming facility.

[211] I find it notable that the maximum penalty for the illegal behaviour that BCLC says should void the gaming contract is punishable by a maximum amount that is far less than the representative plaintiffs won. Mr. Haghdust was denied two prizes totalling approximately $35,000. Mr. Lee was denied a prize of roughly $45,500. To preclude their claim on the basis of illegality would effectively impart a punishment six to eight times greater than the maximum statutory amount. This is clearly disproportionate to the punishment the legislature envisioned for a violation of the *GCA*.

[212] Given the above analysis, I conclude that, on balance, this is not an appropriate case to bar the plaintiff class' claim on the basis of the doctrine of illegality. I do not come to this conclusion lightly, especially given my finding that the plaintiff class was given effective written notice pursuant to s. 92(b) of the *GCA* barring them from entering gaming facilities. However, given BCLC's continued enjoyment of the gaming contracts made as a result of the plaintiff class' illegal behaviour, as well as the disproportionately harsh effect that voiding the contracts would have when compared to the statutory penalty, I find that this is not an appropriate case in which to apply the doctrine of illegality.

(h) Is BCLC liable for breach of contract?

[213] The plaintiff class says BCLC was not entitled to withhold the jackpot prizes for all the discussed reasons. As such they say BCLC is liable to them for breaching the gaming contract. Rightly so, BCLC admits that if the court's answer to any of the common issues leads to the conclusion that BCLC was not entitled to withhold jackpot prizes from any or all class members, then its doing so is *prima facie* a breach of contract.

V. Answers to the Common Issues

[214] My answers to the common issues can be summarized as:

(a) Can the plaintiff class challenge the enactment of the Jackpot Entitlement Rules? **YES**

(b) Were the Jackpot Entitlement Rules validly enacted? **NO**

(c) Do the Jackpot Entitlement Rules constitute a penalty which is *ultra vires* BCLC's rule-making authority? **NO**

(d) Are the Jackpot Entitlement Rules unenforceable against class members who enrolled in the VSE Program prior to their enactment? **YES**

(e) Do the Jackpot Entitlement Rules conflict with s. 93(3) of the *GCA*? **NO**

(f) Does signing a VSE Form constitute s. 92(b) notice? **YES**

(g) Does illegality bar the plaintiff class from recovering? **NO**

(h) Is BCLC liable for breach of contract? **YES**

VI. Order

[215] The practical effect of my answers to the common issues is that the Jackpot Entitlement Rules were not validly enacted and cannot be enforced against the plaintiff class. As such, BCLC had no authority to withhold jackpot prizes from the plaintiff class prior to the enactment of s. 93(3) of the *GCA*.

[216] After the enactment of s. 93(3) of the *GCA*, BCLC was entitled to withhold jackpot prizes from the plaintiff class. The VSE Form constituted effective written notice under s. 92(b) of the *GCA* irrespective of whether it was signed before or after the enactment of s. 93(3) of the *GCA*.

[217] BCLC would have been entitled to withhold jackpot prizes from the plaintiff class from April 1, 2009, onwards if the Jackpot Entitlement Rules had been validly enacted.

[218] There has been mixed success in this proceeding, if there is an issue as to costs, costs may be spoken to.

"The Honourable Mr. Justice Savage"

SCHEDULE "A"

Chronology of Events

DATE	EVENT
1998/1999	BCLC first adopts the VSE Program
2002	The *Gaming Control ,* S.B.C. 2002, c 14 is enacted
July 2005	The Gaming Policy and Enforcement Branch ("GPEB") issues the *Responsible Gambling Standards for the BC Gambling Industry*
30 December 2005	Mr. Lee enrols in the VSE Program for 1 year
28 September 2006	Mr. Haghdust enrols in the VSE Program for 1 year
30 December 2006	Mr. Lee's 1 year enrolment in the VSE Program expires
11 April 2007	Mr. Lee enrols in the VSE Program for 3 years
28 September 2007	Mr. Haghdust's 1 year enrolment in the VSE Program expires
15 November 2007	Mr. Haghdust enrols in the VSE Program 3 years
30 October 2008	At the BCLC Board Meeting, the proposed jackpot entitlement rule is discussed and resolutions are passed
1 April 2009	The Jackpot Entitlement Rules are implemented
22 April 2009	At the BCLC Board Meeting, the Board accepts management reports that discuss the Jackpot Entitlement Rules
25 September 2009	Mr. Haghdust is denied his 1st jackpot at the Boulevard casino
16 October 2009	GPEB writes a letter to Mr. Haghdust re: his jackpot ineligibility
25 January 2010	Mr. Lee has his jackpot denied at the Chances Cowichan Community Gaming Centre
February 2010	GPEB revises the *Responsible Gambling Standards for the BC Gambling Industry*
11 April 2010	Mr. Lee's 3 year enrolment in the VSE Program expires
3 June 2010	The *Gaming Control Act* is amended
15 June 2010	Mr. Haghdust is denied his 2nd jackpot at the Edgewater casino
15 November 2010	Mr. Haghdust's 3 year enrolment in the VSE Program expires
29 March 2013	Mr. Haghdust enrols in the VSE Program for 6 months
29 September 2013	Mr. Haghdust's 6 month enrolment in the VSE Program expires

SCHEDULE "B"

June 2, 2008

Mr. Derek Sturko
Assistant Deputy Minister and General Manager
Gaming Policy & Enforcement Branch
3rd Floor, 910 Government Street
Victoria, BC V8W 1X3

Dear Derek:

Re: Legislative Amendment Request

British Columbia Lottery Corporation (BCLC) is writing to request that the Gaming Policy and Enforcement Branch (GPEB) considers a regulation amendment which would enhance both the quality of our Voluntary Self Exclusion (VSE) program and our capability to control prohibited players. As you are aware, without statutory authority, we are currently prevented through case law and contract law principles from withholding a jackpot win from a self excluded or prohibited player. This is the case even when such players, despite vigilance at our Casino and Community Gaming Centre facilities, wilfully gain entry to the facility and win a jackpot prize.

BCLC is requsting a legislation change to the Gaming Control Act (GCA) and Regulation which would authorize BCLC to lawfully refuse to pay a jackpot prize to a VSE or prohibited person. BCLC believes that paying an individual who is self excluded does not meet our corporate social responsibility commitments under BC Problem Gambling guidelines. Further, the payment of a jackpot to a VSE player in fact rewards that player for not changing their behaviour in regards to entering a gaming facility that they have agreed not to enter. If the legislation changes were made, any jackpot prize won by a VSE or banned player could be donated to charity. Other jurisdictions have introduced similar legislation, such as New Jersey. A copy of its statutory provisions is attached for your reference.

The second issue I wish to raise with you is regarding the penalizing of persons who enrol in the VSE program but then wilfully and repeatedly attempt to enter our gaming facilities. BCLC believes that repeat violators of the voluntary self exclusion program need to understand that they will be deterred from this behaviour and believes there are further actions that can be taken to this end. BCLC is willing to treat VBSE persons and "undesirable" and current VSE enrolment form is already explicit notice under s. 92(b) of

the GCA but we would appreciate GPEB's cooperation and support of taking the extra measure to penalize repeat violators of the VSE program.

If you wish to discuss these issues please give me a call.

Yours truly,

[Micheal Graydon]

Michael Graydon
President & CEO

Enclosure

cc: David Morhart, Deputy Solicitor General
John McLemon, BCLC Board Chair

New Jersey Legislation

5:12-71.3. Penalties for gaming by prohibited persons

2. a. A person who is prohibited from gaming in a licensed casino or simulcasting facility by any provision of P.L1977, c.110 (C.5:12-1 et seq.) or any order of the commission or court of competent jurisdiction, including any person on the self-exclusion list pursuant to section 1 of P.L.2001, c.39 (C.5:12-71.2), shall not collect, in any manner or proceeding, any winnings or recover any losses arising as a result of any prohibited gaming activity.

b. For the purposes of P.L.1977, c.110. (C.5:12-1 et seq.), any gaming activity in a licensed casino or simulcasting facility which results in a prohibited person obtaining any money or thing of value from, or being owed any money or thing of value by, the casino or simulcasting facility shall be considered, solely for purposes of this section, to be a fully executed gambling transaction.

c. In addition to any other penalty provided by law, any money or thing or value which has been obtained by, or is owed to, any prohibited person by a licensed casino or simulcasting facility as a result of wagers made by a prohibited person shall be subject to forfeiture by order of the commission, on complaint of the division, following notice to the prohibited person and opportunity to be heard.

Of any forfeited amount under $100,000, one-half shall be deposited into the State General Fund for appropriation by the Legislature to the Department of Health and Senior Services to provide funds for compulsive gambling treatment and prevention programs In the State and .the remaining one-half shall be deposited into the Casino Revenue Fund. Of any forfeited amount of $100,000 or more, $50,000 shall be deposited Into the State General Fund for appropriation by the Legislature to the Department of Health and Senior Services to provide funds for compulsive gambling treatment and prevention programs and the remainder shall be deposited into the Casino Revenue Fund.

d. In any proceeding brought by the division against a licensee or registrant pursuant to section 108 of P.L.1977, c.110 (C.5:12-108) for a wilful violation of the commission's self-exclusion regulations, the commission may order, in addition to any other sanction authorized by section 129 of P.L. 1977, c.110 (C.5:12-129), the forfeiture of any money or thing of value obtained by the licensee or registrant from any self-excluded person. Any money or thing of value so forfeited shall be disposed of in the same manner as any money or thing of value forfeited pursuant to subsection c. of this section.

L.2001,c.39,S.2.

Know your limit, play within it
Log # 363536

Mr. Michael Graydon
President and CEO
BC Lottery Corporation
74 West Seymour Street
Kamloops BC V2C 1E2

Dear Michael:

I am responding to your June 2, 2008 letter, requesting two amendments to the Gaming Control Act to provide:

- The legal authority for the BC Lottery Corporation to refuse to pay prizes to voluntarily self-excluded (VSE) or prohibited persons; and
- A penalty for repeat violators of the VSE program.

As you may be aware, the Corporation proposed similar amendments for the spring 2008 legislative session. The proposal was discussed in depth by the Corporation's former legal counsel, Ilkim Hincer, and our legal counsel, Roger Denley. Although a modified proposal was included in our 2008 legislative package, government ultimately decided not to proceed with any amendments to the Gaming Control Act.

Further, we were advised earlier this month that amendments to the Gaming Control Act will not be considered in the 2009 legislative session.

The earliest date your proposal could be considered is 2010. In the meantime, I urge you to consider possible non-legislative methods of achieving your objectives.

Please call me if you have any questions regarding this matter.

Sincerely,

[Derek Sturko]

Derek Sturko
Assistant Deputy Minister

pc: Cairine MacDonald
David Morhart
John McLemon
Roger Denley

SCHEDULE "C"

British Columbia Lottery Corporation

VOLUNTARY SELF-EXCLUSION FORM

(Casinos, Community Gaming Centres with slot machines & the Gaming floor of Race Tracks with slot machines)

The Voluntary Self-exclusion Program is designed by British Columbia Lottery Corporation (BCLC) for people who feel it is in their best interest not to participate in gambling. By signing Part I of this form you are voluntarily agreeing to be refused entry to certain gaming facilities other than in the course of your employment in the Province of BC. If you sign Part II of this form, your name and contact information will be sent to a Problem Gambling Counsellor as described in Part II. You may choose to sign Part I alone or both Part I and Part II.

Surname: _____

Given Names: _____

ID used: _____

Date of Birth: _____

Height: _____ Weight: _____

Hair Colour: _____ Eyes: _____ Gender: _____

Address: _____ City: _____

Postal Code: _____ Phone Number: _____

PART I
Self Exclusion Notice

1. I request that I be refused entry (Self-exclusion) to any Casino, Community Gaming Centre with slot machines and the gaming floor of Race Tracks.

2. I request that I be refused entry from entering into or in any way trespassing upon any BC gaming facility for any reason whatsoever as of the date hereof for the period noted below. I understand that my self-exclusion shall expire after the expiration time indicated.

   Expiry Date: _____

3. I agree that I cannot modify, revoke, withdraw or rescind this self-exclusion agreement prior to its expiry. In the event I wish to have the period for self-exclusion extended, I must give written notice to BCLC, Attention: Manager Security and Surveillance, 74 West Seymour Street, Kamloops, BC, V2C 1E2, prior to the expiry date referred to in 2 above.

4. **I have requested self-exclusion and BCLC hereby notifies me as per Section 92 (b) of the *Gaming Control Act* (BC) that I am forbidden to enter any BC gaming facility during the term of this self-exclusion.** I understand that if I attend any gaming facility, during the term of this self-exclusion and I am identified by BCLC or facility staff I will be requested to leave the gaming facility. If I refuse to leave the gaming facility upon request or enter a selected gaming facility during the period of self-exclusion or at any other time when I am prohibited from doing so, I will be removed and may be subject to proceedings under the *Gaming Control Act* (BC) including a fine of up to $5000.

5. I acknowledge that this is a voluntary Self-exclusion Program offered by BCLC and neither BCLC, any of its Gaming Facility Service Providers or any of the officers, directors, agents or employees of either of the forgoing are responsible for any breach of this self-exclusion or for failure to enforce this self-exclusion.

Revised October 31, 2005

British Columbia Lottery Corporation

VOLUNTARY SELF-EXCLUSION FORM

(Casinos, Community Gaming Centres with slot machines & the Gaming floor of Race Tracks with slot machines)

I hereby release and discharge BCLC, its Gaming Facility Service Providers and their respective officers, directors, agents and employees from any liability or claims including claims for financial loss related to this self-exclusion (including my failure to comply with the self-exclusion) or the Self-exclusion Program (including the Referral portion set forth on Part II of this form).

6. As part of my self-exclusion, I consent to my picture and description being circulated to all Gaming Facility Service Providers mentioned above.

By signing this form I acknowledge I have been read the form and understand it.

Signature _____ Date _____

Witness _____ GPEB# or Title _____ Gaming Facility Name _____

I have received a copy of this form

Initials _____

PART II
Referral

As part of the self-exclusion, I consent to have my name and contact information referred to a Problem Gambling Counselor and to have such Problem Gambling Counselor contact me to provide information and help using the information I have provided. I understand this information and help is free of charge. I understand that I do not need to execute Part II of this form.

Signature _____ I prefer to be contacted at this phone number.

Witness _____ GPEB# or Title _____ Date _____

Part II Declined Initial _____

The personal information that you have provided to BCLC will be used to identify you as a person who has requested voluntary self-exclusion from certain gaming facilities and will be used for that purpose and in the administration of responsible gaming programs. By signing Part I of this self-exclusion form, you are authorizing BCLC to use this information and to disclose the information to all selected Gaming Facility Service Providers to assist in identifying you as a person that has requested to be self-excluded.

The authority for obtaining this information from you complies with Section 26(c) of the *Freedom of Information and Protection of Privacy Act (BC)* and the *Gaming Control Act (BC)*. If you have any questions about the *Act*, please contact the BCLC Freedom of Information Coordinator at 74 West Seymour Street, Kamloops, BC, V2C 1E2, or telephone 250-828-5500.

I AM AWARE THAT SHOULD I REQUIRE INFORMATION OR HELP WITH PROBLEM GAMBLING, I CAN ACCESS THE PROBLEM GAMBLING HELP LINE AT 1-888-795-6111.
INFORMATION AND/OR HELP IS FREE OF CHARGE.

Revised October 31, 2005