

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

POM of Pennsylvania, LLC,	:	
Petitioner	:	
	:	No. 418 M.D. 2018
v.	:	
	:	Argued: May 8, 2019
Commonwealth of Pennsylvania,	:	
Department of Revenue, and City	:	
of Philadelphia,	:	
Respondents	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge¹
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge

OPINION BY
JUDGE McCULLOUGH

FILED: November 20, 2019

Before this Court is the Commonwealth of Pennsylvania, Department of Revenue's (Department) application for summary relief in the nature of a motion for partial judgment on the pleadings with respect to the Department's counterclaim to the petition for review in the nature of a complaint seeking a declaratory judgment and injunctive relief, filed in this Court's original jurisdiction by POM of Pennsylvania, LLC (POM). For the reasons set forth, we deny the Department's application for summary relief.

¹ This matter was assigned to this panel before September 1, 2019, when Judge Simpson assumed the status of senior judge.

Code, as has historically occurred. This reading of the Gaming Act would also significantly curtail the Bureau of Liquor Control's enforcement activities with respect to illegal gambling, because many such activities would be entrusted to the Gaming Control Board.

However, there is nothing in the Gaming Act that suggests that it purported to revise all statutes governing illegal gambling, set up a general or exclusive system covering the entire subject matter of gambling, or establish a uniform and mandatory system encompassing all gambling. *See* 1 Pa.C.S. §1971. The Gaming Act does not demonstrate that the General Assembly intended to repeal section 5513 of the Crimes Code, to the extent it continued to regulate illegal gambling. Given the strong presumption against implied repeals of statutes and the lack of an irreconcilable conflict between the Gaming Act's regulation of licensed slot machines and the Crimes Code's regulation of illegal slot machines, we decline to conclude that the Gaming Act impliedly repealed the Crimes Code's regulation of illegal gambling devices and slot machines. Therefore, pursuant to our rules of statutory construction we hold that section 5513 of the Crimes Code, rather than any relevant provision of the Gaming Act, remains the preeminent statute governing illegal and unlicensed slot machines in the Commonwealth.

V. Conclusion

Because the plain language of the Gaming Act indicates that the General Assembly did not intend for the Gaming Act to regulate unlicensed slot machines which fall outside the ambit of the licensed facilities clearly delineated by the Gaming Act, and/or supplant the Crimes Code's regulation of the same, we conclude that the

POM Game is not subject to the Gaming Act.¹⁸ We therefore deny the Department’s application for summary relief in the nature of a motion for a judgment on the pleadings.¹⁹


PATRICIA A. McCULLOUGH, Judge

Judge Cohn Jubelirer dissents.
Judge Brobson did not participate in this decision.
Judge Covey concurs in the result only.

¹⁸ Because we hold that the Gaming Act is inapplicable to the POM Game, we concomitantly conclude that the Department did not fail to join the Gaming Control Board as an indispensable party to the counterclaim, as argued by POM. “A party is generally regarded to be indispensable when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.” *HYK Construction Company, Inc., v. Smithfield Township*, 8 A.3d 1009, 1015 (Pa. Cmwlth. 2010) (internal quotation marks omitted). The relevant analysis of whether a party is indispensable requires consideration of the following factors: (1) whether “absent parties have a right or interest related to the claim”; (2) “[i]f so, what is the nature of that right or interest”; (3) whether that right or interest is “essential to the merits of the issue”; and (4) whether justice can “be afforded without violating the due process rights of absent parties.” *Rachel Carson Trails Conservancy, Inc. v. Department of Conservation and Natural Resources*, 201 A.3d 273, 279 (Pa. Cmwlth. 2018). Moreover, regarding cases involving the Commonwealth, “[a] Commonwealth party may be declared an indispensable party when meaningful relief cannot conceivably be afforded without the Commonwealth party’s direct involvement in the action.” *Id.* at 280.

Here, because the POM Game does not fall under the purview of the Gaming Act, the Gaming Control Board has no regulatory authority regarding the POM Game. Thus, the Gaming Control Board does not have a right or interest related to the counterclaim and meaningful relief can be afforded without its involvement. It is also notable that the Gaming Control Board is aware of this matter, has not sought to intervene, and takes the position that unlicensed “skill games” are not subject to the Gaming Control Board’s regulation. *See* Department’s Reply Br. at 17; Video, *Pennsylvania House Appropriations Committee Budget Hearing, FY 2019-20*, (February 27, 2019), <https://s3.us-east-2.amazonaws.com/pagopvideo/106913203.mp4> (last visited October 15, 2019).

¹⁹ Our denial of the Department’s application, however, does not decide the separate question raised in POM’s claim, *i.e.*, whether the POM Game is an illegal gambling device under the Crimes Code, which both parties appear to acknowledge requires discovery in order to resolve.

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ORDER

AND NOW, this 20th day of November, 2019, the Commonwealth of Pennsylvania, Department of Revenue's (Department) application for summary relief in the nature of a motion for partial judgment on the pleadings, with respect to the Department's counterclaim, is denied.



PATRICIA A. McCULLOUGH, Judge

Certified from the Record

NOV 20 2019

And Order Exit