

AN OVERVIEW OF THE GAMBLING PROVISIONS IN CANADIAN CRIMINAL LAW AND FIRST NATIONS GAMBLING

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Historical Developments in Canadian Law

For Canada, the *Constitution Act 1867* assigns the legislative authority over criminal law to the federal Parliament. This differs from the situation in the United States and Australia, where each state holds the legislative authority for criminal law. After Confederation in 1867, Canadian gambling was governed by existing common law and criminal statutes related to gambling, as varied by Parliament through various post-1867 criminal gambling statutes.

Canada became the first country in the British Empire to produce its own codification of the criminal law. Enacted in 1892, and brought into force in 1893, the *Criminal Code of Canada* drew heavily upon a draft criminal code produced in Britain but never enacted there. The Canadian *Code* also drew upon post-Confederation Canadian statutes, including gambling statutes.

Through more than a century, there have been numerous amendments to the gambling provisions originally found in the *Criminal Code*. The basic scheme that may be discerned from a careful reading of the *Code's* gambling provisions,

though it is nowhere explicitly stated in the provisions, is that gambling is prohibited except where specifically permitted within the *Code*. In the 1950s a Parliamentary Committee considered the expansion of legalized gambling. However, until 1969, parimutuel betting on horse races, regulated by the federal Minister of Agriculture, and low stakes, charitable lottery schemes constituted legalized gambling in Canada.

"Lottery scheme" amendments were made to the *Criminal Code* in 1969. North American interest had been sparked by the first state lottery ticket system that was introduced in New Jersey in the 1960s. Canadian interest was especially fuelled by the desire to raise funds for the Montreal Olympics. The 1969 legislation permitted the federal government or a provincial government to conduct a broad range of lottery schemes. It also permitted a narrower range of lottery schemes conducted by a licensee of a province. There was no authority for the federal government to license others to conduct lottery schemes. The 1969 legislation was "marketed" on the basis that the funds raised would be used for public "good causes" because the lottery scheme revenues would go to governments or to charitable and religious organizations. In particular, the

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Canadian "public use of revenues" approach to casino gambling contrasts sharply with the U.S. approach that typically sees regulation and taxation of casino gambling that is conducted by private entrepreneurs.

In 1979, the federal government entered into an agreement on gaming with the provinces. The federal government agreed not to use its *Criminal Code* permission to conduct lottery schemes and in return, provinces agreed to make an annual payment in a fixed amount set to a fixed year's value. In 1983, Parliament amended the *Code* to permit the federal government, alone, to conduct a "pool betting operation". Provinces objected that this violated the 1979 agreement, arguing that it really dealt with lottery schemes. The federal government took the position that certain operations by provinces were pool betting operations and not lottery schemes. Litigation ensued. In 1985, Ministers in non-Justice portfolios agreed to resolve all litigation. The federal government would use its best efforts to place a bill before Parliament repealing the federal authority to conduct lottery schemes and pool betting operations. The provinces would continue the annual payments under the 1979 agreement and would make a payment of \$100 million to be used for the 1988 Calgary Olympics. In December 1985, Parliament enacted the amending legislation that removed authority for federal operation of lottery schemes and pool betting operations.

The 1985 gambling bill clarified that a province could conduct a lottery scheme on or through a computer, video device or slot machine, but could not license others to do so. Prior to this bill, there had been some who believed that a province could, in theory, license others to conduct lottery schemes using these mechanisms.

Key Criminal Code Gambling Provisions

Offences related to keeping a gaming house or a betting house are found in section 201 of the *Criminal Code*. Section 202 creates offences in respect of betting, pool selling or bookmaking. Section 206 creates offences in relation to lotteries and games of chance.

The *Code* specifically states, in section 204, that private bets between individuals not in any way engaged in the business of betting are permitted. This section also states that parimutuel

betting on horse races is legal, where regulated by the federal Minister of Agriculture. Such regulation is conducted through the Canadian Pari-Mutuel Agency.

Section 207 of the *Code* creates exceptions to the gambling offences for a broad range of "lottery schemes" that are conducted by the provinces (under the *Interpretation Act*, this includes territories). This range includes lottery tickets through slot machines. The section also creates permission for a slightly narrower range of provincially licensed lottery schemes. This includes lottery schemes that are conducted by: a religious or charitable organization where the proceeds are used for a religious or charitable purpose, lottery schemes conducted by the board of a fair or exhibition, and lottery schemes conducted by a private individual where the maximum prize is \$500 or less and the cost to participate is \$2 or less. Licensees of a province cannot conduct a lottery scheme that operates on or through a computer, video device, slot machine or dice game.

Section 207.1, enacted in 1999, allows private, commercial lottery schemes conducted on an international cruise ship that is in Canadian waters. Parliament enacted this amendment on the basis that it would assist tourism on the Saint Lawrence River route and the west coast Inside Passage route by permitting cruise ships to conduct within Canadian waters the gambling that they conducted while in international waters. The gambling must be contained wholly on the ship and must not have external players. There must be a cruise of at least 48 hours duration with a start, visit or end at a port in a foreign nation and there must be some scheduled sailing in international waters.

United States Tribal Gaming

Unlike Canadian law, where aboriginal rights were only recognized as a legal concept by the courts since the 1973 *Calder* decision in the Supreme Court of Canada, the United States courts have recognized such concepts from the early 19th century. Under United States constitutional law, tribes hold "domestic dependent sovereignty". However, they may only legislate in an area to the extent that Congress has not limited their ability to do so. In the 1980s, an issue arose with respect to the ability of the Cabazon tribe in California to legally conduct tribal gambling. This culminated in a major case destined

for the U.S. Supreme Court. Fearing a disastrous loss in the courts, some tribes commenced an initiative to have Congress legislate an Indian Gaming Regulatory Act that would allow certain tribal gaming operations. Then, the U.S. Supreme Court ruled in 1988 that Congress had not limited the Cabazon tribe from conducting its gaming operations. This was a massive win for the tribe. However, the legislative initiative already underway had gathered momentum that was unstoppable, especially when states heavily supported the legislation following the *Cabazon* case.

The *Indian Gaming Regulatory Act* (IGRA) passed in 1989, thereby establishing a congressional limit on what otherwise would have been an untrammelled area of tribal domestic, dependent sovereignty. IGRA established three classes of gaming. Class I permits Indian regulation of traditional games. Class II permits bingos and other tribal-state regulated gaming such as non-banked card games. Class III permits amongst other forms of gambling, slot machines and banked card games in a state that permits some form of class III gaming, where there is a tribal-state "compact".

The experience with U.S. tribal gaming has been varied. In states, where there is a compact that establishes a tribal monopoly on casino gaming, many tribes have done extremely well. Similarly, depending upon market conditions, such as location and competition, other tribes without monopolies within the state have done well. However, in some tribes, market forces and other factors have led to unsuccessful operations. Of the few hundred tribal gaming operations, a small percentage produces the majority of the total revenue. Not all tribes see gambling as a culturally appropriate area. For example, the Navajo tribe, which numbers over 200,000, has chosen not to pursue gambling development. There is also variation on the sharing of revenue by tribes with large commercial gambling operations with tribes that have none.

Canadian Expansion of Legalized Gambling

Unlike the United States, where some states do not permit any lottery tickets, all Canadian provinces and territories offer government lottery tickets. Unlike the United States, all Canadian provinces, and the Yukon Territory offer some form of government slot machine gambling,

whether the slot machines are located in casinos, racetracks, bars or restaurants.

The expansion of government slot machine gambling has occurred rapidly over the past dozen years. The decision to implement machine gaming simply required a provincial executive decision because the *Criminal Code* already contemplated such operations. In many U.S. states, an amendment to the state constitution is required in order to legalize casinos or slot machine gambling. In 1989, Manitoba opened the first Canadian casino to offer slot machine gambling. In 1990 Nova Scotia installed video lottery terminals (which appear to meet the *Code's* definition of a slot machine) in locations such as bars. Although there has been expansion in Canada, there has also been controversy and public debate. However, this debate has occurred within a province or territory and has not become a national debate.

The legalized gambling industry runs to billions of dollars according to statistics Canada. Additionally there is a very large market for illegal gambling, including illegal machine gambling, illegal sports bookmaking operations and card gaming houses.

There are now video lottery terminals or slot machines in every jurisdiction except British Columbia, the Yukon, the Northwest Territories and Nunavut. In Ontario, slot machines are located at racetracks but not in bars. There are casinos with provincial government slot machines in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia and the Yukon.

Accommodation of First Nations' Gaming Aspirations

Section 207 of the *Criminal Code* contemplates provincial designation of licensing bodies. Some provinces have chosen to specify First Nations bodies to issue charitable lottery scheme licenses. Manitoba, Ontario, and Quebec have some experience with these. Of course, even with such first nations licensing bodies, some first nations choose to have first nations charities within the land base obtain a provincial license through the general route available to all charitable organizations.

Some provinces have chosen to share proceeds from provincial government casinos or from provincial government slot machines (including video lottery terminals) with First Nations. British

Columbia, Alberta, Saskatchewan, Manitoba, Ontario New Brunswick, Nova Scotia have such arrangements. Casinos on first nations land bases exist or are possible in BC, Alberta, Saskatchewan, Manitoba and Ontario.

Following the U.S. Supreme Court decision in *Cabazon*, Canadian First Nations observed developments in tribal gaming in the United States and considered the potential for economic development. There are significant legal, demographic and market differences between Canada and the United States. In Canadian law, the *Constitution Act 1982* recognizes existing aboriginal rights. The Supreme Court of Canada has considered the aboriginal gambling right issue in its single decision on two cases, *Pamajewon and Jones* and *Gardiner, Pitchenese and Gardiner*. The court applied the same test that is used for other claims to an aboriginal right. In effect the court found that an aboriginal right to large scale commercial gambling was not made out in those two cases. The court left open the possibility for claimants to raise the issue in the future on a case by case basis, keeping in mind that the usual test for an existing aboriginal right will have to be met.

In the *Saint Mary's Band* case, the issue before the Federal Court of Appeal was whether

the *Indian Act* created authority for band by-laws that regulate gambling. The provision in question speaks of order at public games. It was held in the federal court trial division and in the appeal division that the provision did not envisage regulation of gambling. The Supreme Court of Canada refused leave to appeal.

Conclusion

Parimutuel betting on horse races, regulated by the federal Minister of Agriculture, accounts for a small proportion of legalized gambling in Canada. This brief overview of Canadian criminal law on gambling suggests that the largest portion of legalized gambling, consisting of a broad range of "lottery schemes" falls to provincial operation or provincial licensing. Certain provinces have gone some distance towards accommodating First Nations gambling aspirations in ways that conform to the criminal law while others have not. Accommodations in the gambling field have not always satisfied economic development aspirations or self-government aspirations of First Nations, even in some provinces that have made accommodations. No doubt, this area will continue to see dialogue towards further accommodation.