DEFENDING THE GAMBLING ADDICT - BRIAN A. BERESH

I want to take a few minutes of your time this afternoon to discuss with you the defence of citizens charged with a criminal offence in the context of a gambling addiction. That is, where the citizen accused or suspected of a criminal offence, has a gambling addiction.

I and members of my law firm have defended numerous people charged with offences relating directly to or indirectly to gambling difficulties and addictions. It would be anecdotal at best, and not extremely relevant to attempt to categorize such clients into certain socio-economic groups.

Let me say at the outset that it is disturbing to witness the proliferation of gambling venues permitted in this Province and throughout Canada, and the devastating personal affects on those addicted, and the horrendous financial and societal costs flowing from this "form of entertainment". It is disheartening to see people who are otherwise trouble (crime) free drawn into the gambling scene only to lose all funds, family and employment … particularly in a society where treatment for gambling related conditions receives such a limited priority.

Equally troubling, as my research reveals, this province allows machines such as the "Near Miss" to be used by gamblers when it has been banned from use in some U.S. states because of its addictive nature. The desire to increase government revenues from gambling is a greater priority than is the concern for the devastation caused by enhanced addicting devices.

Clients have described to me in detail the "demonic hook" experienced while playing roulette games, wherein the gambler feels helplessly caught in the game. Clearly governments that permit these types of games are fully aware of the

addictive nature of the games, as are tobacco companies that produce addictive products.

A client of mine, a serious gambler, recently described to me the excessive betting limits allowed at Baccarat tables in this province. He described to me how he was able to lose $14,000.00 in what he estimated to be approximately 6 to 10 seconds and how on another occasion, he was able to amass a quarter of a million dollars in approximately two and one half hours.

It appears that the government has absolved itself from any moral responsibility in this area. As guardians and trustees of the populace, we must assume that governments are fully aware of the highly addictive nature of modern gambling devices but are fully prepared to ignore the realities of the consequences.

In my work I encounter the "gambler" at different stages within the process. The least common is when that person decides to seek advice before detection by state authorities. This is usually prompted by fear or concern about illegal activity undertaken which is likely to be detected. Specifically in my practice this has occurred where the client has stolen money from an employer and audit reviews are likely to uncover the missing funds.

Attempts may be made on the clients' behalf to broker a deal with the employer by revelation of the misdeeds and offer or attempt full restitution in hopes that police forces will not be notified. These efforts usually only work where the employer is satisfied that some remedial measure has been undertaken to ensure that reoccurrence is unlikely. Such efforts by defence lawyers are often successful. I have found that this type of client is generally willing to seek assistance independent of encouragement by the state (i.e a judge).

I caution that although such deals can and are brokered one must avoid committing an obstruction of justice by attempting to "purchase" the client's way out of jail. It really only is in Monopoly that you get a "get out of jail free" card. The equivalent in life really doesn't exist.

In some instances early revelation is met positively with the individual who suffered the loss in that formal forensic audits are not required and negative publicity for the individual or company involved does not occur.

These clients are clearly in the minority. Most clients, specifically those severely addicted, sincerely believe, or hope, that detection by an employer for example will never occur. The usual belief is that any losses will soon be re-couped during the next round of gambling.

On occasion we have been retained by members of a gambler's family or friends who wish to use the office as a tool to convince or assist a reluctant client to "come clean", seek help and rectify past mis-deeds.

More often than not I am retained after the person has been charged and now faces, in addition to other difficulties, public humiliation resulting from the knowledge of charges by friends, fellow employees, family members and potentially an ever vigilant court media. For many the detection is personally devastating and in some instances suicide is contemplated.

It may also be the time when the "accused" a title he/she must now temporarily wear, is caught in the "cross hairs" of life having to confess to a loving spouse that much of their life savings have been dissipated in the numerous attempts to "catch up" on gambling losses.

In some instances, the laying of criminal charges compounds the person's difficulties in that he/she is now in most need of a good defence … but depleted family resources do not permit the hiring of effective top rate counsel. Unfortunately, this can further result in a quick plea negotiation rather than a thorough consideration and exploration of all options..

When retained, my task is to analyze the circumstances generally revealed by the police investigation and plot a strategy for trial or a sentencing hearing. I will return to discuss these options in a moment.

In the third instance we are retained after an accused has pleaded guilty, usually with the belief that a brief explanation about the gambling motivations for the crime will suffice, only to learn that a judge would like to impose jail as a sentence. This shocking realization about reality in our courts usually sends the accused scurrying for legal advice and protection. I have found that more often than not, that this situation arises because of the accused's impecuniousity rather than desire to save money on legal fees. It is in desperation that the accused then attends at a lawyer's office. Unfortunately, by that time, certain harmful admissions may have been made which will drastically effect the outcome of the case. Clearly most lawyers would like to be retained before the accused is even charged so that greater input might be had into how the process unfolds.

How do we then prepare a defence where gambling addiction or gambling is a factor?

I wish to divide this part of my discussions into two areas. The first area or phase is the culpability phase. In this phase, the issue is whether the person is guilty of the offence(s) charged or any included offence. The second phase which I deal with later, is the sentencing or penalty phase, obviously once culpability has been determined by a court or admitted by the person charged.

CULPABILITY PHASE

In the first phase the issue will generally be (a) whether as a result of a gambling addiction an accused "intended", in a criminal sense, to commit the charge alleged, or (b) whether the addiction amounts to an "excuse" in law, thereby nullifying criminal culpability, such as, for example does the defence of necessity. I use necessity as an example because engaging that defence, the accused admits he/she committed and intended to commit the criminal act, but argues that due to exceptional circumstances was forced or had no other option but to commit the act. A recent well-known attempt to engage the defence of necessity occurred in the *Latimer* case arising in Saskatchewan where it was held that the defence was not available to Mr. Latimer who intentionally took his ill child's life in very difficult circumstances.

In the former instance, (a) above, for the accused to be acquitted he/she would have to convince a court that as a result of a gambling addiction he/she was left in a state where the necessary criminal intent to commit the crime was not present. As you can appreciate this is a difficult task and generally would require supporting expert evidence.

At the outset of this discussion I pause to observe that generally our courts have been reluctant to embrace or accept that a gambling addiction is a "true addiction" for lack of a better phrase, like for example is an addiction to drugs, including alcohol. This lack of real acknowledgement appears to me to be akin to the American judiciary (and juries) failure to accept that cigarettes are addicting and that as such manufacturers should be held responsible for causing the addiction. That is that it wasn't a matter of voluntary choice by the smoker.

Many judges still see gambling as a form of entertainment and a type of luxury, engaged in voluntarily by risk taking citizens. Few appear to appreciate the gripping control gambling can have upon the addicted gambler, and how it effects the conduct of some people.

A good example of fairly recent vintage involved an accused who pled guilty in Provincial Court in Calgary to a charge of concocting a scheme to defraud her employee, the Royal bank, of more than $8,000.00. This 43 years old mother had been a bank employee for 12 years, had no prior criminal record and readily admitted her involvement in the crime once it was discovered. As a result, she lost her job at the financial institution. The evidence in the case established that she was addicted to video lottery terminals and that in addition to consuming her own money, she also borrowed from others to feed her habit.

Although theft from an employer will generally attract a jail sentence or a conditional sentence, the sentencing judge found that her gambling addiction and obsession created an exceptional circumstance and he imposed upon her a three year suspended sentence with probation rather than sending her to jail.

Our highest court, the Alberta Court of Appeal, overturned the sentencing judge's decision and substituted a sentence of four months imprisonment to be followed by probation. In arriving at this decision, the unanimous three member court stated:

> "In our view, an addiction to or an obsession with gambling is neither an exceptional circumstance justifying the imposition of a non-custodial sentence nor a mitigating factor warranting a sentence of less than what would otherwise be fit and proper. Similarly, neither addiction to alcohol nor to drugs is recognized as an exceptional circumstance or a mitigating factor in cases of embezzlement. The sentencing judge erred in principal in finding

> that the Respondent's addiction to gambling constituted an exceptional circumstance."[1]

This lack of appreciation is probably in large part due to a lack of judicial education in this area and may be a function of limited exposure to serious gambling by members of legal/judicial community or to a lack of exposure to the newer, more sophisticated gambling devices not present years ago when judges were younger. The fact that judges can more readily relate to and consider the addiction to alcohol may be very telling. Whatever the explanation, it is clear that education of our judges on a case-by-case basis requires the introduction of expert evidence which assists the judge in appreciating how this addiction operates and how it can effect mental processes.

Now although this has been our observation of the judicial response at the first or culpability phase, we are discovering some acceptance of gambling addiction in the sentencing phase where some courts have viewed this as a mitigating circumstance thereby generally reducing the severity of the penalty imposed. I will discuss this in more detail in a moment.

One of the difficulties in raising a gambling addiction as a full defence in the culpability phase is drawing the link between the addiction and the resulting crime. In our criminal justice system we are familiar with a "direct link" process as for example where the excessive ingestion of alcohol/drugs impairs mental functioning and thereby directly raises doubt as to whether the accused was able and/or did form a specific intent to kill, where for example the charge is murder. The charge of murder requires, in addition to the physical act proof of a specific intent to kill. Other crimes, for example impaired driving and common assault require only the proof of a general intent.

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[1] *R. v. McIvor* (1996) 181 A.R. 397

Let me give you some real life examples to help better appreciate my point. In the late 1980's I was asked to defend a young man charged in the city with the attempted murder of a police officer. Briefly the circumstances included the officer being called to a shop by its owner who felt that my client was acting suspiciously. The officer attended and arrested my client. He did a cursory pat down search and satisfied there was no danger placed my client in the rear seat of the cruiser. On the way downtown, my client produced a small handgun, which had been secreted in his buttocks, and shot at the officer's head at point blank range. Fortunately, for all, as the medical evidence at that trial established, the officer was a thick skulled person. The bullet struck a bone at the base of the skull and excited without much damage.

At trial it was established that my client had "dropped" L.S.D. before entering the store. Expert evidence from the late Dr. Rubenstein assisted in convincing Justice Cooke that my client's mental functioning was so impaired that he could not form the specific intent to commit murder. As a result, he was acquitted.

More recently, in Ontario a man was charged with the murder of both of his in-laws. In order to commit the crimes, the accused had to travel in excess of 10 kms. across a city to get to their home. Forced entry was required. following which he killed the two individuals. The accused testified at trial that he was asleep during the entire episode and that his actions were not his own and that he was therefore not culpable. The jury accepted his defence of somnambulism and he was fully acquitted.

For those of you who may question the logic of our justice system in this case, you should be aware that the trial decision, the acquittal, was received by both the Ontario Court of Appeal, 3 judges, and the Supreme Court of Canada, 9 judges, and the acquittal stood.

As stated previously, in order to prove that a criminal offence occurred, the prosecution must establish beyond a reasonable doubt both that the accused physically committed the act and that the requisite criminal intent was present. Our legal system adopts two relevant presumptions which is that a person intends the natural consequences of his/her actions and that ignorance of the law is not an excuse for committing an offence. (See Section 19 of the *Criminal Code of Canada*). This criminal intent is law is referred to as the *mens rea*. Professor G.L. Williams, a remarkable professor in criminal law in his article, Criminal Law: The General Part, 2nd Ed. (1961), 30-31 described *mens rea* as follows:

> "It refers to the mental element necessary for the particular crime, and this mental element may be either intention to do the immediate act or bring about the consequences or, in some crimes, recklessness as to such act or consequence … Some crimes require
> intention and nothing else will do but most can be committed either intentionally or recklessly. Some crimes require particular kinds of intention or knowledge."

Our criminal justice system has accepted as defences, various "justifications", such as self-defence and defence of property, "excuses", such as accident, intoxication, automatism and insanity and "procedural defences" such an entrapment. These are considered traditional defences available in our criminal justice system. Unfortunately, no specific defence has been identified or has adopted gambling addiction, *per se*.

In order to advance a gambling addiction defence, defence counsel would either have to marry it to an existing, traditional defence or advance it as a defence under the general umbrella of a mental disorder. The difficulty that arises in this area is that in order for a mental disorder to constitute a defence it must either specifically affect the accused's ability to form the necessary *mens rea*, amount to automatism,

which is the unconscious, involuntary behavior where the person, although capable of action is not conscious of what he is doing or the full defence of insanity, now referred to as not criminally responsible as a result of mental disorder pursuant to Section 16 of the *Criminal Code*. Cases supporting this approach and type of defence are very rare.

The most likely authority upon which the defence could rely is the Saskatchewan Court of Appeal's decision in *Regina v. Horvath* where, Chief Justice Bayda on behalf of a unanimous Court had occasion to consider in the context of a sentence appeal, a case where the accused was found guilty of several counts of fraud and theft of money from where he was employed. The 36 year old accused was found to be a pathological gambler who used the proceeds of her fraud to gamble. The court further held that she was driven by a desire to win enough money to pay off the amount she had stolen. As branch manager of the bank, she was able to defraud the bank of $198,527.00 and further, as a result of forging her husband's signature, was able to obtain a $25,000.00 line of credit. She had no criminal record and was married with one child. The sentencing judge imposed a conditional sentence of two years less a day from which the prosecution sought to appeal. A conditional sentence is a term of incarceration of less than two years wherein the accused is allowed to serve the sentence in the community rather that in an institution.

In dismissing the appeal, Mr. Justice Bayda, at paragraph 41 of the decision stated:

> "Perhaps the factor that carries most weight in assessing the gravity of the offences in this particular case is the one that generated those offences. The offences were the products of a distorted mind - a mind seriously diseased by a disorder now recognized by the medical community as a mental disorder. The acts committed at the command of that mind were not acts of free choice in the same sense as are the acts of free choice of a normal mind. A pathological gambler does not have the same power of control over his or her acts as one who does not suffer from that complex disease. Accordingly, where those acts constitute criminal offences, the moral culpability - moral

> blameworthiness - and responsibility are not of the same order as they would be in those cases where the mind is not so affected. The criminal law in other cases where the criminal act is the product of a distorted mind recognizes the difference in moral culpability. A good example is the reduction from murder to manslaughter of a criminal act of killing where the actor's mind is seriously distorted by alcohol."

Bear in mind that the Chief Justice's comments in that case related to the appropriate sentence to be imposed after a guilty plea and not whether or not the accused was culpable at law. The Saskatchewan Court of Appeal in that case confirmed the conditional sentence despite the prosecution's request that the accused be incarcerated. I note as well, from the case that the accused had no prior criminal record.

As an aside, it is unfortunate that before Ms. Horvath completed her conditional sentence she appears to have engaged in further criminal activity which resulted in her being charged in June of 2000 with theft from two employers of approximately $70,000.00. On March 19, 2002, in Provincial Court in Saskatchewan she was sentenced to two years less a day in jail despite the court's acceptance that she continued to be a pathological gambling addict. [2]

The difficulty in advancing this addiction as a full defence, even relying upon the *Horvath* decision, is the necessity of establishing the existence of a "distorted mind".

Advancing the defence of insanity is of limited practical effect given that the result may be hospitalization at a psychiatric institution. This of course would depend upon the level and effect of the addiction.

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[2] *R. v. Horvath* [2001] S.J. 189 (Sask. Prov. Ct.)

The Supreme Court of Canada in *Zlatic v. the Queen* (1993) 79 C.C.C. (3rd) 466 had occasion to consider whether the accused's conduct constituted fraud and specifically whether the accused had the necessary *mens rea* to commit the offence where the accused, a clothing wholesale businessman, took funds received from customers for merchandise not yet provided and lost the money as the result of a gambling addiction. In that case, there was evidence that when the accused commenced his gambling bid, he did not care about nor have any desire to pay for the merchandise that his suppliers continued to deliver to him.

Despite the accused's personal circumstances, the majority of the court held:

> "This accused knew precisely what he was doing and knew it would have the consequence of putting his creditor pecuniary interests at risk. It is true that the trial judge made no explicit finding that the accused subjectively appreciated that in gambling he was subjecting the interests of others to the risk of deprivation. However, the trial judge in convicting, must have concluded that the necessary *mens rea* was present. Indeed, it is difficult to see how on the evidence he could have concluded otherwise."

Of interest in that case is the accused's description of how he subjectively appreciated how his enterprise might succeed:

> "I had a chance to lose, but I had a chance to win too, and I believed that my system, I worked on my system, and I can show you the system that I played. The system is a very small possibility to lose, except if the luck is not on your side and basically it happened that I did lose again."

The court when on to state:

> "In short, there is nothing in the evidence which negates the natural inference that when a person gambles with funds in which others have a pecuniary interest he knows that he puts that interest at risk. On the contrary, the accused expressly acknowledged that he was aware of the risk."

> The foregoing establishes the *mens rea.* It is no defence that the accused believed that the accused believed that he would win at the casinos and be able to pay his creditors."

Furthermore, this potential defence suffers from the absence of a reliable "measuring stick" or barometer which would assist courts in determining the degree of addiction. I believe that courts view this addiction, as they do others. There are weekend binge alcoholics, there are daily intoxicated alcoholics. With alcohol and other drugs potential screens are available such as the breathalyzer, intoxalizer and blood tests. No such scientific devices are available to measure the degree of the gambler's addiction.

Likewise common indicia of impairment by alcohol such as slurred speech, glassy eyes, improper gait are not by contrast available to detect the gambling addiction, or the specific effect of the addiction on the gambler at the specific time that the crime occurred.

Therefore, courts are left to rely upon self reporting by the accused as to the specific effect of the addiction at the specific time. This becomes even more difficult to establish as a full defence where for example, the crime such as theft from an employer took place on several occasions over a period of several months or years.

As you an appreciate prosecutors are skeptical of a defence that relies so heavily upon self reporting and the evidence of an accused person. It is often attacked as self-serving and unsubstantiated information advanced by the accused who is fearful of loss of reputation and potentially loss of liberty. Unlike the alcoholic's loss of employment, which compounds his/her problems, the gambler's employment and lifestyle at least externally may remain intact allowing the prosecution to ridicule the veracity of the defence by reference to that evidence.

This approach and a skeptical bench tends to lead to a most unsatisfactory result in terms of the acceptance of the defence.

Despite the lack of a comparable tests ie. breathalyzer, defence lawyers can still amass some corroborating evidence such as depleted bank accounts, evidence of encumbered property and family property sold, and where possible, evidence of actual gambling abuse. Calling the owner of the Baccarat, who in court readily refers to your client as "Hal" his old buddy is a great start.

Despite these difficulties, one should bear in mind that other human conditions suffer from the lack of a barometer or physical measuring stick. For example, a mental disorder which impairs mental functioning. An example that comes to mind is a murder case where two brothers attempted to rob a courier in broad daylight on Jasper Avenue. In the ensuing scuffle with the courier for the satchel he was carrying, one of the brothers, Alvin stabbed the courier to death. I was requested to represent Alvin. In preparation of his defence I discovered that Alvin's father suffered from Huntington's Chorea, a debilitating mental and physical disease. A forensic psychiatrist testified at the trial that despite the lack of any obvious physical difficulties Alvin did suffer from the disease which impaired his mental functioning. Despite the lack of tools to measure the onset of the disease of Huntington's Chorea, the jury found Alvin not guilty by reason of insanity, as the defence was known then.

So, despite the lack of a physical barometer, some defences can still be established and it may be that at sometime in the future we see gambling addiction accepted as a full defence.

Some countries have adopted the general defence of diminished responsibility which permits an accused an excuse where, as a result of generally a mental disorder or condition short of insanity, the accused is held not be culpable.

The adoption of this defence by Parliament would likely allow individuals with a serious gambling addictions to be exonerated from certain crimes.

In order for this to occur, Parliament would have to "boldly go where none other have gone" and in the present political milieu it is difficult to envisage that occurring.

In fact, limiting of certain traditional defences has occurred due to public pressure. A good example of this is the proclamation of section 33.1 of the *Criminal Code* limiting the defence of drunkeness in cases that involve an element of assault or other interference or threat of interference with the bodily integrity of another. Specifically, this section provides:

> "33.1 (1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2)
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> (2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behavior, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.
>
> (3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a

> person with the bodily integrity of another person. 1995, c. 32, s. 1"

Likewise, the Federal Government was lobbied by certain interest groups to eliminate the defence of provocation or to limit its application. Fortunately, to date, the Minister of Justice has resisted those lobbying efforts.

To advance a defence of gambling addiction, counsel will have to be fully prepared and be able to lead expert evidence at trial.. Courts of the future will have to deal with cases which raise this defence similarly to courts that will have to deal with other new defences being advanced. For example, post traumatic stress disorder. The challenge for the defence bar is clear.

SENTENCING PHASE

Let me now turn to the second phase of the criminal justice system, being the sentencing phase. As already indicated, our Courts seem somewhat more willing to consider the effect of a gambling addiction on the sentence imposed following either trial or plea.

During the sentencing phase, our Courts attempt to strike a balance between the punishment, deterrence, denunciation and rehabilitation factors. This process requires a sentencing judge to take into account the general nature of the crime, the context in which it was committed, all aggravating factors and all mitigating factors. It is in the area of mitigating circumstances that the Courts have expressed some interest in giving the gambler a bit of a break. Mitigating factors include a consideration of factors that help to explain why the accused acted as he did, what rehabilitative steps have been undertaken to address the outstanding problem and some of the personal antecedents of the accused.

Let me give you some example of how our courts have addressed this factor in the sentencing phase.

In the case of *R. v. Bambury* [2001} N.S.J. 222, an 11 year veteran of the police force defrauded an individual of an amount not exceeding $5,000.00 while he was on active duty. Evidence established that the accused was addicted to gambling and the monies were taken for that purpose. In considering the appropriate sentence to impose, Mr. Justice Cacchione stated:

> "With respect to general deterrence I find it difficult to see how anyone in the position as Mr. Bambury, that is being a pathological gambler, could be deterred by anything this Court or any other Court can do. I am sure that a pathological gambler, if he or she were to hear that Mr. Bambury had been incarcerated for 20 years, that that would not stop the pathological gambler from continuing with gambling. I think that point was made clearly this morning by Mr. Bambury's testimony. All he thought about day and night, on duty, off duty, whatever, was getting money so that he could gamble. The primary thought was gambling. The secondary thought was how do I get the money to gamble.
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> That gambling addiction will impact upon sentencing considerations can be seen from various cases in this province. I quote The Queen v. Rizzetto (1983), 59 N.S.R. (2d) 132 as well as The Queen v. Landry, [1997] N.S.J. No. 508 and The Queen v. Wilson [1999] N.S.J. No. 476.
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> That an addiction to gambling can be a mitigating factor can be seen from cases of The Queen v. Horvath, [1997] S.J. No. 385 Saskatchewan Court of Appeal, cited and quoted by Mr. Pink, as well as in The Queen v. Mitchell [1996] A.J. No. 1176 (Alberta Provincial Court)."

The Ontario Court of Justice in *R. v. Dinardo* [2001] O.J. No. 2839 (Ontario Court of Justice) considered the appropriate sentence for a 50 year old mother of two who defrauded the Jewish Family and Child Services Organization of $246,000.00 in 1999. Initially, she denied her activities to authorities but then confessed

diverting $50,000.00 to herself in order to support her gambling addiction. A forensic audit revealed the actual loss.

The court considered the major aggravating factors to be the quantum of the loss and the serious breach of trust. The mitigating factors included the lack of a criminal record, the remorse expressed by Ms. Dinardo, and her willingness to seek help for her addiction. An expert report prepared by Dr. Ben-Aron assisted the court in understanding her addiction and how it directly contributed to her criminal acts.

Ms. Dinardo carefully planned her own suicide but couldn't carry through with it because her daughter's plans to leave her home fell through and despite the accused's best efforts, she couldn't get her daughter to leave the home. In a letter filed in court, Ms. Dinardo expressed her dilemma succinctly as follows:

> "I was a prisoner of compulsive gambling and all logic and common sense was lost to me."

Although the sentencing Judge Vaillancourt in Ontario referred to the *McIvor* decision from Alberta (referred to above), he refused to follow it. In refusing to send her to jail, the trial judge stated:

> "Ms. Dinardo understands that she has put herself in a most vulnerable position. The breach of trust carried out by Ms. Dinardo warrants a deterrent sentence.
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> The amount of the theft and the circumstances surrounding the breach of trust are compelling factors for incarceration. However, the cumulative weight of the mitigating factors set against the backdrop of Ms. Dinardo's serious gambling addiction cause me to impose a conditional sentence."

In the end, she was sentenced to a conditional sentence for two years and permitted to serve the sentence in the community. This is a significant decision given the magnitude of the theft involved and the substantial weight attached to the gambling addiction.

In another case from Halifax, Nova Scotia, a former R.C.M.P. computer and communications specialist received a 90 day conditional sentence for stealing $10,000.00 from an R.C.M.P. Mess. The funds were taken to feed the accused's video lottery gambling habit. The accused was 55 years of age and had been a 35 year veteran of the R.C.M.P. The prosecution requested a jail sentence. Judge Curran attached substantial weight to the mitigating factor, being his addiction, and to the fact that the accused had attended Gambler's Anonymous and ceased gambling.

In the *R. v. Lloyd* [1998] S.J. No. 639 (Sask. C.A.) decision, the Saskatchewan Court of Appeal had occasion to consider a crime committed by a person who did not suffer from a gambling addiction but whose theft from her employer was caused directly as a result of her husband's addiction to video lottery terminals. In that instance, the Court of Appeal stated:

> "Although the crime in this case was not committed by the gambler, it was clearly committed as a result of an addiction by a key family members and the funds were stolen to meet this addiction."

In the result, the Court imposed a conditional sentence of six months to be served in the community along with a restitution order in the sum of $32,000.00.

It appears that the Provincial Court has been far more accepting of addiction as a mitigating factor than has the Court of Appeal. Some examples include:

Alberta Provincial Court

In *R. v. Mitchell* [1996] A.J. No. 1176 (Alta. Prov. Ct.), Provincial Court Judge Van De Veen had occasion to consider the appropriate sentence for an accused charged with theft of $55,000.00 from her employer over a period of 16 months. This accused was in a position of trust with her employer and had substantial access to large sums of money. She was addicted to video lottery gambling and after her arrest entered into a twelve step program to deal with her addiction.

Judge Van De Veen, in granting a 9 month conditional sentence and two year period of probation to follow, held:

> "It is cleat the accused failed to appreciate the risk of video lottery terminal gambling and the increases availability of video lottery terminals contributed to her unfortunate addiction. I have taken these circumstances into account in my decision to grant a conditional sentence order."

In the *R. v. Trottier* [2001] A.J. 203 (Alta. Prov. Ct.), Assistant Chief Judge Caffaro had occasion to consider a case where the accused stole $172,835.00 from his employer to support a gambling habit.

In imposing a conditional sentence, Judge Caffaro stated:

> "Post *Proulx* the Court of Appeal of Alberta had a chance to revisit conditional sentencing in its decision in the case of *R. v. Beaudry* which in fact recognized that the sentencing landscape has changed considerably …"

Judge Van De Veen again had occasion to consider the appropriate sentence in *R. v. Armstrong* [2001] A.J. No. 770 (Alta. Prov. Ct.) in the Spring of last year wherein the accused pled guilty to fraud in the amount of $186,202.47 from his employer Symcor Services Inc. She was a trusted employee of the company which acted as a clearing center for banks. Her crime involved moving funds

electronically to accounts to which she had access and then crating false transaction to cover off money which had been taken over a period of approximately 18 months.

When the fraud was discovered, the accused advised that she was spending all the money on video lottery terminal gambling and her employment was terminated immediately. She then attended South Country Treatment Center in Lethbridge to address issues around her gambling addiction.

In refusing to send her to jail, Judge Van De Veen at paragraph 51 of her decision stated:

> "Our governments acknowledge the significant revenues received from the gambling industry and that VLT's are particularly addictive. Society and the authorities are aware that some people will "fall through the cracks" as it were and end up with gambling addictions which can destroy their lives. The accused before me is when of those people."

She went on to further state:

> "On the other hand restorative justice envisages restoration not only of the accused, but also of the victim. The payment of restitution ought to be an integral part of restorative sentences.
>
> The inability of the accused to make restitution, however, ought not to deprive her of a Conditional Sentence Order if she otherwise qualifies for such a sentence. Her ability to make restitution is not a precondition to the granting of a Conditional Sentence Order."

In the result, she imposed a two year less a day conditional sentence order.

His Honour Judge Tilley in *R. v. Holmes* [1999] A.J. No. 862 (Alta. C.A.) had occasion to consider a fit sentence for a 42 year old accused who was employed by

the Toronto Dominion Bank for 15 years and rose to the position of sales and service manager at a branch in small community. Over a period of one and one half years, she stole over $100,000.00 from her employer. She had no prior record, had pled guilty and was genuinely remorseful.

The court accepted that she was a pathological gambler and that she stole the money to indulge her addiction to video lottery terminal gambling.

Accepting that the addiction was a serious and substantial mitigating factor, his Honour Judge Tilley imposed an 18 month conditional sentence.

Court of Appeal

Our Court of Appeal has been very reluctant to accept addiction as substantial mitigating factor.

In the *Holmes* decision I have just referred to, the prosecution appealed Judge Tilley's decision. The appeal was allowed and although the Court of Appeal indicated that an 18 month jail sentence would have been appropriate but credited the accused for time spent serving the conditional sentence and imposed a 9 month jail term.

In reaching that conclusion, the three member panel of the Court of Appeal stated:

> "The evidence presented to the sentencing judge was not convincing that compulsive gamblers are not deterred by a significant custodial sentence. Further, there is little to distinguish a gambling addiction from an addiction to alcohol or drugs. Those addictions have never been accepted as diminishing the effect of imprisonment as a deterrent. Where general deterrence and public denunciation are the paramount sentencing

> considerations, a conditional sentence is usually not appropriate: r. v. Brady, supra.
>
> Her actions were premeditated and deliberate and displayed a degree of sophistication and cunning.

In the *Regina v. John* decision (1995) 162 A.R. 238 (C.A.) the Court of Appeal had occasion to consider the appropriate sentence where the accused embezzled a large sum of money from an aboriginal band when he was a band councillor. Although the accused did not suffer from a gambling addiction, it is relevant to consider the comments of Mr. Justice Coté before the unanimous court which imposed imprisonment for 1 year to be followed by probation for 18 months. At paragraph of that decision he stated:

> "The next question is, is this a exceptional case? One can always imagine circumstances of grave illness, stress, duress, small amounts of money, encouragement, and other bizarre circumstances (such as maybe mental problems) which would be exceptional circumstances that would justify a judge in not giving jail in a case of embezzlement or other theft by someone in a position of trust."

This appears to set an extremely high standard of proof for what is an exceptional case. It is of further interest that no reference is made, by way of example, to any type of addiction in the examples provided by Justice Cote..

In *R. v. McDermand*, [2000] A.J. No. 638 (Alta. C.A.), the Court of Appeal considered the appropriate sentence for an accused convicted of defrauding her employer of $88,918.06. She was employed by a company in Calgary dealing with payroll, accounting and accounts payable. At trial she received an 18 month jail sentence to be followed by a probation order.

Despite the addiction, the Court of Appeal upheld the sentence where the trial judge did not refer or consider the addiction as mitigating factor.

In *R. V. Watkinson* [2001] A.J. No. 394 (Alta. C.A.), the Court of Appeal had occasion to consider the appropriate sentence for the 36 year old accused who had no previous record and who was employed as a claims adjuster for Canadian Surety Company - Canada West Insurance Company. The sum of $117,000.00 of illegitimate payments were made to her as a result of a scheme that she had established.

It was established that the accused was a pathological gambler with psychological problems.

This panel of the Court of Appeal imposed a conditional sentence for 18 months. In its decision, the Court of Appeal at paragraph 26 stated:

> "Crafted effectively, in this case, a conditional sentence can provide sufficient denunciation and deterrence. Furthermore, restorative objectives can be met in this case through a conditional sentence."

From the above examples, it clear that our courts have been inconsistent in their approach to cases which involve an accused who has gambling addictions.

Preparation of The Defence

Given the authorities referred to above, preparation for the defence of a gambling addict is challenging. In some instances there is no paper trial which will assist in establishing the addiction.

In other cases counsel, to properly defend the accused, must obtain some or all of the following:

a) bank account records;

b) credit card statements and records;

c) retirement savings and/or pension withdrawal records;

d) *viva voce* evidence from friends and family about the accused's conduct.

One of the great difficulties is that often the undiscovered addict is secretive in his or her activities and revelation of the actual addiction comes as a complete surprise to those close to the accused.

In order to properly prepare the case, be it for the culpability phase or the sentencing phase, a psychologist of psychiatrist must be employed who can properly assess the existence of the addiction, the extent of the addiction and the specific effect of the addiction on the accused.

These experts ought to be individuals who have substantial knowledge and experience with gambling addiction. Those without that knowledge or experience bring only a general approach to the case. This expert evidence is absolutely essential because often the conduct of the accused in perpetrating the crime is no different than the accused who is motivated simply by greed.

Restitution and Government Culpability

The *Criminal Code* permits a sentencing court to order restitution to any party who has suffered a loss as a result of a crime. For example, the defrauded employer, the shop owner from whom theft has occurred and others who have suffered losses are entitled, al law, to receive an order in criminal courts which is tantamount to a civil judgment. The individual who suffered the loss is not therefore required to successfully sue the individual or individuals who caused the loss.

The *Criminal Code* permits that as part of a conditional sentence or probation that an order for restitution can be made against the accused at the time of sentencing.

In addition, section 738 provides that:

> "Where an offender is convicted or discharged under section 730 of an offence, the court imposing sentence on or discharging the offender may on application of the Attorney general or on its own motion, in addition to any other measure imposed on the offender order that the offender make restitution to another person as follows:"

An order for restitution pursuant to section 738 can, pursuant to section 741 be entered as a civil judgement in civil court without any further proceedings against the accused. It appears as well that such an order may withstand a declaration of bankruptcy by the accused.

The purpose of the restitution order is obviously to permit the victim of the loss to recoup to the extent possible. In almost every case involving loss of funds where the reason has been a gambling addiction, the courts will impose a restitution order.

From recent government public statements, there appears to be an acceptance that a certain percentage of gamblers will become addicted. This knowledge by the government and acceptance of some responsibilities is confirmed by its concession that some revenues from gambling ought to be used to cover addiction counselling and addiction centers that have to be established. In addition, the government is well aware that in this province it permits some gambling devices to be employed even though those devices are prohibited in other jurisdictions because of their addictive nature.

It may well be that we will see in the future an argument launched by defence counsel implicating the provincial government and suggesting that the government be responsible for a portion of the restitution to innocent claimants. If the link can be made directly between the government's knowledge of the addictive nature of the machines and its permission to allow such devices to prey on the public, that argument may in fact succeed.

Undoubtedly the government may counter with the "alcohol argument" and the suggestion that gambling is simply a matter of personal choice.

Clearly, if an argument relating to government culpability is to succeed, evidence would have to be led to establish that the accused had lost a level of control as a result of the addiction. In addition, the specific provisions of the *Criminal Code* may prohibit a judge making an order directly against the government for restitution.

It may well be that in the future we will see a civil action commenced to recoup losses against not only the gambler but against the government that permits gaming devices to flourish within society.

Unfortunately, it does not appear that the devastating consequences of permitting highly addictive devices has been fully considered. I predict that our courts will see many more legal and social problems arising directly from gambling in the future. The challenge will be how those problems are dealt with.

Thank you.