

Taking a chance on it: the legal regulation of gambling

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Gambling dates far back in human history as an almost universal practice. Dice with numbers on four sides have been found which were used in Egypt five thousand years ago! Gambling tables were discovered in the ruins of Pompeii. The Roman historian, Tacitus, who lived about 100 A.D., recorded that gambling was very common among the tribes of Germany.

Gambling is inescapably part of our modern lives and culture. Most people like to take chances for greater gain in life. Who has never flipped a coin, played a game of Bingo, entered for a door prize, or bought a raffle ticket? Risk and reward seem to be positively correlated, so the more one risks, the more one consequently stands to gain. We have adopted the language of gambling in common speech. When we speak of a long shot, taking one's chances, something being a good bet, or considering the odds of something happening, we are employing gambling language. Similarly, business seems to be in perpetual risk management mode.

More and more, life is seen as a gamble. In our personal lives, we do not know what our health will be in five years, whether that new dishwasher will work as advertised, whether we will be laid off, whether our marriage will endure, even whether our politicians will follow through on their promises once elected. In business, it seems to be a gamble whether a customer's cheque will clear, whether a trained employee will quit, or what the government regulators will do next. Any investment, such as in mutual funds or other shares, is also, inherently, a form of gambling.

Business itself can be seen as a gambling venture. Even with the most meticulous market research and business plan, one never knows what will happen. Some contracts commonly regarded as having a legitimate business nature have an element of speculation in them insurance contracts, various stock exchange transactions, and futures transactions in commodities and currencies. Yet few business people would see it that way. This has suggested the paradox that the gambling known as business looks with austere disfavour upon the business known as gambling (Ambrose Bierce, *The Devil's Dictionary*, 1906).

Gambling Defined

How is it that some gambling-like activities are legitimate while others are not? Where do we draw this line? True gambling usually takes place between individuals, not between businesses, and has been defined in one well-known case as mutual promises under which either party may gain or lose according to the ascertainment of an event uncertain to their knowledge *Carlill v. Carbolic Smoke Ball*, (1893). It involves the transfer of something of value from one person to another on the basis of mere chance. Three elements are part of the process: the payoff, pure chance, and agreement to pay by the bettors.

Therefore, while stock market investing has risks, pure chance neither predominates nor controls the transaction. The stock exchange does not involve pure chance because the money invested relates to the capital development of corporate industry. The Criminal Code of Canada defines gaming as a game of chance or a game of mixed chance or skill.

Is insurance anything but a gamble, or contract of wager? In both insurance and gambling, one person must pay out to another person a sum of money on the occurrence of a particular event. However, the insured person still does not want the insured loss to occur. One does not hope one will win the bet with the insurance company. It is fraud to deliberately cause the loss to trigger insurance payment, which only covers the loss in any case. Wagers bring forth a windfall to the triumphant gambler, at the personal expense of the others.

There are many forms of true gambling. Lotteries, elaborate forms of the raffle, come in many varieties. There are the grand public lotteries in which millions of dollars are drawn for, right down to the video lottery terminals. There is racetrack betting, casinos, pull tickets, dice and card games, sports betting, and bingo. Bookmakers take bets on anything from prize fights to election outcomes. The publicly authorized and regulated gambling returns handsome revenues to provincial treasuries, which money is, in turn, distributed for public purposes such as charities, recreation, culture, and community development.

Turpitude of Gambling Reflected in the Law

Gambling bears a stigma associated with earning money merely by playing games (hence the term gaming, which was decided in *Bailey v. McDuffee* (1878) to be synonymous with gambling) as compared to earning it by respectable means. Religions frown on gambling. In the Jewish Talmud, gamblers are ineligible to serve as judges or witnesses. Christianity's views on work, stewardship, and love of neighbour also generally rule out gambling activity.

The enchantment and thrill of quick and easy windfalls, both legal and illegal, snare a number of people who might be elsewhere engaged in more salubrious endeavours. As many people are likely addicted to gambling as to alcohol, and compulsive gambling often leads to devastating consequences.

Ultimately, gambling may fall under the control of organized crime. It attracts and exploits people most vulnerable and desperate, who may be seduced by the prospect of becoming rich quickly. The stakes in gambling can escalate precipitously (who is not bewitched by the bait of double or nothing?). When the stakes are high enough, one may be motivated to influence the results. Early in this century, professional baseball players threw their World Series games because of betting; recently, professional sports have severely disciplined their own players and coaches for betting on games.

It is for all of these reasons quick, unwholesome windfalls, exploitation of human vulnerabilities, control of one's estate by others which could lead to extortion and organized crime, and the manipulation of high stakes outcomes that the law has historically taken a stern view toward gambling.

Today provincial governments deal comprehensively with gambling, whether that is for regulating the activities of others or establishing the infrastructure and partnering in it. Overall, the ends are currently thought to justify the means. Governments are accused of being addicted to gambling revenues. Nevertheless, the debate rages as to the proper role of government in promoting gambling to raise public money.

Government as Gambling Operator

Gambling, under certain conditions, is a legal activity that generates considerable revenue for the provinces. For example, in 1994, the Casino de Montreal generated \$36 million in profits in its first three months of operation and a temporary casino in Windsor generated more than \$73 million in provincial taxes in less than a year (Hardly a Quick Fix: Casino Gambling in Canada, 1996) In 1996, the Alberta government received \$554,881,000 in revenues from gambling (Alberta Treasury Branch, Public Accounts 1995-96), a figure which is likely to grow with the extension of regulatory operations under the Gaming and Liquor Act. The licence is also a source of revenue for the province. For example, if the Alberta bingo prize money exceeds \$15,000, the licence costs \$3000. Percentage of profits apply to raffle licences, pull ticket licences, and casino licences.

Legislation Regulating Gambling Civil

Although agreements in the form of bets were enforceable at common law (Earl of March v. Pigot , 1771), they never had high priority in over-worked courts. Other civil disputes competed for their time and attention. Judges were reluctant to enforce frivolous or morally questionable wagers. Eventually the English Parliament sought to preserve the stability of a land-based economy which experienced disruption through large transfers of wealth for payment of gambling debts. It stepped in and ruled such contracts unenforceable.

In England, the Statute of Anne (1710) sought to constrain gambling by deeming that all Notes, Bonds, Judgments, Bills, Mortgages, or other Securities or conveyances whatsoever given for the payment of gambling debts were void, frustrate, of none Effect to all Intents and Purposes. Similarly, the Gaming Act of 1845 renders gaming contracts void.

All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made.

In the four western provinces, the English Acts of 1710, 1835, and 1845 are in force as a result of the date of reception of English laws in 1870. Other Canadian provinces followed the English legislation and declare that all types of bets are void at the civil level. For example, section 4 of Ontario's Gaming Act, is virtually identical to the clause above.

In the 1966 case of Breitmeier v. Batke, an Alberta court refused to recognize an agreement between winners of a bingo prize to split the winnings three ways. Although acknowledging that the bingo event was a lawful event, the court found that such a lawful activity falls within the definition of gaming event which is a contract unenforceable by the Gaming Act (1845). Thus, while lawful gaming events are not illegal, they give rise to agreements which can only bind parties by honour. Individuals can participate in lawful gaming activities; however, a party cannot recover on a debt in a court if the debtor refuses to pay.

It is, therefore, impossible for a winner of a bet to collect through court action. Even if the winner was paid by cheque or promissory note, those negotiable instruments, will not be enforced in court. Likewise, a loser who has already paid a bet cannot ask a court for recovery of it. A curious little-known exception exists in section 3 of the Ontario Gaming Act, which allows a loser of \$40 or more at one sitting of cards, dice, tables or other game to sue for recovery of it within three months.

Administrative

Each province has its own regulatory framework for licensing of legally-authorized gambling. For example, legislation has permitted the placing of bets at race courses for many years in all provinces.

In Alberta, new gambling regulations came into force in July 1996. The new Gaming and Liquor Act combines the former Interprovincial Lottery Act and the Liquor Act. Under the new Act, a Board is set up to oversee licensing of liquor and gambling establishments. The objective was to streamline the liquor rules and expand lottery supervision. Under the Act, inspectors can investigate liquor and gambling establishments, and video lottery machines. The powers of the Commission are now clearly outlined, including its objective to generate revenue for the Government of Alberta. A charity or any other person dedicating the proceeds of the gaming to charitable or religious purpose may obtain a gaming licence (section 20).

Criminal

These statutes do not make betting a criminal offence; they do not prescribe fines or imprisonment for those who make bets. The Criminal Code does, however, make certain betting activities illegal. In 1967-68, the Criminal Code was amended allowing for the operation and licensing of lotteries and gambling by the provinces and the federal government. In 1985, the provinces were given exclusive jurisdiction to regulate gaming activities. The Criminal Code of Canada exempts individual betting from being illegal, but renders illegal operating or being found in common gaming houses (s. 201), and common betting houses .

Such facilities are broadly defined as places which are kept for gain for the purpose of playing games in which all or any portion of the bets or proceeds from a game is paid, directly or indirectly, to the keeper of the place . A bet under the Code, is one that is placed on any contingency or event that is to take place in or out of Canada, including on the Internet. If no provincial licence has been issued, the place is deemed to be a common betting or gaming house, and is criminally illegal. Section 197(2) exempts social clubs or associations if proceeds are not paid to the keeper of the club and if no fee is charged for participation.

The Criminal Code also outlaws betting, pooling, and bookmaking. However, betting in lawful games or bets between not more than ten individuals is exempt. Private bets between individuals not engaged in any way in the business of betting and horse racing, if done in accordance with provincial regulations, are also exempt. In all of this, one should remember that even authorized gambling takes place in the context of civil unenforceability in the law courts.

The Federal Court of Appeal recently affirmed in *St. Mary's Indian Band v. Canada*, (1996) that the Indian Act does not confer on Indian bands the authority to operate or regulate casinos outside of these provisions of the Criminal Code.

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