Alberta Gambling Research Institute

4th Annual Conference

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April 1st 9 am to 10:15 am Session

Hal Pruden's Presentation

"A Bird's Eye View of Canadian Criminal Law on Gambling"

I must preface my remarks with the caution that the views I express today are my own and do not necessarily reflect a position of the federal Department of Justice. The second observation that I feel obliged to make is this: while I have had a rather unique, bird's eye view of gambling law in Canada over the past two decades, I have but a worm's eye view of the federal Department of Justice. On the upside, what you will hear today is from the horse's mouth; on the downside, this horse is not a hospitality account in the saddlebags.

Legislative Matters

Of interest to some of the Australian visitors will be the fact that the *Criminal Code* applies throughout Canada. This is the function of having a Constitution that divides legislative powers between the federal and provincial levels of government. Criminal Law is a federal head of legislative power. However, with respect to certain forms of gambling, we will soon see that the situation is a bit more complicated than that because provinces may use their Property and Civil Rights head of constitutional legislative authority to enact laws that relate to certain gambling activities, where the federal Parliament has made those forms of gambling permissible. The Supreme Court of Canada, in 1991, indicated in

Furtney that it is entirely appropriate for Parliament to set out in criminal legislation what gambling is permitted, and then, for provincial legislatures to enact laws relating to certain gambling that is permitted by Parliament. The Canadian situation is certainly different than what exists in the United States where each state creates its own criminal law, with the federal Congress enacting legislation that touches gambling in relation to interstate communication matters and Indian gaming matters.

The basic scheme that may be discerned from a careful reading of the complex gambling provisions in the *Criminal Code* is this: all forms of gambling are illegal, except those forms that are specifically permitted by the *Code*. We find, first, that **pari-mutuel betting on horse races** is permitted, where the betting meets certain conditions, and is regulated by the federal Minister of Agriculture. Second, **Private bets** between individuals who are not in any way engaged in the business of betting are also legal. Third, gambling on a broad range of "lottery schemes" is also permitted. These include **lottery schemes** conducted by a province, conducted by a licensee of a province or conducted on an international cruise ship, where certain conditions are met. The definition of a "lottery scheme" is very broad. However, for provincial licensees, it does not include gambling on a slot machine, video device, computer, or a dice game.

With your indulgence, I am going to use some minutes to take a short trip down Canadian gambling's "history lane" before coming to some thoughts on a few social and policy topics that confront us today.

At Confederation in 1867, the pre-existing criminal laws continued. Of course, from 1867, the federal Parliament has had the sole constitutional authority to make criminal laws and it did begin to enact criminal legislation with regard to gambling, notably by codifying, in 1886, the laws related to lotteries.

In 1892, Canada was the first country in the British Empire to enact a home-grown codification of its criminal law, although it was modelled to some extent on an English draft model code. The *Criminal Code of Canada* came into force in 1893 and, yes, it did contain several offences and permitted exceptions relating to gambling. These have multiplied over the years. I note, in passing, that "mother England" has still not gotten around to codifying its criminal law.

Early amendments to the gambling provisions in the *Criminal Code* focussed upon curtailing lottery schemes, though not to the same extent as occurred in the USA following lottery scams there in the last half of the 19th century. Other reforms, in

the early decades of the twentieth century included, for example, the 1920 amendment that permitted the use of pari-mutuel systems for the long-standing betting on horse races, if the pari-mutuel system is operated by a race association.

In 1956 a Special Joint Committee of Parliament (with Committee members from both the House of Commons and the Senate) reported on its study of "Capital and Corporal Punishment and Lotteries". Its recommendations included the expansion of the permitted charitable lotteries, including higher prize limits and provincial government licensing.

In 1967, a lotteries bill was tabled in Parliament but it died on the Order Paper in 1968. The legislation was enacted in 1969. It included a provision that created permission for "lottery schemes" operated by the federal government, by a provincial government or by the licensee of a provincial government, as per the 1956 recommendation. It should be noted that from 1963, many states in the U.S.A. had moved to adopt a state lottery. Permission for the federal operation and the provincial operation of lottery schemes was a new element that apparently had not been considered within the 1956 Special Joint Committee's report. I note that the 1969 legislative changes were "sold" on the basis that proceeds would be used for "public good causes, including government purposes. Perhaps it was also felt

that government operation would result in cautious expansion with harm reduction in full view.

A decade later, in 1979, certain provincial and federal Ministers, not in Justice Portfolios, signed an agreement that the federal government would not use its *Criminal Code* permission to conduct federal "lottery schemes" and the provinces would make an annual payment to Canada of 24 million dollars, in 1979 dollars. This payment is indexed and I understand it is now about 60 million dollars.

In 1983, Parliament amended the *Criminal Code* in order to permit the federal government to operate "pool betting operations". Provinces complained that this looked very much like a "lottery scheme" and the federal government complained that certain provincial lottery schemes looked very much like "pool betting operations". Litigation ensued. In 1985, certain provincial and federal Ministers, not in Justice portfolios, agreed to drop the litigation. The federal government agreed to use its best efforts to place a bill before Parliament to eliminate the permission for the federal government to operate lottery schemes and pool betting operations. In exchange, the provinces agreed to contribute 100 million dollars for the 1988 Calgary Olympics and to continue the annual payments under the 1979

agreement. The federal government tabled the legislation and Parliament enacted it in 1985.

In 1989, the Manitoba government opened what it billed as a “European-style” casino in Winnipeg. This was closely followed by the placement by the Atlantic Provinces of video lottery terminals (VLTs) at locations such as bars. This all occurred with an executive decision and did not require legislation or public consultation. Only later was there a public backlash and referenda regarding VLTs in some provinces.

In 1998, Parliament enacted legislation that permitted operators of international cruise ships that are on an international voyage of at least 48 hours to continue their gaming while in Canadian waters. For this permission to apply, certain conditions must be met, including the ban on gaming within 5 nautical miles of a Canadian port of call.

Social and Legal Policy Issues

Internet Gambling:

There are some who say that Internet gambling is a murky area of Canadian law. This is surprising to me, given the *Starnet* conviction in the British Columbia courts several years ago and the more recent decision in the Prince Edward Island Reference on the *Earth Fund Lottery* and in light of the permission for private bets, which is found in section 204 of the *Criminal Code.* I would argue that the criminal law is, for the most part, quite clear in regard to Internet gambling and that challenges of investigation and enforcement relating to international Internet gaming offences should not be confused with the question of what is legal or illegal.

Section 204 of the *Criminal Code* sets no limits on the method of communication for bets **between private individuals who are not engaged in any way in the business of betting**. In person, by telephone, or by computer - you and I can bet the farm and all the horses without attracting the weight of society's most severe sanction, the criminal law - if we are both private individuals who are not engaged

in the business of betting… And if I am wrong about that, I'll eat my shirt and chew the buttons.

Section 207 permits provinces, but not licensees of a province, to operate a lottery scheme on or through a computer. They may do this within the province, or with the cooperation of another province, in that other province, but not offshore. In the *Earth Fund* court reference, the Prince Edward Island Court of Appeal affirmed that a province cannot license a lottery that has "consideration" and "prizes" flowing by means of Internet transactions, even if the winners are determined by a manual draw. In a move that is rarely seen, the Supreme Court of Canada dismissed the subsequent appeal "from the bench" and without hearing from the lawyers for the respondents. This means that the Court did not even need to hear submissions from Intervenors, such as the federal government, and it did not reserve judgement. In basketball terms, this was a slam dunk. Provincial licensees cannot conduct Internet lottery schemes, even if the draw aspect of the lottery scheme were to be a manual drawing. The case does not speak to provincially licensed lottery schemes that simply use the Internet to advise provincial residents of the lottery scheme and where they can buy tickets.

In *Starnet*, an offshore Internet gambling site was licensed in a foreign jurisdiction and drew players globally, notably in the USA. However, equipment was kept in British Columbia for recording bets. In Canada, a conviction under section 202(1) (b) of the *Code* resulted, with imposition of a fine, measured in millions. One of the persons involved, Mr. Blair Downe, was subsequently prosecuted in the USA.

It is important to remember that, as a matter of law as indicated by the Supreme Court of Canada in *Libman*, if an offence takes place in whole or in part in Canada, it may be that Canada is the appropriate place for charges to be heard. So, an Internet lottery sale from offshore into Canada might be prosecuted in Canada, according to section 206(7). Also, the Canadian purchaser, under section 207(4) of the *Code*, commits a summary conviction offence. As an observation, if a state believes that the policy should be to make money, then as some Australian states have done, it makes sense to have Internet gambling that takes money from players offshore, regardless of what other countries might think. Another is to make money from Internet gambling that is offered only to residents, as appears to be the case in Finland and Austria. Another option, that available under Canadian criminal legislation is to permit a provincial government to offer its own computerized lottery schemes to its residents.

Compulsive Gambling

There are few people who would argue that the expansion of legalized gambling has not created new gamblers and that it only makes more visible those who were problem illegal gamblers, who now choose legal gambling. Even those who do make such arguments recognize the human tragedy that exists, in health and economic terms, for problem gamblers and their families.

There is currently one private Senator's bill now before Parliament that is motivated by the desire to reduce the incidence of problem gambling. Bill S-11 would eliminate provincial government slot machines (VLTs) from bars in those provinces that do place them in bars. I note that British Columbia, Ontario and the 3 territories choose not to offer VLTs in bars. The observation that I can make in respect of a private bill before Parliament is that the *Criminal Code* reflects the current federal government policy. It is for the Minister of Justice and his Cabinet colleagues and not for Departmental officials to comment upon any future change to the current policy.

I imagine that provincial government slot machines in casinos, whether they are coin-in–coin-out or coin-in-paper-out, are presumably no less addictive than slot

machines in bars. The differentiation with the Senate private bill, then, appears to lie in the expectation that a bar patron might hold, as opposed to a casino patron, that the bar will serve up only alcohol and not gambling. It might well be that moving machines and gambling patrons into casinos with alcohol (or to minicasinos across the street from bars?) might not look so much different than having slot machines in bars, except that there would be no seats without a slot machine, unlike the current situation in bars.

Ultimately, the question for Parliament comes down to whether the criminal law should be used to eliminate slot machines in bars or whether it is appropriate to leave the question for a province, and its residents, to decide. Some provinces have held plebiscites on VLTs in bars and might be expected to resent a "one size fits all" amendment to the *Criminal Code.*

First Nations Gambling

When the *Criminal Code's* gambling provisions were amended in 1969, a federal White Paper was in circulation that advocated termination of special status for Indians. This policy balloon was later exploded by a sharp backlash. However,

the legislative “lottery scheme” train had already left the station, without a First Nations caboose attached.

Subsequently, a number of provinces have accommodated First Nations’ gaming aspirations to some level. They do this through sharing slot machine revenue from locations on or off reserve and by designating First Nations licensing bodies, under section 207(1)(b) of the *Code,* as the bodies that will grant licenses for charitable lottery schemes on First Nations lands.

However, even the most advanced accommodations do not satisfy all First Nations. Some are calling for recognition of a claimed aboriginal or treaty right to develop economically, through casinos and “for-profit” gambling. Regardless of one’s perspective on First Nations’ sovereignty views, the reality remains that First Nations governments, typically, have large service provision needs and they face monumental economic challenges. They see gambling as an economic engine and a touchstone for self-government.

The Supreme Court of Canada, in a single decision covering two separate cases (*Pamajewon*; *Gardiner*), has indicated that a claim to an aboriginal right related to gambling is to be tested just as any other aboriginal right is tested. Also, the

existence of a right must be determined on a case-by-case basis and a court must consider the historical evidence related to the claim. The *Pamajewon* decision illustrates that proving in court that there is an existing aboriginal or treaty right relating to "for-profit" gambling is an uphill climb.

Conclusion

Legalized gambling is a topic that readily attracts media interest. It has become embedded in our culture. By way of illustration, there are two questions one may ask strangers and be virtually certain to engage their minds (1) what would you do if you were cast away on a desert island? And (2) what would you do if you won the lottery?

Legalized gambling generates serious questions: "what gambling should be legal and in which places?" and "How can we reduce the risk of harm and reach the problem gamblers, who are a small percentage of all gamblers but a numerically huge population?". These questions have no easy answers.

Finally, anyone who has muddled through them will tell you that the gambling provisions of the *Criminal Code* are a difficult read. Even when a policy decision is taken regarding a particular amendment to these provisions, drafting the amendment requires caution in order to avoid unintended consequences. The Parliamentarians and the legislative drafters must know as best they can what other operations will be set in motion. They should ask themselves, "What other consequences will occur if I pull on this string?" The current gambling legislation is a most intricate web. "Nuking" it and starting from scratch in order to produce more reader-friendly legislation sounds like a great idea. However, there are probably few people who would be prepared to enter the daunting debate and difficult negotiations that would, inescapably arise from even the most modest proposal, which would be to simply rewrite what already exists.

Even with a limit of simply rewriting, many could not resist the urge to advocate changes with such arguments as: "A small change would mean a lot more money for good causes" or "Making this change would spare many people a lot of pain."

My thanks to the organizers for the invitation to speak and, most importantly, thanks for your patience.