



# Recent Legislative Initiatives Affecting Land-Based Gaming in Canada

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*Late 2009 and early 2010 have seen a number of legislative efforts affecting land-based gaming, both at the federal and provincial levels of government. These initiatives reflect the double-sided public attitude towards gaming in Canada. The provincial legislatures often produce constructive and forward-thinking proposals that speak to the future of gaming in an international setting, an encouraging attitude for those seeking commercial opportunities in what is now a mature gaming market. At the same time, we must remain aware there are still opportunities for certain political actors to introduce instability into that market. This is particularly evident where those actors have no need to be responsive to the broader public interest in gaming.*

### Bill S-226 – Restrictions on VLTs and Slot Machines

Pursuant to s-s. 207(1)(a) and 207(4)(c) of the Criminal Code (the “Code”), the provincial governments are the only entities that have the authority to conduct and manage gaming that is operated on or through computers, video devices and slot machines. Such gaming may be conducted and managed anywhere in the province.

Bill S-226, sponsored by Senator Jean Lapointe, proposed to amend the Code to restrict the authority of the provincial governments, limiting them in their authority by providing that gaming operated on or through computers, video devices and slot machines cannot be carried on outside casinos, race-tracks and betting theatres. The provinces, many of which have allowed slots and VLTs to be placed in restaurants, bars and other venues, would be faced with the first federally-mandated restrictions on their jurisdiction to conduct and manage gaming since 1985, when the federal government voluntarily abdicated the field of gaming to the provinces.

If Bill S-226 or a similar bill were to become law, the market in Canada for manufacturers and distributors of slots and VLTs would be severely curtailed. Figures cited by Senator Lapointe state that there are 38,652 VLTs in 8,309 locations across Canada, and his stated goal is that within three years of the bill being passed and coming into force, there would be only 206 locations in Canada where VLTs and slots could be placed. Manufacturers and distributors of such devices with contracts with provincial lottery corporations should consider whether there is language in those contracts that addresses which party suffers the consequences if a change in the law renders the use of some of their products illegal, as many devices currently installed in some provinces would have to be removed.

Moreover, if S-226 passed, it would cause considerable shift in political structure of the gaming debate in Canada. The federal government has taken a “hands-off” approach to gaming since 1985, when it entered into an agreement with the provincial governments whereby the conduct and management of gaming and betting would rest entirely with the provinces (the “1985 Agreement”). Bill S-226, if passed, would represent the first time since 1985 that the federal Parliament prohibited a gaming activity being carried on by the provincial governments. The federal government has been loathe to amend the Code in a way that would have the effect of taking a source of revenue away from the provincial governments. The enactment of Bill S-226 would clearly reintroduce the federal government into the field of gaming in the role of the regulator of last resort. Lobbying of the federal government by groups opposed to gaming would become a regular part of the gaming field, with the

federal government seen as being able to withdraw lawful gaming opportunities from the provinces if they are not conducted and managed in a manner deemed appropriate by the federal government.

The consequences to the federal government could be legal as well as political. The 1985 Agreement explicitly commits the federal government “to refrain from re-entering the field of gaming and betting...and to ensure that the rights of the Provinces in that field are not reduced or restricted.” The legal consequences of breaking this pledge are unclear, but there is the possibility that it could give rise to the provincial governments being able to sue the federal government for damages.

While Bill S-226 was first introduced into the Senate by Senator Lapointe on February 11, 2009, it represents merely the latest iteration of a bill that Senator Lapointe has been introducing and re-introducing into the Senate since April 2003. In Canada, senators are unelected legislators who are appointed by the government of the day, and who retain office until the age of 75. On December 6, 2010, Senator Lapointe turns 75 years old, at which point he will no longer be eligible to serve in the Senate. Unless he can find another legislator willing to advocate on behalf of this cause in his absence, it is expected that 2010 will represent the last chance Senator Lapointe will have to see this bill enacted.

### Bill C-31: Pari-Mutuel Horse Racing Betting

In the field of pari-mutuel horse-race betting, the Federal government has demonstrated an understanding of the increasingly international nature of betting, and a willingness to amend the law to account for this reality. Pari-mutuel horse-race betting is the only form of gaming that is still directly regulated by the federal government, such regulation being carried out under the auspices of the Canadian Pari-Mutuel Agency (the “CPMA”), an agency of the Minister of Agriculture and Agri-Foods.

In 2006 and 2007 the CPMA embarked upon the Comprehensive Regulatory Framework Review, in which stakeholders in the Canadian pari-mutuel horse-race betting industry deliberated how to modernize the law to ensure a regulatory model that would provide for the most modern, efficient, and effective approach to protecting the betting public. In the fall of 2007, the CPMA presented a package of changes to stakeholders, the majority of which were thereafter approved the responsible federal government Minister.

Some of these changes were deemed to require amendments to section 204 of the Criminal Code, which amendments formed part of Bill C-31, that was introduced into the House of Commons on May 15, 2009. Some amendments to the Code address how payouts are to be calculated where pari-mutuel betting

pool is comprised of both foreign and Canadian bets. Currently, the Code uses archaic language to set forth how horse racing associations may deduct and retain monies from the amount bet in a pool, referring specifically to Canadian currency (“cents” and “dollars”). This complicates the calculation of payouts in Foreign Pool pari-mutuel betting, where the monies wagered by Canadians is pooled with monies bet by non-Canadians. Bill C-31 would have eliminated such language from the Code and greatly simplified calculations.

As well, the current language of the Code appears to restrict the CPMA to applying a single method for calculating all payouts, not permitting any differentiation between methods used for domestic and foreign pool payouts. Bill C-31 would have allowed the CPMA to set regulations setting forth varying methods for calculating payouts.

Finally, the CPMA has for many years carried out its regulatory responsibilities by approving pari-mutuel systems prior to their initial use by an association, and thereafter carrying out periodic inspections of the approved systems. The Code does not explicitly permit this form of regulation;

the relevant section currently provides that the operation of a pari-mutuel system must be carried on under the “supervision” of the CPMA. In order to make it clear that the CPMA's present method of conducting the regulation of pari-mutuel systems constitutes valid “supervision,” the Bill proposes adding a definition of “supervision” as section 204(12) of the Code: “For greater certainty and for the purposes of this section, ‘supervision’ includes supervision by periodic inspection.”

It is hoped that these amendments will be re-introduced by the government during the new session of Parliament which commenced on March 3, 2010. The proposed amendments that were set out in Bill C-31 reflect a realistic approach to the regulation of gaming and betting,

as has been followed by the CPMA for many years, and such responsible regulatory efforts are to be applauded.

### **B.C. Gaming Control Regulations**

In December 2009, the regulations governing gaming in British Columbia were amended, and included in those amendments was a change that has introduced a less onerous procedure for introducing new slot machines into gaming venues in British Columbia.

Under the newly-amended regulations, adding slot machines to a gaming facility that did not previously have slot machines is no longer defined as a “substantial change.” Removing this action from the “substantial

change” category means the British Columbia Lottery Corporation does not require a written directive of the responsible Minister in order to introduce such slot machines, and accordingly avoids the legislative requirement to engage in a consultation process with local governments and stakeholders as set out in the legislation before the Minister can provide that written directive.

### **Manitoba Gaming Control Act and Regulations**

As well, Manitoba has recently amended its Gaming Control Act and Regulations, however these

amendments have yet to come into force. The primary focus of these amendments is to extend the safeguards applied to casino gaming to ticket lottery sales. This means that lottery ticket retailers will soon be subject to the same types of due diligence investigations and terms and conditions imposed on companies and individuals involved in casino gaming. As well, the public complaints procedure set out for casino gaming will now be extended to ticket lottery issues, and there will be new technical integrity requirements set forth for machines used in ticket lottery retailing. Also, due diligence investigation will now be required of owners of premises used for charitable gaming, and a progressive discipline regime will be introduced to address contraventions of the

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gaming legislation, permitting the imposition of orders on a scale running from remedial to punitive.

Finally, the Manitoba Regulations have been amended to permit the licensing Texas Hold 'Em poker as a charitable gaming event; and to include a technical integrity requirement for gaming devices that they display the correct value of the prizes available, where applicable.

### **Ontario – Privatization of the OLG**

Potentially the greatest opportunity in Canada for private investment in the gaming industry is under being considered by the Ontario government: the privatization of a share of the Ontario Lottery and Gaming Corporation (the “OLG”), the state-owned corporation responsible for conducting and managing gaming and betting in the province.

In December 2009, media reports indicated that the Ontario government, faced with a record C\$24.7 billion deficit, had asked CIBC World Markets Inc. and Goldman Sachs Group Inc. to review privatization opportunities, and that among the assets being considered for sale were those of the OLG. On March 5, 2010, the Ontario Minister of Finance, Dwight Duncan, stated that the government is still moving along with the process of considering the sale of public assets, but that it has not yet been determined what assets are to be sold. Mr. Duncan stated that the government was continuing to examine whether certain state-owned businesses could be “unleashed” to provide new jobs and economic opportunity, and indicated that the government was considering “new models for maximizing assets that protect and preserve the public interest.” Retaining government regulation was foremost in the Minister's mind, as he stated that “it is possible to significantly increase revenue and maintain regulatory control” and that government regulation remained a “critical” factor in their deliberations.

The Minister's statements regarding “regulatory control” may be reflective of an indication that with respect to the OLG, there are a number of legal hurdles that would need to be overcome for any kind of privatization. To be lawful, the OLG's gaming activities must fall within s-s. 207(1)(a) of the Code to be lawful, and that provision requires that the government of Ontario at all times remain the entity that “conducts and manages” the gaming being carried on through the OLG.

Some observers have posited the idea of a “super-corporation” that would manage and control several of Ontario's Crown Corporations, with a stake in the assets being sold to investors. There is no legal reason why such a structure could not work with OLG as one of the corporations under the umbrella of such a “super-corporation.” Internal business decisions over OLG matters could be segregated as requiring the ultimate

approval of the provincial government, regardless of the composition of the board and shareholders of the “super-corporation.”

Courts have stated that “conducting and managing” means the province must remain the operating mind of the lottery schemes operated at the gaming facilities. This requirement has been interpreted differently across the provinces. For instance, capital investment by the provincial government is not a necessary precondition to satisfying the “conduct and manage” requirement. It is just one of the factors relevant to that determination. As a result, private entities can be the owners of the gaming premises, as is the case in British Columbia and the equipment, as is the case in Nova Scotia provided the government retains its oversight role.

The courts have also permitted provincial governments to enter into revenue-sharing agreements with private entities. Such sharing was not found to involve improper delegation of the “conduct and manage” function. However, certain functions will likely have to remain in government hands after any sale of assets or interest in assets of the OLG. The Ontario government will have to find a way to ensure that it retains the final word on matters relating to business decisions (e.g. budget-setting, material contractual arrangements and material expenditures), decisions to originate gaming activities, operating policies at gaming properties, among other matters that approach the core of the “conduct and manage” function.

It is our hope that the report of CIBC World Markets Inc. and Goldman Sachs Group Inc. will be made public when it is provided to the government. We will revisit issues relating to any proposed privatization of the OLG as we get more concrete ideas of what the government is considering. Suffice it to say that “conduct and management” is a flexible concept, and should not prevent government from monetizing these assets if potential purchasers are prepared to treat unique assets in a unique fashion. **CGL**

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