

Video Lottery Restrictions in Canada: The Saga of Bill S-226

By Michael D. Lipton, Q.C. and Kevin J. Weber¹

On Feb. 11, 2009, Sen. Jean-Marie Lapointe reintroduced into the Senate a bill that has been his personal crusade for more than six years. Bill S-226, like its many predecessors, would make it illegal to operate video lottery terminals (VLTs) in restaurants and bars, restricting their use to casinos, racetracks and betting theatres. Each time Lapointe has reintroduced this bill, it has gotten closer to being put to a vote in the House of Commons. If this bill is enacted, it would severely limit opportunities for VLT manufacturers in Canada. In addition, it could have a seismic effect upon the regulatory structure of gaming in Canada in general, with potentially negative implications for all entities involved in the Canadian gaming industry.

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 federal government retained the authority to regulate gaming through the Criminal Code. However, since 1985, Parliament has not made any amendments to the gaming and betting provisions of the Code without first obtaining the tacit assent of the provincial governments.

Bill S-226, if passed, would represent the first time since 1985 that Parliament prohibited a gaming activity from 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, and a number of provinces whose laws allow VLTs to be placed in restaurants and bars have already indicated their opposition to Bill S-226 and its predecessors.

The enactment of Bill S-226 would clearly reintroduce the federal government into gaming, in the role of a regulator of last resort. Lapointe has made no secret of the fact that his bill is inspired by his view that VLTs are a major cause of problem gaming in Canada. While he has limited the scope of the bill to removing VLTs from restaurants and bars, rather than seeking their complete elimination, and while he stated during committee hearings in 2004 that "I do not object to the terminals as such, although I do not have much faith in them," his tone over the years has been that of one who has a visceral hatred of VLTs. Over the years, he has referred to VLTs in Senate debates variously as "these rotten machines," "these infernal machines," "these diabolical machines" and "these bloody machines."

¹ Michael D. Lipton Q.C. and Kevin J. Weber are partners at Dickinson Wright LLP in the company's Toronto office. They are members of the firm's global gaming practice group, which has an international gaming law practice with offices in Toronto, Las Vegas, Michigan, Nashville, Phoenix and Washington, D.C. They can be reached at (416) 367-0874 or at mdlipntonqc@dickinsonwright.com and kweber@dickinsonwright.com respectively.

Lapointe was unable to get two previous bills adopted by the Senate, due in part to election calls and prorogation. Bill S-18 was sent to committee hearings in 2003, but the hearings were never held. It was reintroduced as Bill S-6 in 2004 and went through committee hearings, but it was never reported out of the committee. The bill was then reintroduced as Bill S-11, in which incarnation it was passed by the Senate, though it still needed to be passed by the House of Commons to become law. Bill S-11 never reached the floor of the House of Commons, as an election dissolved Parliament before it could be given a first reading in that chamber. The bill was then reintroduced as Bill S-211 in 2006. It again passed through the Senate, and this time was given a first and second reading in the House of Commons. It was referred to a committee, but that committee could not hold hearings due to Parliament being prorogued in 2007.

On its fifth go-around, the bill was reintroduced as Bill S-213, and it received passage from the Senate and was reported out of committee in the House of Commons. In the House of Commons, Bill S-213 was championed by prominent Liberal Member of Parliament (MP) Denis Coderre and had support from many opposition members. Bill S-213 was days away from receiving its third (final) reading, leading to a vote on the floor of the House of Commons, when an election was again called. Again, Lapointe was forced to restart the legislative process, leading us to the present Bill S-226.

A vote on Lapointe's bill would put the federal government in a politically unenviable position. Allowing the bill to pass would incur the wrath of many provincial governments. By having its members vote to defeat the bill, the government would place itself squarely within the crosshairs of those lobbying groups that oppose lawful gaming, possibly handing the opposition an election issue.

Lapointe's bill has been before Parliament for more than six years, having been introduced six times during that period. Canada has been governed by minority governments for most of that time, and the inherent instability of minority governments has hindered Lapointe's efforts to get the bill passed by both chambers of Parliament. At the same time, the political maneuvering that accompanies minority governments may assist Lapointe's efforts, if he can ever bring the bill to a vote in the House. The opposition parties will always be eager to force the government to take a position on the bill, since the government is guaranteed discomfort regardless of the position it takes.

The immediate effect of the bill's passage would be to drastically curtail the market for VLT manufacturers in Canada. According to figures cited by Lapointe, there are currently 38,652 VLTs in 8,309 locations across Canada; within three years of the bill's passage and enforcement, there would be only 206 locations in Canada where VLTs could be placed.

On a policy level, the fallout from the passage of the bill could be even more far-reaching. Since 1985, there has been a presumption that the federal government retains only a vestigial role in the regulation of gaming in Canada. The passage of this bill would mark the beginning of a new era, in which the federal government would be viewed as a regulator of the

manner in which provincial governments choose to conduct and manage lawful gaming. The provinces' authority to conduct and manage gaming would be seen as subject to paternalistic federal oversight, with the federal government 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 1985 agreement with the provinces has long been cited as an obstacle to the federal government's ability to take an active role in gaming. However, the debate over Lapointe's bill appears to indicate that this obstacle may be political rather than legal. In responding to questions posed at Senate committee hearings on the predecessors to Bill S-226, Department of Justice representatives have implied that the provinces lack the effective means to enforce the 1985 agreement.

The federal government is not able to abdicate a matter of federal jurisdiction by agreement; so long as Parliament retains authority over gaming as part of its criminal law power, it may make laws in the area without reference to any agreement signed by a particular government. Even if Parliament had endorsed the 1985 agreement (which it did not), the Parliament of 1985 would have no power to bind the Parliament of 2009. Nor could the provinces successfully sue the federal government for legislating in this area. A contract purporting to prevent Parliament from enacting laws within its sphere of competence would be voided as being contrary to public policy. In the end, the only power the provincial governments would have to protest a law such as that contemplated by Bill S-226 would be to withhold the annual payments to the federal government stipulated by the 1985 agreement. Those payments are a pittance when compared to the amounts at stake in the present-day Canadian gaming industry, amounting to approximately \$63.9 million per year in 2008; withholding them would be no more than a symbolic protest.

The passage of Bill S-226 would have an immediate effect upon VLT manufacturers by curtailing the number of locations where VLTs could be placed. The long-term effect could well be even more momentous. In an instant, the federal Parliament would become a legitimate venue for interest groups opposed to various aspects of lawful gaming—a venue in which a government that has no direct pecuniary interest in gaming revenue could be placed under constant political pressure to hobble the gaming industry.

Parliament is currently in recess for the summer, and speculation is that a federal election will be called before the end of 2009. At the time of writing, the progress of Bill S-226 is such that there may not be sufficient time to get it to the third reading stage before the termination of this Parliament. The one certain thing is that Lapointe is not likely to be dissuaded from reintroducing his bill once again. We continue to monitor the situation and will endeavor to keep the lawful gaming community apprised of events as they occur.