

Status of Canadian Compulsive Gambling Litigation

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The authors will attempt to give an overview of the litigation by compulsive gamblers against Canadian gaming entities, and especially the litigation concerning class action suits.

Litigation by compulsive gamblers has become increasingly more frequent. There are cases pending in France¹ and Australia.² In Austria, a compulsive gambler has been successful in litigation against Casinos Austria.³ Interestingly, compulsive gamblers have generally been unsuccessful in the United States. In *Poulos, et al. v. Caesars World, et al.*,⁴ the United States Court of Appeals basically affirmed a lower court decision which denied class certification that would have “encompass[ed] nearly everyone who has video poker or electronic slot machines within the last fifteen years.”⁵ The case had a procedural history consisting of “nearly ten years of judicial wrangling spanning several judges and an over seventy-page civil docket.”⁶ Three of plaintiff’s causes of action had been based on the Racketeer Influenced and Corrupt Organizations Act (RICO) and three were based on fraud.

¹ “French casino hit by lawsuit,” “Crossing Continents,” BBC News, Aug. 5, 2004. The gambler alleged the casino breached its duty of care to him.

² “Pokies addicts to sue for loss; Rate of return illegal—group,” *Herald Sun* (Melbourne), Dec. 9, 2004.

³ “Gambling addict wins a fortune in court ruling against casino; Compulsive player is compensated by Austrian operator that failed to help him kick the habit,” *Sunday Telegraph* (London), Feb. 22, 2004.

⁴ 79 F.3d 654, 2004 US App. LEXIS 16490 (9th Cir. 2004). Plaintiff’s lead attorney was David Boies.

⁵ *Id.* at 658.

⁶ *Id.*; “Video game gamblers’ bid for class fails,” *The Legal Intelligencer*, Aug. 12, 2004; “The decision was welcomed with relief in the gambling world because the proposed class would have encompassed nearly everyone who had played video poker or electronic slot machines at more than 60 casinos within the past 15 years.”

In *Williams v. Aztar*,⁷ plaintiff, a compulsive gambler, attempted to obtain federal jurisdiction by alleging a RICO statute violation along with pending state causes of action. The federal court concluded that his attempts to invoke federal jurisdiction were frivolous and that the plaintiff should “show cause” why he should not be sanctioned for filing the frivolous appeal.⁸

In Canada, there have been approximately five lawsuits filed by compulsive gamblers against gaming operators or casinos. Because most gaming operations and casinos in Canada are government sponsored, the government or some branch or association thereof will be a defendant in any claim naming a gaming operator or casino. Of the five lawsuits filed, three are or were in Ontario; the other two claims are in Nova Scotia and Quebec.

In March 2002, Lisa Dickert signed a self-exclusion form at the Brantford Casino in Ontario. This meant that she was barred from all provincial casinos and racetracks for six months. Notwithstanding her exclusion form, she returned to gambling facilities and lost heavily. After staying at the casino for an extended period without rest, Ms. Dickert departed by automobile and subsequently was involved in a motor vehicle accident. On February 5, 2003, her lawyer, Sean Dewart, sued the Ontario Lottery and Gaming Corp. (the “OLGC”) on behalf of Lisa Dickert, her husband, and two minor children. The claim requested damages of \$750,000 for negligence, aggravated damages of \$125,000, and punitive damages of \$125,000.⁹

The statement of claim alleges that, notwithstanding her signing a self-exclusion form in March 2002, “no steps were taken to prevent Lisa Dickert from subsequently gambling

⁷ 351 F.3d 294 (7th Cir. 2003).

⁸ Id. at 298; one case involving compulsive gamblers against operators of video poker machines did settle out of court after seven years of litigation. *Johnson v. Collins Holding Corp.* 3:97 cv 2136 (D. South Carolina).

⁹ Plaintiff’s Complaint, Ontario Superior Court of Justice, par. 1.

at the casinos, and she was welcomed back by the staff, by name, when she broke down approximately four to six weeks after having signed the form and went back to the casinos.”¹⁰ Addressing the accident, the statement of claim alleges:

On August 5, 2002, following a 52-hour gambling binge at the Point Edward Casino, during which time Lisa Dickert had not slept and had not eaten properly, she drove back towards her house. She became involved in a single vehicle accident, as a result of which her vehicle was damaged beyond repair. She has not gambled since.¹¹

The Plaintiffs further claim that:

As a consequence of the negligence of the defendant and its employees as set out above, all of the plaintiffs have suffered damages, including loss of income, loss of the investment in the restaurant franchise referred to above, loss of the family vehicle and severe psychological and emotional harm. The family unit has been fractured and the infant plaintiff’s sense of security and self-esteem has been permanently harmed.¹²

In addition, each of the plaintiffs has been deprived of the care, guidance, and companionship of the other members of the family.¹³

In November 2003 Ms. Dickert settled the lawsuit pursuant to a confidential settlement. It is uncertain what impact, if any, her settlement might have on pending and future litigation. Her lawyer, Sean Dewart, opined, “It’s hard to say. Certainly the OLGC doesn’t appear to take very effective steps to deal with problem gamblers and they’re going to be held to account for that.... One settlement won’t open the flood gates but if they don’t get their house in order they’re going to get sued.”¹⁴

Ed Morgan, a University of Toronto law professor, suggested that any substantial settlement may be a significant factor in future litigation. “If it is disclosed that they

¹⁰ Complaint, par. 15-17.

¹¹ Complaint, par. 18

¹² Complaint, par. 23.

¹³ Complaint, par. 23-24; “Gambling Addict Sues Gaming Corporation,” *The Standard* (St. Catharines), July 30, 2003.

¹⁴ “Gambling Addict, Crown Agency Settles Suit,” *Toronto Star*, Nov. 22, 2003.

settled generously, then certainly it will encourage other claimants, but not if it's seen 'as being dismissive of her claim' with only legal costs covered.”¹⁵

Gabe Macaluso filed three lawsuits as a result of his compulsive gambling. Two suits were against his former employer, Hamilton Entertainment and Convention Facilities Inc., alleging wrongful termination in April 2003. He alleged that he was dismissed “while he suffered from a disability – his compulsive gambling.” Just as the case was to begin before the Ontario Human Rights Commission, the matter settled in August 2004 pursuant to a confidential settlement.¹⁶ When it was “leaked” that the amount was \$400,000, Macaluso again sued his former employer for “allegedly breaking the gag clause in his \$400,000 legal settlement, which he says harms his recovery from problem gambling.”¹⁷ His third suit was filed on October 3, 2003,¹⁸ requesting alternatively \$2 million damages for negligence, \$2 million for intentional infliction of harm, \$2 million for intentional interference with economic interests, \$2 million for conspiracy, and punitive/exemplary damages of \$1 million.¹⁹ The lawsuit was filed in Hamilton Superior Court against the OLGC and Falls Management Company, which operates Casino Niagara, and the Queen. His complaint alleged that he had lost roughly \$1 million by gambling at Casino Niagara²⁰ and that defendants encouraged “his progression...to pathological gambling”²¹ by giving him comps and allowing him “to gamble on credit at the baccarat tables in contravention of their own professed rules.”²² When the plaintiff

¹⁵ Id.

¹⁶ “HECFI Settles Macaluso Suit for at Least \$350,000,” *Hamilton Spectator*, Aug. 14, 2004.

¹⁷ “Macaluso Suing City Over Leaked Information,” *Hamilton Spectator*, Sept. 2, 2004.

¹⁸ Court File No. 3-10728.

¹⁹ Complaint, par. 1.

²⁰ Complaint, par. 20.

²¹ Complaint, par. 10.

²² Complaint, par. 11.

“uttered suicidal words” he was barred from entering Casino Niagara.²³ While the plaintiff was addressing his gambling problems, Casino Niagara rescinded its prohibition and invited him to return and granted him “a new platinum card,” which was given to important players.²⁴

The third Ontario lawsuit²⁵ was filed by Constantin Digalakis and his wife on May 25, 2001, against the OLG, the Falls Management Company, and other gaming defendants for several million dollars each. Digalakis alleged that he was allowed to return to gaming facilities even though he requested self-exclusion.²⁶ His complaint requested damages of \$1 million based on negligence, breach of contract, and breach of fiduciary duty against certain defendants. The defendants responded²⁷ and, for example, Windsor Casino Ltd. raised affirmative defenses such as: no duty of care, no fiduciary duty, no loss, release of all claims, voluntary assumption of risk, contributory negligence, and no basis for award of punitive damages. The matter is now in discovery and settlement is a viable possibility.

While each of the above referenced cases have been brought as a result of casino operators allegedly failing to properly contend with problem gambling, they do not address the Video Lottery Terminals (“VLTs”). VLTs are of no significance in the Ontario anti-gambling litigation because they are prohibited in Ontario²⁸; however, VLTs are the significant factor in two lawsuits that seek class action status in Nova Scotia and

²³ Complaint, par. 12-13.

²⁴ Complaint, par. 14-17; “Former Copps Coliseum Executive to Sue Ontario Government for Gambling Addiction,” *Portage Daily Graphic*, Aug. 20, 2003.

²⁵ 01-CV-211503.

²⁶ Complaint, par. 18-30.

²⁷ Statement of Defense, Falls Management Company, Nov. 14, 2001.

²⁸ Ontario does have slot machines. For an excellent analysis of the distinction between VLTs and slots, see Eugene Martin Christiansen, “Central Systems for Machine Gaming: A Good Policy?” Oct. 3, 2003. www.cca-i.com.

Quebec. Whereas settlement in the Ontario lawsuits might be of minor hardship to defendants, a class action award could have serious repercussions. Furthermore, unlike the three Ontario litigants, the Nova Scotia and Quebec plaintiffs are suing primarily for non-pecuniary reasons.

Bernard Walsh is suing the Nova Scotia government (Nova Scotia Gaming Corp. and the Nova Scotia Alcohol and Gaming Authority) and the Atlantic Lottery Corp. His lawyer, Dick Murtha, has requested class action status on behalf of all gambling addicts in Nova Scotia. He is seeking general damages, special damages, costs of future care and punitive damages, but claims “his main goal is to get the machines out of the province.”²⁹ In his lawsuit filed September 21, 2004, his statement of claim alleges the defendants introduced and regulated VLT gaming “in a negligent manner” and breached its fiduciary duty to residents of Nova Scotia³⁰ and “ought to have known of the potential dangers and damages to individuals.”³¹ It also argues VLTs are “an inherently dangerous product ... by virtue of the fact that their ordinary use has led to addictive and/or problem gambling. VLTs should be viewed as an extraordinary peril.”³²

The Complaint further alleges that VLTs

were released onto the public with no warnings as to their addictive qualities. This duty to warn is increased by virtue of the fact that VLTs do not present the individual player with an obvious danger as to the possibility of addictive game play. As such, the reasonable and prudent player would not be aware of the risk he was being subject to.³³

²⁹ “Suit Aims to Kill VLTs; Anti-gambling Crusader Says N.S. Must Pay for Ruined Lives,” *Halifax Herald Ltd.*, Sept. 22, 2004.

³⁰ Case S.H. 199763, Supreme Court of Nova Scotia, par. 10, 15.

³¹ *Id.* par. 11.

³² *Id.* par. 24.

³³ *Id.* par. 23.

Walsh claims “roughly 100 people” have committed themselves to join the class action suit if it is approved.³⁴

The most significant lawsuit is the class action litigation in Quebec initiated on May 18, 2001,³⁵ by Jean Brochu against Loto-Quebec. Brochu, a lawyer, had embezzled \$50,000 from his employer and he blamed the VLTs for his addiction. Unlike other litigants, Brochu received about \$150,000 “in provincial court funding.”³⁶ On May 6, 2002, the Quebec Court authorized a \$700 million class action (money damages of \$578 million and \$119 million exemplary). The suit may include “any person who, since June 1993, became a compulsive gambler by using video lottery terminals that were put at their disposal and kept in clubs, bars and other public sites by Loto-Quebec.”³⁷

The breakdown for damages of \$578 million is as follows:³⁸

Individual Cost	Description	Claim
\$2,800	Cost of Individual Therapy (30 days)	\$333,200,000
\$500	Psychological Follow-up	\$59,500,000
\$500	Fees for Medical Expertise	\$59,500,000
\$963	Loss of Salary during Treatment (\$7/hr * 32hrs/wk * 4.3 wks)	\$114,597,000
\$100	Misc. Expenses (parking, transportation, etc.)	\$11,900,000
\$4,863	Total	\$578,697,000

The exemplary damages of \$119 million would create a foundation for research and treatment of VLT compulsive gamblers.³⁹

³⁴ “Lifelong Gambler Calls VLT Lawsuit a Long Shot,” *Halifax Daily News*, Sept. 27, 2004.

³⁵ No. 200-06-000017-015.

³⁶ www.canadianlawyermag.com, Feb. 2002 at 12; Fonds d’aide aux recours collectifs. Additional funding was allowed for the payment of expert testimony; telephone interview with Roger Garneau, attorney for Brochu, Jan. 20, 2005.

³⁷ Judgment, par. 1; On February 21, 2003, the Quebec Court of Appeal rejected Loto-Quebec’s attempt to contest the \$119 million sought as exemplary damages.

³⁸ <http://www.vivaconsulting.com/newsflasharchive.html>.

³⁹ *Id.*

More than 460 individuals have indicated an interest in joining the class which could rise to approximately 25,000 to 50,000 of the province's estimated 125,000 compulsive gamblers.⁴⁰ The plaintiffs basically allege Loto-Quebec knew or should have known that the VLTs it managed were dangerous because they created a pathological dependency. The judge in authorizing the class action noted that approximately 95 percent of Quebec's compulsive gamblers played VLTs.⁴¹ He also ordered publication of class action notices in both French and English newspapers throughout the province of Quebec.⁴² One major issue is whether messages on the machines, such as "play with moderation," were an inducement rather than a warning.⁴³

There has been considerable discovery and the matter, according to its chief advocate, will be proceeding to trial in February, 2007 and should take six months. The plaintiffs' law firm will also be utilizing the expertise of Claire L'Heureux Dube, who retired in 2002 from the Supreme Court of Canada. She will be a consultant and of counsel in the class action suit.⁴⁴ Former Judge of the Superior and Appellate Court of Quebec, Jacques Philippon, will also be assisting plaintiffs. Loto-Quebec is seeking to add two manufacturers of gaming equipment as defendants, claiming it was their responsibility to install various warning devices.⁴⁵ The plaintiffs are not seeking recovery of gambling losses.

⁴⁰ "Video Lottery Suicide," *Montreal Gazette*, Dec. 10, 2001; "If successful each [plaintiff] could receive compensation ranging from \$5,000 to \$50,000 lawyers estimate." The number of Quebec compulsive gamblers may be closer to 160,000; telephone interview with Roger Garneau, *supra* n. 35.

⁴¹ Judgment, par. 65.

⁴² Judgment, par. 107, 117.

⁴³ "Warning about gambling message: Entices VLT use, critics tell court," *Montreal Gazette*, April 20, 2002; "Adding insult to injury, the messages were once displayed on VLT screens only when the devices weren't being used by gamblers."

⁴⁴ <http://www.vivaconsulting.com/newsflasharchive.html>.

⁴⁵ *Id.* WMS Gaming Inc. (Chicago, Illinois), Spielo Manufacturing Inc. (New Brunswick) as well as Video Lottery Consultants Inc. (Montana, USA).

When VLTs had become popular in Quebec, organized crime “had hidden ownership links to a Quebec City VLT emporium,” and VLT licenses were given to “politically connected” individuals. It was possible to have 35 VLTs at an establishment, instead of the legal limit of 5; VLT revenues have become magnets for loan sharking; and VLTs were “far more accessible” in poor Quebec neighborhoods.⁴⁶

Should the Brochu matter be resolved on favorable terms to the plaintiffs, it will likely encourage similar activity throughout the Canadian provinces. In Alberta, for example:

Edmonton-area gambling foes are betting that if a lawsuit being brought by compulsive gamblers against Loto-Quebec is successful, it could be repeated in Alberta.... “I’m sure there are a number of people who are going to be watching the case in Quebec with interest. Perhaps if there’s some headway in Quebec there may be some action taken here. One would wish them well.”⁴⁷

One other unusual case is the criminal prosecution of Boyd Dulmage of Ontario for embezzling \$91,000 to support his gambling habit. The judge ordered him to repay the money, perform community service, and remain on probation.⁴⁸ There was no jail time since the Ontario Justice concluded:

“the Canadian public benefits from gambling on a large scale now,” said Ontario Court Justice Paul Belanger, who noted that more gambling addictions are the inevitable consequence. “The federal, provincial and, to some extent, municipal governments must share some of the responsibility for creating people who fall prey to this addiction.... The responsibility for creating the proverbial monster should be shared.”

⁴⁶ *VLT Gambling in Alberta: A Preliminary Analysis* (2004) at 53.

⁴⁷ “Local Gambling Foes Eye Quebec Suit,” *Edmonton Sun*, May 22, 2001.

⁴⁸ “Gamblers will ‘rely on’ ruling to avoid jail: Crown fears flood of cases after judge decides government is partly to blame for addicted gambler’s criminal actions,” *Ottawa Citizen*, July 6, 2003.

The Crown attorney had requested 12 to 18 months incarceration.⁴⁹ Jean Brochu, in addition to escaping jail time, “was able to keep his job because his illness was recognized by the court.”⁵⁰ It should be noted, however, that the recognition of compulsive gambling as an illness is a legal one; it is not a medical recognition.

It is apparent in Canada that compulsive gambling, or problem gambling, is a serious problem. The rate of compulsive gambling is on the rise, as is the presence of VLTs and gambling opportunities. Despite the apparent increase in compulsive gambling, and the legal recognition of problem gambling as an illness by the courts, the Canadian government and the respective provincial governments are doing little to address the issue. Gambling in Canada is a cash cow for the governments, “a way to extract billion of tax dollars from Canadians with nary a peep of protest.”⁵¹ While other forms of detrimental activity are restricted with respect to their advertising, examples being tobacco and alcohol, the state invests heavily in the advertising of lotteries and casinos, despite the astronomical odds of winning. The result is billions of dollars in revenue. In 2003, revenue for the Canadian government from government run lotteries, VLTs and casinos reached \$11.8 billion , \$6.5 billion of that being profit. In comparison, the GST, which most people outwardly appear to oppose, generates \$29 billion.⁵²

Despite the massive amounts of revenue generated from gambling, the government spends little on the issue of compulsive or problem gambling. Statistics Canada, in a study released in 2003, has estimated that 1.2 million adult Canadians are at risk of compulsive gambling, or have already developed betting troubles. Of those, 120,000

⁴⁹ “Confessions of a gambler: Boyd Dulmage’s betting ‘habit’ cost him everything he had—and then some,” *Ottawa Citizen*, Feb. 22, 2004.

⁵⁰ “Lawyer Seeks Suit Over Video Lotteries,” *Calgary Herald*, May 20, 2001.

⁵¹ Andre Picard, “Canada has a gambling problem” *The Globe and Mail* (6 January, 2005) A17.

⁵² *Id.*

people have financial or social problems, are depressed, or are alcoholics. 18 per cent said they had considered killing themselves in the year before the survey – six times the number of non-problem gamblers who said the same.⁵³ Although statistics demand that attention be paid to this problem, very little is spent by the government. In Ontario in 2003, the total gambling expenditure by Ontario residents was estimated to be over \$4 billion⁵⁴, yet only 0.7 per cent of this, only \$36 million, was spent by the Ontario government on problem gambling prevention, treatment and research.⁵⁵ The small amount of money spent by the government on problem gambling is more distressing when one considers that problem gamblers are responsible for roughly 36 per cent of the revenue earned from all gambling in the province. Considering that the \$36 million spent by the government represents only 2.6 per cent of the \$1.41 billion spent by problem gamblers, there is clearly a need for a more dedicated approach to problem gambling by the province.⁵⁶ One must remember that these are the numbers from a province that does not allow VLTs, and still the numbers are high. Where VLTs are permitted, the numbers grow disproportionately to the detriment of compulsive gamblers.

Although provincial governments do currently take action with respect to problem gambling, it is clear that these actions are not strong enough. If the government continues to benefit from gaming the way it currently does, it needs to maximize its efforts to diminish the adverse effects resulting from problem gambling. In order to effectively deal with the issue of problem gambling, the government should increase the funds spent on

⁵³ “Study labels VLTs as ‘crack cocaine’ of gambling scene” *The Guardian* (13 December 2003) A11.

⁵⁴ Robert Williams and Robert Wood, “The Demographic Sources of Ontario Gaming Revenue” prepared for the Ontario Problem Gambling Research institute, June 23, 2004, pg. 24, available online at <<http://www.gamblingresearch.org/download.sz/078%20PDF%20Final%20report%20-%20posted%20version.pdf?docid=6117>>.

⁵⁵ *Id.* at 45.

⁵⁶ *Ibid.*

problem gambling and the respective manner in which funds are allocated. This may be difficult for any government, like Ontario's, whose coffers benefit so greatly from gambling revenue. It would mean diminishing the profit generated from gambling in an effort to help control those who create the revenue. A tenuous position to take, one which the government has to date been unwilling to support because the economic benefits of gaming have offset the social and economic costs – this in itself a difficult argument to swallow.

The courts in Canada may unwittingly provide a solution to the government's failing to adequately address problem gambling. Where the government has failed to provide for problem gambling, ignoring the social costs, the class action claims previously discussed may ensure that the issue is no longer ignored or diminished. Any orders made to the benefit of the plaintiff would result in serious cuts to the revenues generated by the government. By forcing the hand of the government in this manner, the courts are also effectively enticing the government to provide better programs for problem gambling through their positive treatment of class actions claims.

Canada seems to have the dubious distinction of having a higher proportion of serious compulsive gambling lawsuits proceeding to trial than other jurisdictions. Should the class action lawsuits previously discussed succeed at trial, such successes may spur similar litigation throughout the provinces and territories, as well as other countries like Australia that often look to Canadian law as relevant. Canada has an opportunity to set the standard on the issue of problem gambling, and as such it must ensure that despite the revenue generated from gambling, proper treatment is available, and that research is supported in this field. The courts' response to problem gambling, as well as the growing

social costs associated with it must be weighed against the economic benefits currently favoured by the government and modified to more properly reflect the government's mandate to protect the health, safety and welfare of its populace.