

Charitable Gaming: The Legal Context

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Introduction

Charitable gaming has become both a large service industry in Canada and an important source of revenue for charitable organizations. The legal authority for charitable gaming rests in paragraph 207(1)(b) of the *Criminal Code of Canada*.¹ Based on that exemption, an industry employing thousands of people and providing billions of dollars in revenue has developed since 1970, mostly in the last decade.

Gambling in Canada is illegal but there are a few exceptions. Historically, the major exception was for horseracing under section 204 of the *Criminal Code*. Government lotteries became important sources of revenue for provincial governments and, for a short period of time, for the federal government, beginning with amendments to the *Criminal Code* in 1969. The predecessor to paragraph 207(1)(a) authorized governments to conduct and manage lottery schemes. The federal government agreed in 1985 to vacate the field and, as a result, only provincial governments and their Crown agents conduct and manage many forms of lotteries.

Initially, the lotteries were in the traditional forms of lottery tickets such as “scratch and win tickets” and raffle tickets. In Ontario, the profits from these lotteries were intended to provide funds to hospitals and other charitable organizations and community facilities. Few municipalities in Ontario do not have at least one arena or community centre built in the 1970s or early 1980s using lottery monies. A similar approach was taken in other provinces but was gradually abandoned by the late 1980s and early 1990s. Instead the funds became part of the Consolidated Revenue Fund in provinces such as Ontario and were no longer dedicated for charitable purposes.

Governments during this time were looking to new types of lottery schemes. Commercial casinos were introduced into Canada (first in Manitoba), and provincial governments also conducted and managed a variety of slot machine and video lottery terminal schemes in bars and restaurants and in “charity casinos”. Several jurisdictions, such as Ontario and Alberta, allocated a portion of the profits from the slot machine and VLT lottery schemes to charitable

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organizations and government lottery schemes, once again, became an important, dedicated source of revenue for charitable organizations. In the case of Ontario, for example, the Ontario Trillium Foundation will distribute to charities up to \$100 million per year of profits from the Ontario Lottery Corporation's slot machine schemes.

Governments also started to become partners with charities in a number of provinces, including Alberta, British Columbia, Manitoba and Ontario. The government, in these partnerships, conducts and manages electronic bingo during, or as part of, a regular bingo event. Super Star Bingo in Ontario is a good example of this type of partnership. In other circumstances, the government lottery scheme is conducted and managed in the same facility as the event conducted and managed by the charity. Manitoba introduced this model with two facilities in Winnipeg in the early 1990s. Ontario attempted to do so using video lottery terminals at "charity casinos" but changed its approach in 1998 to the \$100 million in funding given to the Ontario Trillium Foundation.

These sources of funds are not what have been usually considered to be "charitable gaming". Nevertheless, the amounts of money involved are significant and some of the same ethical and moral issues will be faced by charities whether they "conduct and manage" lottery schemes themselves or receive grants from government revenues dedicated from lottery schemes conducted and managed by provincial governments.

Charitable gaming – where the charity conducts and manages the lottery scheme – grew out of amendments in 1969 to the *Criminal Code* which permitted a broader range of gambling. The *Criminal Code* had historically included some minor exemptions which reflected societal attitudes towards gambling. Some of these exemptions permitted charities to conduct and manage lottery schemes. These exemptions, however, were narrow, did not provide much scope for gambling, and did not meet the public demand for gambling. As a result, enforcement was a problem. In 1956, a joint committee of the House of Commons and Senate issued its *Report of the Joint Committee of the Senate and House of Commons on Capital Punishment, Corporal Punishments, Lotteries*.² The *Report* commented:

The Committee is of the opinion that the enforcement of the present provisions is a matter of concern in all parts of Canada. It appears that the standards of enforcement vary from province to province and that considerable variations occur within provinces reflecting to some extent the differing opinions of various communities on lotteries. Whatever the variations in standards of enforcement, the Committee notes that there is widespread difficulty in enforcement and it is disposed to accept the statement of the Commissioner of the Royal Canadian Mounted Police that there is lack of support for the present prohibitory laws and that they cannot be enforced in the face of adverse public opinion.

The effect of this lack of public support for the present lotteries law is observable in many parts of Canada. There is fairly widespread violation, not only of the spirit but the letter of the lotteries law, frequently by organizations representative of the community in general and motivated by worthy purposes of community improvement or charity. The Committee has little doubt that the results of this evasion of the lotteries law are serious in that the law and law enforcement in general are thus brought into contempt.

An unsatisfactory by-product of the present situation is the existence of fraudulent lotteries which law enforcement agencies are unable or unwilling to control. This being so, it is difficult to protect the public from fraudulent lottery schemes where all or the major portions of the proceeds are taken by the promoters operating under the guise of charity.³

The Committee recommended a substantial opening up of the "lotteries law", which would benefit primarily "charitable, religious or community purposes". However, Parliament did not act upon its recommendations until 1969 with the *Criminal Law Amendment Act, 1968-69*.⁴ The amendments to the *Criminal Code* generally followed the Joint Committee's recommendations and also permitted government lottery schemes. The amendments were part of a broader reform of the criminal law of Canada that was intended to reflect evolving societal attitudes and values in a number of areas of social and economic activity.

The intervening 30 years, as noted above, have seen a dramatic increase in legalized gambling in Canada. The scope of gambling is broad and includes traditional forms of "paper" lotteries as well as electronic gaming. Societal attitudes and values, however, appear to continue to be ambivalent about gambling. The law recognizes that some people will gamble for recreational or other purposes. It also directs that the profits from gambling will be used for public benefit, either through charities or the government. However, gambling is still seen as requiring restriction through the criminal law.

The Ontario Court of Appeal in *R. v. Andriopoulos*, commenting on a defense argument that gambling was no longer "criminal" in nature, stated:

The essential fallacy of this proposition is in equating a lottery, licensed, conducted and managed by the province, to all forms of gaming and gambling...The business of organized gaming is the subject matter of the prohibitions, presumably because it invites cheating and attracts other forms of criminal activity. There is no evidence that public perceptions of commercial gaming have changed or that it is any less criminal in nature than it ever has been.⁵

All of this is to say that after 30 years of growth, "charitable gaming" is essentially an exemption from the *Criminal Code*'s prohibitions against gambling. Those prohibitions, which are set out in several arcane and convoluted

sections of Part VII of the *Criminal Code*, continue to provide the basic “legal context” for the activity. The exemption provided by paragraph 207(1)(b) follows the recommendations of the Joint Committee to a remarkable degree.

Parsing 207(1)(b):

Paragraph 207(1)(b) of the *Criminal Code* provides that it is lawful:

... for a charitable or religious organization, pursuant to a licence issued by the Lieutenant Governor in Council of a province or by such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof, to conduct and manage a lottery scheme in that province if the proceeds from the lottery scheme are used for a charitable or religious object or purpose.

There are several elements of this paragraph that need to be explored. First, a “charitable or religious organization” is the entity that may conduct and manage a lottery scheme. It appears that the definition of “charitable” is the common law one as that phrase is not otherwise defined. Certainly, the cases that have considered the *Criminal Code* and charitable gaming would appear to have made this assumption.⁶ It is not clear, though, why Parliament included “or religious” given that the advancement of religion is a charitable object at common law. It may be that Parliament intended that religious organizations that otherwise would not be considered “charitable” under the common law would also be eligible for a lottery licence.

Second, the organization must obtain a “licence”. The LGIC of a province may issue the licence or may authorize another authority or person to issue the licence. That authorization has been implemented through orders-in-council or by legislation.⁷ In most provinces, lottery licensing is largely done at the provincial level; in Ontario most licences are issued at the municipal level in accordance with a *Lottery Licensing Policy Manual* issued by the Registrar of Gaming, a provincial authority created by statute.

This overall regulatory scheme has withstood several court challenges. The Supreme Court of Canada in *R. v. Furtney*⁸ concluded that the provincial licensing scheme was constitutionally valid. Paragraph 207(1)(b) delegated administrative authority, not legislative authority, to the LGIC. In addition, “the regulation of gaming activities has a clear provincial aspect under s. 92 of the *Constitution Act, 1867*, subject to Parliamentary paramountcy in the case of a clash between federal and provincial legislation.”⁹

The use of policy manuals in determining eligibility for a licence has also been supported. The policy guidelines were considered in *1092445 Ontario Inc. v. Linda Monzon, Deputy Director of Gaming Control*¹⁰ in the context of the licensing of public places of amusement. Although the licence is under a

different paragraph of 207, the legal arguments would be the same. The Divisional Court in Ontario commented:

Section 207(1)(d) of the *Criminal Code*, on its face, provides the Lieutenant Governor in Council with the discretion to regulate lotteries, including limiting the types of “public place of amusement” lotteries. Sec. 207(1)(d) does not impose positive duties or obligations on the Lieutenant Governor to provide for lotteries. The Lieutenant Governor may, therefore, choose to provide for only some of the lotteries which could be permitted under the Code...The Respondents’ use of the policy as a guideline in making their decision was not an improper fettering of discretion.¹¹

The *Policy Manual* also deals with eligibility requirements for organizations and use of proceeds. Not all “charitable or religious organizations” are necessarily eligible for a lottery licence. The *Policy Manual* sets out guidelines, based on policy decisions made by the Registrar, on how to determine eligibility. In some cases, the *Policy Manual* may limit the type of lottery scheme a licensee may conduct and manage or the activities for which the proceeds may be used. Similar approaches are taken in the other provinces, in varying degrees of formality.

The third component is that the licensee must “conduct and manage” the lottery scheme. There is little case law on this phrase and it is not defined in the *Criminal Code*. The approach taken by the courts to date seems to be a practical one. The courts look to the elements of the lottery scheme and to who “controls” each element of it. Control over the proceeds from the lottery scheme is, of course, one of the more important elements. This approach does not require that the entire lottery scheme be “operated” by the licensee. The cases recognize that the private sector may be involved in the supply of goods and services that are part of the overall scheme. The issue turns to who is the directing mind and in control of the lottery scheme.¹²

The courts, in general, appear to consider the following factors in making their decisions as to who “conducted and managed” the lottery scheme:

- who is guiding or leading the scheme;
- who is controlling the major decisions; and
- who benefits directly from the lottery scheme.

They focus on the reality behind the scheme and not just on the formalities. Although formalities such as written contracts are important, it is what happens in fact that is critical. As such, there is no “laundry list” that is used to make this determination.

The use of proceeds is restricted in paragraph 207(1)(b). The licensee must use the proceeds from the lottery scheme for “charitable or religious objects or

purposes". The licensee, presumably, must use the proceeds only for its own charitable or religious objects or purposes. In the case of service clubs, which do not usually have exclusively charitable objects, those objects or purposes will typically include making donations for charitable activities in their communities.

There is, however, a legal issue as to the character of the funds from a trust law perspective. Are all the proceeds impressed with a "trust" or is it only the net proceeds? If all of the proceeds are impressed with a trust, is that trust subject to other lawful obligations? For example, a "bet" is in essence a contract between the player and the licensee. The terms of the contract are that the player pays \$X to purchase a "chance" to win a "prize". If the player or his or her "number" is selected to win, then the licensee has a contractual obligation to issue the prize. Provided that the lottery scheme is otherwise legal, the contract is a valid one and there is a legal obligation of the licensee to pay the prize. Similarly, if the licensee purchases goods or services from gaming suppliers and the contract is otherwise legal, the licensee has a legal obligation to pay the supplier.

The Ontario Order-in-Council (OIC) directly addresses the issue. Paragraph 11(1)(b) provides that:

... the gross proceeds from the lottery scheme shall be used for the charitable or religious objects or purposes providing a direct benefit to the residents of Ontario as set out by the licensee in the application for a licence, less the cost of the prizes awarded and such reasonable and necessary expenses actually incurred in the management and conduct of the lottery, and such expenses shall be restricted to those set out in the terms and conditions of the licence.

That paragraph incorporates a policy decision taken by the LGIC in issuing the OIC. For example, it limits the use of proceeds to charitable or religious objects or purposes that provide a "direct benefit to the residents of Ontario". Each province takes a similar approach. The paragraph also expressly refers to the terms and conditions of the licence which, among other things, limit the type and amount of expenses that may be incurred by the licensee.

Terms and conditions are an essential part of the overall regulatory structure for licenced lottery schemes. Subsection 207(2) contemplates the use of terms and conditions and it provides that:

Subject to this Act, a licence issued by or under the authority of the Lieutenant Governor in Council of a province ... may contain such terms and conditions relating to the conduct, management and operation of or participation in the lottery scheme to which the licence relates as the Lieutenant Governor in Council of that province, the person or authority in the province designated by the Lieutenant

Governor in Council thereof or any law enacted by the legislature of that province may prescribe.

The subsection, interestingly, allows for terms and conditions to apply to not just the “conduct and management” of the lottery scheme which are the responsibility of the licensee. The terms and conditions may also deal with the “operation” of the lottery scheme¹³ and “participation in” the lottery scheme. The operation of the lottery scheme is different from the conduct and management and, therefore, the terms and conditions apply to persons who provide goods and services to the licensee. The players are usually the other persons who “participate in” the lottery scheme. As a result, the terms and conditions not only directly regulate the licensee but also regulate how the “operator” carries out its operation of the lottery scheme.

The terms and conditions are very detailed and a full discussion is beyond the scope of this article. The terms and conditions may be both general, applying to all licences and types of lottery schemes, or specific to a type of lottery scheme or licensee. They will cover the following areas:

- conduct of the event
- *bona fide* members and their role
- lottery trust account, proceeds and expenses
- books and records
- financial reports and financial statements
- conflict of interest
- rules of play for the specific lottery scheme
- requirements of the licensee for the specific lottery scheme, e.g., standards for bingo paper
- maximum and type of expenses that may be incurred for the specific lottery scheme
- role of the operator in the operation of the lottery scheme
- role of an association in, for example, a bingo hall.

The types of lottery scheme that are available in most provinces include bingo, break open tickets (sometimes called Nevadas or pull-tabs), raffles, and table games such as blackjack. There are often regional variations within a province reflecting historic local traditions and activities.

There are, however, several types of lottery scheme that are not licenced to charities. The conduct and management of slot machines and games operated on, or through, a video device or computer, including video lottery terminals

are, pursuant to subsection 207(4)(c) of the *Criminal Code*, the exclusive domain of the provinces. These types of lottery scheme are the ones that are most commonly found in commercial casinos and in other premises operated by provincial governments or their agencies.

Regulating Gaming Suppliers and Gaming Assistants

The *Report* of the Joint Committee noted above came to certain conclusions about the private sector's involvement in gambling. It noted that there were fraudulent lottery schemes where all or the major portion of the proceeds were taken by the promoters rather than the charities. The Ontario Court of Appeal in *R. v. Andriopoulos*¹⁴ also commented on the criminal nature of gambling because it presumably attracts fraud and other criminal activities.

A 1990 study prepared by the Ontario Ministry of Consumer and Commercial Relations came to the conclusion that charities were not benefiting from charitable gaming to the degree considered appropriate. There were also concerns raised about the level of honesty, integrity and security in the industry in certain instances. *Charitable Gaming – Putting the Charities Back in the Driver's Seat*¹⁵ recommended that gaming suppliers and gaming assistants be registered and directly regulated under separate legislation. Other provincial governments came to similar conclusions in the 1990s and have enacted legislation to regulate the industry.

The Ontario Gaming Control Act¹⁶ is a typical "regulatory statute". It requires suppliers and most of their employees to be registered under the *Act* if they provide goods or services for gaming purposes for remuneration. The registration process involves a due diligence review of the applicants' backgrounds to determine whether or not they are eligible for registration. If the Registrar determines after an investigation that an applicant is not eligible, there is an appeal process before the board of the Alcohol and Gaming Commission of Ontario. The Registrar may also propose to revoke, to suspend, or to refuse to renew a registration, a decision which may also be appealed.

The statutes also permit the establishment of standards for goods and services and regulate certain behaviour. The registrant must comply with the standards in providing the goods or services. Failure to do so could be a basis for the Registrar to issue a proposed order to comply or to revoke, suspend or refuse to renew a registration. In addition, because the standards are legislative in nature, they become an implicit part of a contract between the supplier and a licensee. If the goods or services do not comply with the standards, there is an argument that the supplier has failed to comply with a contractual obligation.

Licenseses, if they purchase goods or services, must do so only from a registered gaming supplier. If a gaming assistant is used in the operation of the lottery scheme, that assistant must be employed by the gaming supplier and, in most

cases, registered as a gaming assistant. There are some exceptions to the registration requirement which are specific to the lottery scheme.

Conclusion

Charitable gaming has become “big business” in Canada. Its growth has attracted attention from a number of perspectives. First, there was a recognition that societal attitudes had changed and that gambling was more acceptable. It remained criminal in nature, but gained greater acceptance in part because it provided funds for charitable purposes. There was, and remains, a perceived need to regulate the activity through a lottery licence process at the provincial level. That process also regulated expenses and the use of proceeds.

The growth of gaming also attracted the attention of the private sector. As with the licensees, direct regulation of the gaming suppliers and gaming assistants developed. Regulatory statutes have been put in place to require the registration and regulation of gaming suppliers and, in some cases, their employees.

The legal context is, therefore, a mixture of legal instruments (*Criminal Code*), administrative measures such as Orders-in-Council, licences, terms and conditions of licences, and regulatory statutes. Charitable gaming can be very profitable but is also highly regulated and is certainly the most regulated fundraising activity that charities use.

Charitable gaming also involves government in a regulatory role and as a competitor in the overall gaming marketplace. Recent years have seen an increased “partnership” in many provinces between charities and government. Given the flexibility that governments have under the *Criminal Code*, it may be that the next phase of charitable gaming will reflect a greater level of co-operation and partnership between the charitable sector and the government.

FOOTNOTES

1. R.S.C. 1985, c. C-46, as am. (hereinafter the *Criminal Code*).
2. Ottawa: Queen’s Printer, 1956. The *Report on Lotteries* was issued on July 31, 1956.
3. *Ibid.*, at pp. 65 and 66.
4. S.C. 1968–69, c. 38, ss. 12 and 13.
5. Unreported decision, April 3, 1994 (Doc. No. CA C-16740).
6. See for example *Nanaimo Community Bingo Association v. Attorney General for British Columbia* (1998), 52 B.C.L.R./ (3d) 284, [1999] 2 W.W.R. 428 (B.C.S.C.) or *Keystone Bingo Centre Inc. v. Manitoba Lotteries Foundation* (1990), 76 D.L.R. (4th) 423 (Man.C.A.).
7. For example, in Ontario, the LGIC issued Order-in-Council 2688/93, as amended, to authorize the Registrar of Gaming and Municipalities to issue licences. Other

orders-in-council authorize a few specific First Nations authorities to issue licences. By contrast, in Nova Scotia, the Nova Scotia Alcohol and Gaming Authority is authorized under the *Gaming Control Act*, S.N.S. 1994–95, c. 4 to issue licences.

8. [1991] 3 S.C.R. 89, 66 C.C.C. (3d) 498, 8 C.R. (4th) 121 (S.C.C.).
9. *Ibid.*, at p 103.
10. Unreported decision, March 12, 1998, Ontario Court (General Division) (Divisional Court).
11. *Ibid.*
12. See for example, *Keystone Bingo Centre Inc. v. Manitoba Lotteries Foundation* (1990), 76 D.L.R. (4th) 423 (Man.C.A.) and the cases referred to in that case. Paragraph 207(1)(g) of the *Criminal Code* would seem to recognize explicitly the involvement of the private sector in the “operation” of the lottery scheme.
13. Paragraph 207(1)(g) of the *Criminal Code* provides the statutory base for the private sector’s involvement. It makes it lawful:

... for any person, for the purpose of a lottery scheme that is lawful in a province under any of paragraphs (a) to (f), to do anything in the province, in accordance with the applicable law or licence, that is required for the conduct, management or operation of the lottery scheme or for the person to participate in the scheme.
14. *Supra*, footnote 5.
15. Toronto: Queen’s Printer, 1990.
16. S.O. 1992, c. 24, as amended.