SCC File No. _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

PETER AUBREY DENNIS AND ZUBIN PHIROZE NOBLE

Applicants
(Appellants)

– and –

ONTARIO LOTTERY AND GAMING CORPORATION

Respondent
(Respondent)

APPLICATION FOR LEAVE TO APPEAL
PETER AUBREY DENNIS AND ZUBIN PHIROZE NOBLE
(Pursuant to S.40 and 58 of the *Supreme Court of Canada Act*, R.S. 1985, c. S.26 and Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, as amended)
VOLUME II OF II

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MEMORANDUM OF ARGUMENT

PART I – OVERVIEW OF PARTY'S POSITION

1. Ontario, like other Canadian jurisdictions, has increasingly relied upon government-sponsored gambling as a means to both raise public funds and to generate profits for private casino operators. This increase in gambling has resulted in a rise in the social problems that accompany it, including compulsive gambling and the resulting financial, mental and health-related devastation to individuals and their families.

2. This action concerns the systemically flawed efforts of the defendant to mitigate the damage that its casinos cause through its use of a "self-exclusion" system. The defendant, Ontario Lottery and Gaming Corporation, ("OLGC") tells its customers that "when the fun stops being fun"[1] they can enter into an agreement under which OLGC promises that it will use its "best efforts" to deny them entry into its casinos. However, its "best efforts" entail merely providing casino security guards with binders containing over 10,000 photographs, which guards are somehow supposed to memorize, in order to visually identify persons who have signed the self-exclusion agreements. Since at least 2001, OLGC knew or ought to have known that its self-exclusion system was wholly inadequate for its purpose. However, it did little or nothing to fix the system, while at the same enjoying the millions of dollars that problem gamblers fed into its coffers.[2]

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[1] Plaintiffs' Motion Record, Volume 2, Tab Y, p. 526 [Application for leave to appeal ("**LA**"), Vol. II, Tab E1, p. 23.]

[2] The Canadian Medical Association has recently reported that 4% of the Canadian population are problem gamblers. These persons are responsible for 23% of gambling revenue. See CMAJ July 9, 2013 vol. 185 no. 10 E435-E436, http://www.cmaj.ca/content/185/10/E435.full.pdf+html.

3. The plaintiff has advanced a limited and narrow theory of liability,[3] alleging that OLGC owes duties to the putative class in contract and tort and that its failed self-exclusion system represents a systemic breach of those duties. It seeks to certify substantial common issues concerning the existence and breach of duties against the background of one common contract in which OLG promises to make "best efforts," while at the same time acknowledging that issues of causation and damages will remain for individual class members.

4. This action is cast in the same mould as this Court's decision in *Rumley v. British Columbia.*[4] Like the plaintiffs in *Rumley,* the plaintiffs in this case adopted a deliberately focused strategy in which there were substantial issues that could be resolved at a common issues trial, while leaving issues of causation and harm for later individual hearings. Yet, while the class action in *Rumley* was certified, and the class members ultimately received compensation, this case was not and the putative class members were left without meaningful recourse.

5. The decision below cannot be reconciled with *Rumley.* The sole basis for not certifying this case was that members of the class were "vulnerable" to varying extents, meaning that proof or causation and extent of loss were individual issues, an argument that was specifically rejected by this Court in *Rumley.* Indeed, notwithstanding that *Rumley* and its principles were the subject of argument by the plaintiffs in the Court of Appeal, there is no reference to it, nor any analysis of its underlying principles in the Court of Appeal's reasons.

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3 The Court of Appeal's conclusion at para. 59 of its reasons that this case "[...] would amount to little more than a general commission of inquiry into the prevention of problem gambling" is contrary to both the pleading and the explicit findings of the Motion Judge who correctly held, at para. 80 of his reasons that "it is no part of [the plaintiffs'] case that OLGC owes duties of care, or other legal duties, to problem gamblers as such. In consequence, **this wider question is not in issue in this proceeding**" (emphasis added). [LA, Vol. I, Tab C12, p. 182-183]

4 [2001] 3 S.C.R. 184., [Book of Authorities ("**BOA**"), Tab 7]

6. Moreover, the Court of Appeal's failure to recognize that persons who entered into self-exclusion agreements with OLGC[5] constituted a vulnerable group belied common sense, the evidentiary record and was at odds with decisions in other jurisdictions.

7. The failure of the Court of Appeal to analyze, much less rationalize, the decision of this Court in *Rumley* will lead to significant jurisprudential confusion in Canada's largest province where the bulk of national class actions are litigated. Furthermore, there will be a harmful effect, not only on those members of the putative class who will be denied access to the court, but also to other groups of persons who seek to redress systemic wrongs. In virtually every case involving systemic wrongs, there will be variations in the degree of vulnerability of class members. This will often, if not always, mean that there will be a requirement to prove, as in *Rumley,* "injury and causation [...] in individual proceedings following resolution of the common issue [...]."[6] The Court of Appeal's decision in this case will provide defendants in future cases with a powerful weapon to resist certification and thereby close the doors of the courthouse to future classes of injured persons.

8. It is therefore a matter of public importance that this Honourable Court clarify the extent to which groups of persons who allege systemic wrong are entitled to have collective access to the court.

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5 The class sought to be certified involved people who signed self-exclusion forms between December 1, 1999 and February 10, 2005. See reasons of Ontario Court of Appeal, para. 2. [LA, Vol. I, Tab C12. p.159]

6 *Rumley, supra*, para. 36. [BOA, Tab 7]

PART II – QUESTIONS IN ISSUE

9. The sole issue on this application is whether this case raises issues of public importance warranting leave to appeal.

PART III – STATEMENT OF ARGUMENT

A. There is no principled distinction between this case and *Rumley*

10. This is a case alleging "systemic wrongs" that seeks to apply this Court's ground-breaking 2001 class action decision in *Rumley v. British Columbia*. It emerges from a different factual context but shares many characteristics, including the challenge of individual variation among class members. To answer these challenges, the plaintiffs in *Rumley* adopted a deliberately focused strategy to tailor the claim as appropriate for resolution in a class proceeding. The plaintiffs in this case did the same.

11. In *Rumley*, this Court concluded that a class action seeking recovery on behalf of students who were alleged to have been abused at a residential school over a 42 year period could be certified as a class proceeding even though:

- the alleged abuse occurred over "a period of many years";[7]
- the abuses varied by student;
- the abusers varied;[8]
- at the same time that the standards of care were changing, circumstances of individual plaintiffs were changing too;[9]

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7 *Ibid.*, para. 2. [BOA, Tab 7]

8 *Ibid.*, para. 14. [BOA, Tab 7]

9 *Ibid.* [BOA, Tab 7]

- abuses occurring at the school examined in the class action might be differentiated in the person causing the abuse, "for example abuse inflicted by staff but not by other students."[10]
- the duty of care owed could "vary over time," depending on "the state of knowledge of those in charge of the school, the reasonably informed educational standards and policies of the day, the measures implemented to prevent abuse and other factors."[11]
- some students would have claims that spanned multiple and different standards of care.[12]

12. Against this complex factual matrix, this Court nevertheless decided that three issues could be certified as common issues in the class proceeding:

- was the defendant negligent in failing to take reasonable measures to protect students?
- if "yes," is there conduct warranting an award of punitive damages?
- if "yes," what amount of punitive damages should be awarded?

13. With respect to the common issues certified, this Court concluded that "the individual issues will be a relatively minor aspect of this case."[13] It did so even though it also concluded that "it seems likely that there will be relevant differences between class members here"[14] in relation to proof of damages since "no class member will be able to prevail without making an individual showing of injury and causation."[15]

14. The Court in *Rumley* emphasized that the plaintiffs had the right to shape their claim to fit the class action mould. It held that the plaintiffs deliberately limited their claims "to claims of

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[10] *Ibid.*, para. 33. [BOA, Tab 7]

[11] *Ibid.* [BOA, Tab 7]

[12] *Ibid.*, para. 14. [BOA, Tab 7]

[13] *Ibid.*, para. 36. [BOA, Tab 7]

[14] *Ibid.* [BOA, Tab 7]

[15] *Ibid.*, para. 37. [BOA, Tab 7]

'systemic' negligence,"[16] as they were entitled to do "to make the case more amenable to class proceedings [...]."[17]

15. The plaintiffs in this case have pleaded a limited and narrow theory of liability that will either succeed or fail at trial, just as the plaintiffs did in *Rumley*. The plaintiffs' theory of the case is simple. When Ontario decided to permit casino gambling in the early 1990s, it knew this would come at the price of increased gambling addiction and its disastrous consequences.[18] OLGC publicly pledged to be a leader in the area and confirmed its responsibility.[19] To these ends, OLGC developed a self-exclusion system, by which problem gamblers could fill out a form to request that they be refused to be admitted to OLGC casinos. For its part, OLGC undertook to use its "best efforts" to exclude them.[20] The plaintiff alleges that OLGC failed spectacularly in discharging its obligation.[21] Many self-excluded gamblers continued to return to casinos.[22] OLGC hired a consultant in 2001 who prepared a comprehensive report, which concluded that OLGC's sole method of enforcement was wholly inadequate. Despite this, the plaintiffs allege that OLGC did nothing about it.

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16 *Ibid.*, para. 36. [BOA, Tab 7]

17 *Ibid.*, para. 30. [BOA, Tab 7]

18 Reasons of Justice Wilson, para. 148 ("When the Ontario Casino Corporation (OCC), the predecessor to the OLGC, embarked upon legalized gambling in Ontario in 1993, it is clear that the crown corporation knew that increased availability of gambling would result in an increased incidence of problem gambling. This is reflected in legislative reports dating back to the inception of legalized gambling in Ontario in 1993.") [LA, Vol. I, Tab C7, p. 104]

19 *Ibid.*, paras. 151-153. [LA, Vol. I, Tab C7, p. 105]

20 Reasons of Court of Appeal, para. 2. [LA, Vol. I, Tab C12, p. 159]

21 Reasons of Justice Cullity, para. 92. [LA, Vol. I, Tab C1, p. 24]

22 Reasons of Justice Wilson, para. 94. [LA, Vol. I, Tab C7, p. 93]

16. The common issues trial will determine whether OLGC owed duties to those persons who signed self-exclusion forms, the nature and extent of such duties, if found to exist, and whether OLGC's self-exclusion program breached its duties. It will focus on the policies it had in place, staff training, detection methods and other steps that were taken by OLGC to discharge its best efforts pledge.[23] Justice Wilson's dissenting judgment explained some of the inquiries as follows:

> OLGC, as a crown corporation, undertook to the public to protect the weak who would inevitably succumb to the illness of problem gambling once gambling was legalized. Did they fulfill that undertaking? What was known and what decisions were made? Was there a conflict of interest as alleged [...] between OLGC's obligations to the public and its motive to maintain enormous profits with an eye to the bottom line? Why does it appear that so few steps were taken after the release of the Martin report in 2001 that condemned in no uncertain terms the inadequacies of the memory based system for self-excluders?[24]

17. The case that the plaintiffs propose to try is fundamentally similar to the case that was certified in *Rumley.* In *Rumley*, this Court explained the kinds of issues that would be considered at the common issues trial: "[i]ssues related to policy and administration of the school, qualification and training of staff, dormitory conditions and so on [...] the overall history and evolution of the school is likely to be important background for the claims generally [...]."[25]

18. In *Rumley*, this Court held that the "essential question is whether the school should have prevented the abuse or responded to it differently." Similarly, the essential question in this case is whether OLGC should have taken different steps to assist enrolled addicted gamblers to whom it had made a "best efforts" promise. Both cases allege systemic wrongdoing and, as such, the focus

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[23] Compare *e.g.* the analytical exercise contemplated in *Rumley*, as described in paragraph 12 above, and paragraph 343-344 of Justice Wilson's decision at the Divisional Court: "OLGC, as a crown corporation, undertook to the public to protect the weak who would inevitably succumb to the illness of problem gambling." [LA, Vol. I, Tab C7, p. 141]

[24] Reasons of Justice Wilson, paras. 343-344. [LA, Vol. I, Tab C7, p. 141]

[25] *Rumley, supra*, para. 38. [BOA, Tab 7]

must be on an examination of the common policies and practices of the defendant, not on the individual circumstances of members of the class.[26]

19. As in *Rumley*, the plaintiff acknowledges that individual inquiries may be required to prove damages. This was no bar to certification in *Rumley* because the Court held that the resolution of issues concerning existence of breach of duty on behalf of the whole class would substantially advance the litigation on behalf of the parties. The same is true here.

20. The courts below declined to certify this case because they held that class members would individually need to prove that they were "vulnerable."[27] Their reasoning in this regard stands in sharp contrast to the courts in the United Kingdom that have inferred vulnerability for gamblers that sign self-exclusion forms on the basis of mere common sense. In *Calvert v. William Hill Credit Ltd.*,[28] the English High Court of Justice – Chancery Division asked why "should there be identified a voluntary assumption of responsibility merely because a problem gambler requests that the [self-exclusion] procedure be applied to him."[29] The court concluded that

> [I]n my judgment the request and undertaking in response make all the difference. [...] [T]he very essence of self-exclusion is that a problem gambler, recognizing in a moment of clarity that he is likely to succumb to his addiction in the future, seeks his bookkeeper's assistance in helping him to control what he fears will be otherwise uncontrollable when temptation

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[26] See reasons of Sachs J. in *Fresco v. Canadian Imperial Bank of Commerce,* 2010 ONSC 4724 (CanLII), at para. 200, dissenting in the Divisional Court but affirmed by the Court of Appeal, 2012 ONCA 444 (CanLII). [BOA, Tab 4]

[27] Ironically, the defendant did not even argue before the Motion Judge that variance in vulmerability could be a basis to deny certification. See reasons of Justice Wilson, para. 135: "[Plaintiffs'] counsel advised the court during argument in this Appeal that [OLGC] did not plead or argue that vulnerability was a prerequisite to consideration of the various liability and damages issues. This was not disputed by counsel for OLGC. This assertion is confirmed by a review of the record before Cullity J., and in particular, a review of [OLGC]'s 129 page factum presented to the motions judge." [LA, Vol. I, Tab C7, p. 101]

[28] [2008] All E.R. (D) 170 (Ch. Div.), aff'd [2009] Ch. 330 (C.A.). [BOA, Tab 2]

[29] *Ibid.*, para. 178. [BOA, Tab 2]

> returns. He is, in effect, putting the bookkeeper on notice of his fear that, at precisely the time when he wishes exclusion to be imposed upon him, he will himself be unable to control his gambling. Absent that fear, there would be no point in self-exclusion at all.

21. Similarly, in a case involving problem gambling, the Nova Scotia Court of Appeal held that if a gambler does not request self-exclusion, it is not reasonable to expect a casino to reliably identify a problem gambler.[30] However, where a gambler requests self-exclusion, "the clear rule is known to the individual and casino – this person shall have no opportunity to gamble."[31]

22. Apart from common sense, there was a strong factual basis in the record to support a finding of collective vulnerability on the part of members of the class. As Justice Wilson held in her dissenting judgment in the Divisional Court:

> From the undisputed background facts giving rise to the self-exclusion program, it is clear the OLGC was targeting vulnerable, problem gamblers. The OLGC has specialized knowledge that an increase in problem gambling would be a consequence of introducing legalized gambling in Ontario. Given the role of the OLGC for implementing a system of responsible gambling in Ontario and given that the target group for the exclusion program was problem gamblers, vulnerability may be presumed by signing the self-exclusion contract.[32]

23. Justice Wilson went on to summarize the evidence that supported an inference of class-wide vulnerability as follows:

- In 2002, OLGC's Compliance Manager was asked on cross-examination: "Would you agree, based on common sense, that **the people who are seeking to be self-excluded at the OLGC had problems stopping themselves from gambling**?" OLGC's Compliance Manager answered: "**Based on common sense that would make sense, yes. They would have that problem.**"[33]

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30 *Burrell v. Metropolitan Entertainment Group*, 2011 NSCA 108 at para. 43 ("Without a prohibition, the casino could not reliably distinguish a gambling addict from a frequent gambler.") [BOA, Tab 1]

31 *Ibid.*, para. 44. [BOA, Tab 1]

32 Reasons of Justice Wilson, para. 112. [LA, Vol. I, Tab C7, p. 96]

33 Reasons of Justice Wilson, para. 159 (emphasis added). [LA, Vol. I, Tab C7, p. 106]

- An OLGC document approving the self-exclusion program was entitled "Problem Gambling."[34]
- The plaintiff's expert opined that for the approximately 10,000 gamblers that signed self-exclusion forms during the class period, "**87% could be characterized as problem or pathological gamblers**, 10% were moderate gamblers, and 3% were not problem gamblers. By this calculation [the plaintiffs] argue that 97% were problem gamblers."
- Even **OLGC's expert agreed that between 73% and 95% of persons that signed the self-exclusion forms "were severe problem gamblers at the pathological end of the spectrum of this progressive condition."**[35]
- **OLGC's expert** "highlighted the [...] categorization of self-excluders in one of the studies **in almost identical terms to [the plaintiff's expert]: 88.8% of the self-excluders met the criteria for pathological gambling**, 6.8% were considered "at risk" gamblers, and 4.3% had no gambling problems."[36]

24. In contrast to this case, where variance in vulnerability among class members was held to be a basis to *deny* certification,[37] this Court in *Rumley* cited "vulnerability" in the context of explaining the benefits that a class action[38] provides as a basis to *grant* certification. Even though the Court in *Rumley* acknowledged that "it seems likely that there will be relevant differences between class members here,"[39] including proof "of injury and causation [...] in individual

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34 Reasons of Justice Wilson, para. 160. [LA, Vol. I, Tab C7, p. 160]

35 Reasons of Justice Wilson, para. 187 (emphasis added). [LA, Vol. I, Tab C7, p. 111]

36 Reasons of Justice Wilson, para. 188 (emphasis added). [LA, Vol. I, Tab C7, p. 111]

37 See also the reasons of the Motion Judge in *Rumley* who denied certification at first instance in part on the basis of variation in "the vulnerability of particular plaintiffs." *L.R. v. British Columbia* [1998], 65 B.C.L.R. (3d) 382 at para. 61. [BOA, Tab 7 & 6, respectively]

38 *Rumley, supra* at para. 39 ("The final factor [in the class action certification test] is 'whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means'. On this point it is necessary to emphasize the particular **vulnerability** of the plaintiffs in this case. The individual class members are deaf or blind or both. Litigation is always a difficult process but I am convinced that it will be extraordinarily so for the class members here. [...]") (emphasis added). [BOA, Tab 7]

39 *Ibid.*, para. 36. [BOA, Tab 7]

proceedings following resolution of the common issue [...],"[40] this did not cause the Court in *Rumley* to conclude the class action could not be certified due to different levels of vulnerability.

B. The Court of Appeal's Decision is a Pernicious Departure from the Class Action Trilogy

25. In *Dutton v. Western Canadian Shopping Centres Inc.*,[41] this Court recognized the critical function that class actions play in providing meaningful access to justice:

> The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated vis-à-vis the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.[42]

26. Courts across Canada have built on the foundation of this Court's 2001 class action trilogy by certifying the kinds of cases that the Court referred to in *Dutton*. Many of those cases have subsequently been tried, settled or otherwise resolved in class members' favour, bringing meaningful compensation to persons who otherwise would never have been able to bring their case to court. *Rumley,* in particular, has since become "the template for subsequent class actions on behalf of institutional physical and sexual abuse survivors, as well as others harmed by systemic negligence."[43]

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[40] *Ibid.* [BOA, Tab 7]

[41] [2001] 2 SCR 534. [BOA, Tab 9]

[42] *Ibid.*, para. 26. [BOA, Tab 9]

[43] J. Kalajdzic, "Accessing Justice: Appraising Class Actions Ten Years after *Dutton, Hollick & Rumley*" (Markham, ON: LexisNexis, 2011) at p. 5. [LA, Vol. II, Tab E2, p. 26] After this Court's decision in *Rumley*, the federal

27. Undoubtedly, the future will bring with it new and different instances of mass harm caused by systemic breach which will, in turn, breed claims for class-wide relief. In addition to the different types of class action claims this Court described in *Dutton*, there may be other claims involving unprecedented privacy breaches, government failure to recognize harm and to take timely action to protect, mass discrimination, and mass torts causing wide-spread injury. In each of these scenarios, it can be plausibly expected that defendants will point to the unanimous decision of the Ontario Court of Appeal as authority for the proposition that certification of a class action should be denied because the "vulnerability" of any given group in a "systemic wrong" case is not common.[44]

28. That would be unfortunate because (i) the Court of Appeal's decision is contrary to this Court's decision in *Rumley*, (ii) the conclusion is contrary to reasonable (indeed, plausible) inferences based on the plaintiff's strong factual record at present (in circumstances where the plaintiff has not yet obtained any discovery from OLGC) and (iii) the conclusion is contrary to jurisprudence in other jurisdictions which have concluded, on the basis of similar facts, that a duty of care may be owed to gamblers who seek to self-exclude.

C. There is a Public Interest in Having this Action Heard on the Merits

29. This case raises serious issues of alleged "systemic wrongs" arising from government-sponsored gambling. It addresses important issues of public policy while, at the same time, it is

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government paid over $1.9 billion to thousands of persons harmed in Indian residential school settings. See (http://aadnc-aandc.gc.ca/1315320539682/1315320692192). [LA, Vol. II, Tab E3, pp. 36-41]

[44] One recent post on a website called "Canadian Class Action Defence" (http://www.canadianclassactiondefence.com/) states that the Court of Appeal's decision in this case "provided some guidance on the limits of systemic wrongs [...]." See online: (http://www.canadianclassactiondefence.com/2013/07/certification-refused-where-individual-issues-overwhelm-systemic-wrong/) [LA, Vol. II, Tab E4, pp. 42-44]

carefully tailored to advance issues that can readily and efficiently be adjudicated. As Justice Cullity recognized:

- "The action involves **the response of a government agency to the recognized serious social problem of addictive or compulsive gambling**." [para. 5]
- "The **tension between maximizing profits and promoting responsible gambling** to the financial detriment of OLGC **is acute**." [para. 5]
- "[...] Plaintiffs' counsel have attempted to frame the claims advanced on behalf of the class **quite narrowly** [...]." [para. 6]
- "[...] sufficient allegations of OLGC's breaches of the contractual duty to exercise its best efforts have been pleaded. Essentially, the allegations are that **OLGC knew that its system of memory-based enforcement was entirely inadequate to identify self-excluded gamblers who sought re-entry; that it knew that the system was ineffective; that it did not attempt to remedy the deficiencies; and that it failed to implement more effective measures reasonably available to it**." [para. 92]
- If the plaintiffs can prove "that the self-exclusion program was **mere window-dressing** [...] **it could, in my judgment, be found to have been unconscionable at the outset to offer such a program to vulnerable program gamblers seeking assistance and [...] to attempt to exclude OLGC's liability when so doing**." [para. 106]
- "The material facts from which a finding of causation could be made have, in my judgment, been **sufficiently pleaded**." [para. 137]
- "[...] Even if the procedures prescribed by OLGC are considered to be policy decisions, **this would not, in my opinion, necessarily confer immunity on the decision to adopt an allegedly inadequate method of enforcement of the best efforts commitment**." [para. 156]

30. There is a strong national public interest in permitting this case to be heard on the merits. Casino gambling in Canada is a significant industry. It attracts tens of millions of customers who generate substantial revenue for private corporations and for governments.[45]

31. Casino gambling continues to grow throughout Canada.[46] Governments increasingly rely on casinos as a means to fill budgetary holes.[47] This trend will continue as more casinos are built.

32. It is undisputed that gambling can become a serious addiction. This Court has previously recognized "the various social costs involved with gambling and VLTs," including "addiction, crime [and] bankruptcy [...]."[48] OLGC is acutely aware of these costs, having sponsored the publication of a pamphlet as early as 1999 that acknowledged that "compulsive gamblers develop a need to gamble, just as an alcoholic has a need to drink or a heroin addict has a need to 'shoot up'. What he or she is looking for is the "high" that comes from being involved in gambling activities."[49]

33. In 1993, when the Province of Ontario was considering whether to introduce casino gambling, the Chairman of the Canadian Foundation on Compulsive Gambling warned OLGC: "The negatives are not adequately stated. [...] More casinos will not only result in greater crime,

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45 Reasons of Justice Wilson, para. 91 ("Based upon OLGC figures, there were three OLGC gambling venues with an estimated 21.1 million visits in 1999/2000. By 2008, there were 27 OLGC gambling venues with an estimated 42 million annual visits to OLGC's four commercial or 'resort' casinos, six charity or 'community' casinos, and 17 slot machine facilities at racetracks.") [LA, Vol. I, Tab C7, p. 93]

46 Net revenue from government-run lotteries, VLTs, casinos and slot machines rose from $2.73 billion in 1992 to $13.74 billion in 2010. See online: <http://www.statcan.gc.ca/pub/75-001-x/2011004/article/11551-eng.pdf>. [LA, Vol. II, Tab E5, pp. 45-51]

47 Simpson, *Gambling: A Unique Policy Challenge,* Healthcare Quarterly, 15(4) October 2012: 7-9. [LA, Vol. II, Tab E6, pp. 52-55]

48 *Siemens v. Manitoba (A.G.)*, [2003] 1 S.C.R. 6 at para. 30. [BOA, Tab 8]

49 [LA, Vol. II, Tab E7, p. 56].

but will also create a greater incidence of compulsive and pathological gambling, with its incalculable economic and human cost,"[50] cautioning that "this is going to be a very expensive operation in the years to come."[51]

34. In light of these concerns, OLGC pledged that "any overall strategy to deal with issues on problem gambling rests with the provincial government [...] and all those involved in the gaming industry."[52] OLGC promised that it was "committed to leading the way" to address problem gambling.[53]

35. One of the key means by which OLGC proposed to mitigate the damage caused by problem gambling was its self-exclusion program. Similar programs exist in eight provinces in Canada and abroad.[54] In the self-exclusion forms, OLGC agreed to use its "best efforts" to deny entry to people that signed the forms. As described above, its "best efforts" consisted of providing to security guards binders containing approximately 10,000 photographs of persons who signed the forms and somehow expecting them to recognize and deny entry to them.

36. As a matter of common sense, OLGC's self-exclusion program was doomed to failure from the start. In 2001, OLGC commissioned an internal study called the "Martin Report,"[55] which

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50 Reasons of Justice Wilson, para. 150. [LA, Vol. I, Tab C7, pp. 104-105]

51 *Ibid.* [LA, Vol. I, Tab C7, pp. 104-105]

52 Reasons of Justice Wilson, para. 152. [LA, Vol. I, Tab C7, p. 105]

53 *Ibid.*, para. 153. [LA, Vol. I, Tab C7, p. 105]

54 There are self-exclusion programs in Alberta, B.C., Manitoba, Nova Scotia, Ontario, PEI, Quebec and Saskatchewan. [LA, Vol. II, Tab E8, p. 57]

55 Reasons of Justice Wilson, para. 96. [LA, Vol. I, Tab C7, p. 93]

Justice Wilson described as "unequivocally condemn[ing] the memory-based enforcement as inadequate."[56] The Martin Report concluded:

- The OLGC self-exclusion program brought significant "risk and liability" to the Corporation;
- Staff training relating to the program was "inconsistent";
- Recognition of excluded persons across casinos was "relatively impossible."
- It was a "pitfall to develop a program and not monitor or enforce it."[57]

37. The Martin Report called for a complete "overhaul"[58] of the self-exclusion process. The plaintiffs allege that after the Martin Report was released, OLGC did virtually nothing to take action to reform and improve the self-exclusion process. OLGC took no steps to create a centralized computer database to coordinate entry and removal, as its own expert recommended.[59]

38. OLGC denies that it owes duties to those persons who enter into its self-exclusion program.[60] It is a matter of interest and debate as to whether such a duty can and should be imposed by the court.[61] Finding the existence of a duty of care to self-excluded gamblers would be consistent with appellate authority from the Ontario Court of Appeal and this Court. Justice Cullity

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56 *Ibid.*, para. 243. [LA, Vol. I, Tab C7, p. 121]

57 *Ibid.*, para. 98. [LA, Vol. I, Tab C7, p. 94]

58 *Ibid.*, para. 97. [LA, Vol. I, Tab C7, p. 94]

59 Although the Martin report was a key aspect of the plaintiffs' argument, it was cited by only one dissenting judge of the Ontario Divisional Court. [LA, Vol. II, Tab E9, pp. 58-76]

60 Reasons of Justice Cullity, para. 148 [LA, Vol. I, Tab C1, p. 37]; Reasons of Justice Wilson, para. 103. [LA, Vol. I, Tab C7, p. 95]

61 See Kalajdzic, Jasminka and Sasso, William V., "Do Ontario and its Gaming Venues Owe a Duty of Care to Problem Gamblers?" (2006), Gaming Law Review, Vol. 10, No. 6, 2006. [LA, Vol. II, Tab E10, pp. 77-104]

held that there was a "sufficiently close" analogy to the Ontario Court of Appeal's decision in *Heaslip Estate v. Mansfield Ski Club Inc.*,[62] in which the court found that "once the government has direct communication or interaction with the individual in the operation or implementation of a policy, a duty of care may arise, particularly where the safety of the individual is at risk."[63] He also cited extracts from this Court's decision in *Childs v. Desormeaux,*[64] which referred to situations of proximity "where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls"[65] and to situations involving "defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large,"[66] which gives rise to "special duties."[67]

39. As described above, a court in the United Kingdom has upheld the existence of such a duty and the Nova Scotia Court of Appeal has suggested, in *obiter*, that one may be found in these circumstances. However, a dispositive finding of whether, and where, casinos owe a duty of care to problem gamblers who seek to self-exclude (and the content of the duty of care) requires a hearing on the merits on the basis of a comprehensive factual record. This is such a case and it deserves to move forward.

D. Conclusion regarding application for leave to appeal

40. Two judges in this case concluded this case had a strong public interest element.

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62 (2009), 96 O.R. (3d) 401 (C.A.). [BOA, Tab 5]

63 *Ibid.*, para. 21. [BOA, Tab 5]

64 2006 SCC 18. [BOA, Tab 3]

65 *Ibid.*, para. 35. [BOA, Tab 3]

66 *Ibid.*, para. 37. [BOA, Tab 3]

67 *Ibid.* [BOA, Tab 3]

41. Justice Cullity held this case had a "very strong public interest" element both from the perspective of class action law and based on the importance of the gambling addiction issue. He held "there is [...] **a very strong public interest** in the question whether a government agency should be actively attempting to make profits from the gambling losses of patrons who include vulnerable problem gamblers – and, if this is considered to be socially acceptable by the community – in the steps that should be taken to protect the latter. [...] **The availability of the CPA procedure to test them by providing access to justice to self-excluded gamblers is, and in my opinion should be, itself a matter of serious interest to the community at large.**"[68]

42. Justice Wilson reached a similar conclusion, holding that "allowing this lawsuit to proceed as a class action would generate much more reliable information about the consequences of legalizing gambling in Ontario. This is a huge potential benefit, not just to the members of the class as defined, but to the public in general, both gamblers and non-gamblers."[69]

43. Since *Rumley* was decided in 2001, a body of caselaw has developed which has sought to apply this Court's decision to situations involving cases of "systemic wrongdoing." This case offers an opportunity for this Court to consider "systemic wrongdoing" class actions with the benefit of some 11 years of cases that have applied this Court's reasoning to further refine or expand on the circumstances in which these claims can be prosecuted as class actions.

PART IV – SUBMISSIONS REGARDING COSTS

44. The plaintiff requests its costs of the application for leave to appeal.

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[68] Costs endorsement of Justice Cullity, May 21, 2010 (emphasis added). [LA, Vol. I, Tab C3, pp. 63-64]

[69] Reasons of Justice Wilson, para. 342. [LA, Vol. I, Tab C7, p. 140]

PART V – ORDER SOUGHT

45. The plaintiff requests that this Court grant the application for leave to appeal, with costs.

All of which is respectfully submitted,

DATED at the City of Toronto in the Province of Ontario this ___th day of September, 2013.

SIGNED BY:

Louis Sokolov per

Louis Sokolov

Jean-Marc Leclerc

Hassan Fancy per

Hassan Fancy

Counsel/Agents for the Applicants

PART VI – TABLE OF AUTHORITIES

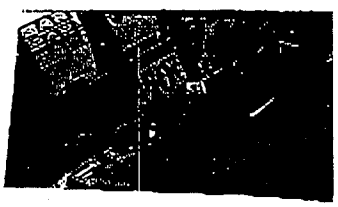
CASES

Name	Cited in Paras.
Burrell v. Metropolitan Entertainment Group, 2011 NSCA 108	21
Calvert v. William Hill Credit Ltd., [2008] All E.R. (D) 170 (Ch. Div.), aff'd [2009] Ch. 330 (C.A.)	20
Childs v. Desormeaux 2006 SCC 18	38
Fresco v. Canadian Imperial Bank of Commerce, 2010 ONSC 4724 (CanLII)	18
Heaslip Estate v. Mansfield Ski Club Inc. (2009), 96 O.R. (3d) 401 (C.A.)	38
L.R. v. British Columbia [1998], 65 B.C.L.R. (3d) 382	24
Rumley v. British Columbia, [2001] 3 S.C.R. 184	4, 5, 7, 10, 11, 13, 14, 16, 17, 18, 19, 24, 26, 27, 28, 43
Siemens v. Manitoba (A.G.), [2003] 1 S.C.R. 6	32
Western Canadian Shopping Centres Inc.v. Dutton, [2001] 2 S.C.R. 534	25, 26

PART VII – STATUTES, REGULATIONS, RULES RELIED UPON

Supreme Court Act (R.S.C., 1985, c. S-26)	Loi sur la Cour suprême (L.R.C. (1985), ch. S-26)
Appeals with leave of Supreme Court **40.** (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.	Appel avec l'autorisation de la Cour **40.** (1) Sous réserve du paragraphe (3), il peut être interjeté appel devant la Cour de tout jugement, définitif ou autre, rendu par la Cour d'appel fédérale ou par le plus haut tribunal de dernier ressort habilité, dans une province, à juger l'affaire en question, ou par l'un des juges de ces juridictions inférieures, que l'autorisation d'en appeler à la Cour ait ou non été refusée par une autre juridiction, lorsque la Cour estime, compte tenu de l'importance de l'affaire pour le public, ou de l'importance des questions de droit ou des questions mixtes de droit et de fait qu'elle comporte, ou de sa nature ou importance à tout égard, qu'elle devrait en être saisie et lorsqu'elle accorde en conséquence l'autorisation d'en appeler.
Marginal note:Application for leave (2) An application for leave to appeal under this section shall be brought in accordance with paragraph 58(1)(*a*).	Note marginale :Demandes d'autorisation d'appel (2) Les demandes d'autorisation d'appel présentées au titre du présent article sont régies par l'alinéa 58(1)*a*).
Marginal note:Appeals in respect of offences (3) No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.	Note marginale :Appels à l'égard d'infractions (3) Le présent article ne permet pas d'en appeler devant la Cour d'un jugement prononçant un acquittement ou une déclaration de culpabilité ou annulant ou confirmant l'une ou l'autre de ces décisions dans le cas d'un acte criminel ou, sauf s'il s'agit d'une question de droit ou de compétence, d'une infraction autre qu'un acte criminel.
Marginal note:Extending time for allowing appeal (4) Whenever the Court has granted leave to	Note marginale :Prorogation du délai d'appel (4) Dans tous les cas où elle accorde une autorisation d'appel, la Cour ou l'un de ses juges peut, malgré les autres dispositions de la

appeal, the Court or a judge may, notwithstanding anything in this Act, extend the time within which the appeal may be allowed.	présente loi, proroger le délai d'appel. L.R. (1985), ch. S-26, art. 40; L.R. (1985), ch. 34 (3e suppl.), art. 3; 1990, ch. 8, art. 37.



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When the Fun Stops Being Fun

The OCC recognizes its responsibility to help those for whom "the fun stops being fun". The Corporation is committed to leading the way in the North American gaming industry in dealing with a social problem that affects a small minority of players.

The Ontario government has earmarked a minimum $10 million from slot machine revenues at charity casinos and racetracks...more than any other gaming jurisdiction in North America.

In addition, Ontario's commercial casinos contribute hundreds of thousands of dollars to educational and prevention programs geared to early identification of addiction to gambling.

The OCC has renewed its support for the Canadian Foundation on Compulsive Gambling which hosted the National Conference on Responsible Gaming in Ottawa. The theme was "Community and Treatment – Sharing Responsibility".

Since the Windsor casino opened, there has been no statistically significant change in the number of problem gamblers, according to the first and only Canadian study of local gamblers to date. The psychology department at the University of Windsor estimates the number of problem gamblers to be approximately three per cent.

But the study did identify an area in which the OCC and the casinos recognized an opportunity to make a difference. Many self-identified problem gamblers report they do not know where to turn to seek help. Each commercial casino has developed a media campaign of radio ads and billboards to elevate awareness for employees, patrons and the community.

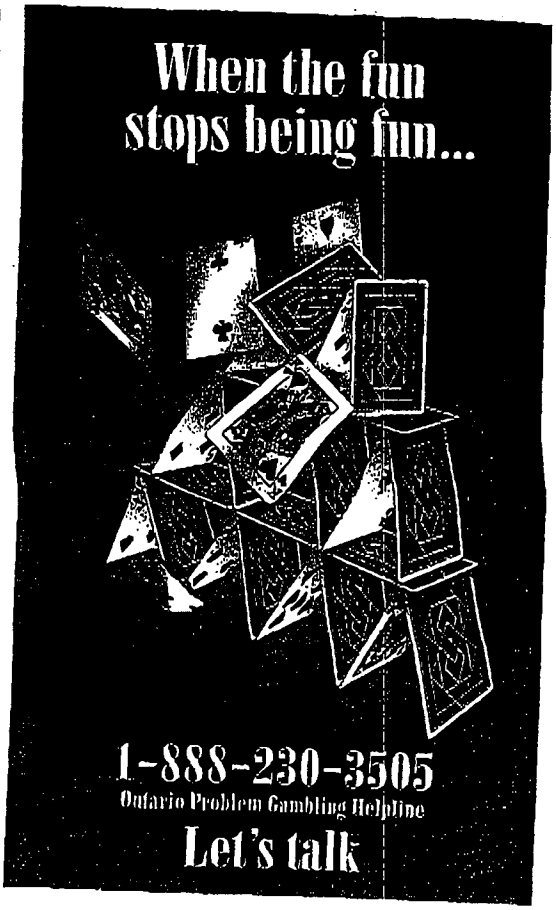
The OCC encourages the critical first step for problem gamblers to seek help from one of the 45 treatment centres available in Ontario. All casinos display the toll-free confidential Problem Gambling Helpline number in an eye-catching poster campaign throughout the gaming facilities. This number provides information and treatment referral 24 hours a day. *Casino Rama* also prints the helpline number on ATM machines and matchbook covers.

Each commercial casino has designed a two-tier approach. Respect and respond. The casino *respects* the privacy of guests, and recognizes that the decision to gamble is a personal decision. But staff are trained to *respond* by guiding problem gamblers to local support systems in place.

Leading Edge Training for All Gaming Employees

Casino Rama sponsors training workshops of different treatment modalities for local care providers and bursars for Georgian College's Addiction programs. It also contributes to the Mnjikaning First Nation to address problem gambling issues within its own community and neighbouring First Nations.

All three casinos have a "self-exclusion program" in which an individual asks to be excluded from visiting the casino. He or she signs a contract enabling the casino security to intervene if they are found on the premises.



Educational and prevention strategies at Ontario's commercial casinos, combined with the province's $10-million problem gambling program, put Ontario at the forefront of prevention.

This is Exhibit.....referred to in the affidavit of.....
sworn before me, this.....
day of.....20.....

.....
A COMMISSIONER FOR TAKING AFFIDAVITS

Accessing Justice: Appraising Class Actions Ten Years after *Dutton*, *Hollick & Rumley*

Jasminka Kalajdzic*

Ten years ago, the Supreme Court of Canada released a trilogy of class action decisions.[1] All three were penned by the Chief Justice, and all three were unanimous. Some of the most repeated and important phrases in all of class action jurisprudence can be found in those three sets of reasons. The trilogy gave content to the commonality and preferability criteria applied in all certification motions, and established other important procedural tests. More significantly, the trilogy effectively codified the objectives of class actions and signalled the entrenchment of this procedural device in our civil justice system.

In 1983, the Supreme Court had rejected a class action against General Motors on the basis that existing representative action rules, passed down from English Judicature Acts centuries before, were "totally inadequate for employment as the base from which to launch an action of the complexity and uncertainty" of a 2,000-member class action.[2] Class actions, wrote Justice Estey, were "more fittingly the subject of scrutiny in the legislative rather than the judicial chamber".[3]

Almost 20 years later in *Dutton*, Chief Justice McLachlin rejected Justice Estey's deferral to the legislature and made it the Court's job to build a framework for the conduct of class actions for all provinces, whether or not a class proceedings statute had been enacted. With clear language and purpose, the nine Supreme Court of Canada justices affirmed that the class action's importance in modern litigation and

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* University of Windsor Faculty of Law. I gratefully acknowledge James Van Manen, a Windsor law student who helped edit the papers in this collection, and the Law Foundation of Ontario, for its financial support of this project.

1 *Western Canadian Shopping Centres v. Dutton*, [2000] S.C.J. No. 63, [2001] 2 S.C.R. 534 (S.C.C.) [hereinafter "*Dutton*"]; *Hollick v. Toronto (City)*, [2001] S.C.J. No. 67, [2001] 3 S.C.R. 158 (S.C.C.) [hereinafter "*Hollick*"]; and *Rumley v. British Columbia*, [2001] S.C.J. No. 39, [2001] 3 S.C.R. 184 (S.C.C.) [hereinafter "*Rumley*"].

2 *General Motors of Canada Ltd. v. Naken*, [1983] S.C.J. No. 9, [1983] 1 S.C.R. 72, at 105 (S.C.C.) [hereinafter "*Naken*"].

3 *Id.*, at 102.

contemporary society "has become manifest".[4] In light of "[t]he rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs", class actions had developed to resolve the problem of many suitors having a common grievance.[5] By splitting the fixed costs of litigation between many members of the class, class actions improve access to justice; without them, "the doors of justice remain closed to some plaintiffs, however strong their legal claims".[6]

Since the trilogy, class actions have been consistently lauded and justified on the basis that they improve access to justice. For many, it is self-evident that representative litigation helps overcome economic, social and psychological barriers to claiming and obtaining redress. Yet, more recently, the Supreme Court itself expressed doubt that class actions *inevitably* engage access to justice considerations.[7] There is no question that class actions do increase the number and types of claims being litigated. However, the extent to which they are successful in providing a fair remedy for the injuries suffered by the class, or whether they provide sufficient incentives to private Attorneys General to prosecute on behalf of the powerless, is not self-evident.

Access to justice has been a dominant theme in legal discourse for decades, and continues to be described as the overarching issue in civil justice reform initiatives. While the mantra of access to justice is repeated in virtually every class action decision issued by courts across the country, surprisingly few commentators have attempted to evaluate whether or to what extent class actions have, in fact, improved access to justice. On the 10th anniversary of the Supreme Court's trilogy of class action decisions, over 80 participants, from the bar, the academy and the bench, convened at the University of Windsor Faculty of Law, to discuss class actions critically and thoughtfully. Twenty-two speakers from Canada, the United States and the United Kingdom, many of whom have papers in this special volume of the Supreme Court Law Review, appraised class actions through the lens of access to justice. The papers in this volume revisit the aims of class proceedings legislation, assess the extent to which access to justice has been advanced, and discuss the

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4 *Dutton, supra*, note 1, at para. 46.

5 *Id.*, at para. 26.

6 *Id.*, at para. 28.

7 *Kerr v. Danier Leather Inc.*, [2007] S.C.J. No. 44, [2007] 3 S.C.R. 331, at para. 69 (S.C.C.).

ways in which the practice of, and approach to, class actions can be revised to increase their access to justice potential.

I. THE TRILOGY: CLASS ACTIONS ENTRENCHED

At the time of the *Naken* decision, only the Province of Quebec had enacted class proceeding legislation. By the time of the trilogy, a pivotal Ontario Law Reform Commission Report[8] and an Attorney General's Report[9] had been released calling for class proceedings legislation to be enacted, and two provinces in English-speaking Canada had passed such statutes.[10] Chief Justice McLachlin reflected on those developments and wrote in *Dutton* that this reform had been "motivated in large part by the recognition of the benefits that class actions can offer the parties, the court system, and society". That the Court was willing to fill the legislative void in those provinces without class action statutes spoke volumes about the importance the judges attached to the need for effective mechanisms of mass harm redress.

In the second of the trilogy of cases, *Rumley*,[11] the Court spoke of the inherent flexibility of the class action mechanism. It emphasized that courts are ultimately looking to balance efficiency with fairness, and that for vulnerable class members, like the survivors of institutional abuse who were the plaintiffs in *Rumley*, allowing the case to proceed as a class action would go some way toward mitigating the emotional and psychological barriers they faced. *Rumley* became the template for subsequent class actions on behalf of institutional physical and sexual abuse survivors, as well as others harmed by systemic negligence.[12]

Finally, in *Hollick*,[13] the Court considered Ontario's *Class Proceedings Act*[14] and affirmed that "the Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool." The Court said it was "essential therefore that courts not take an

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[8] Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982).

[9] *Report of the Attorney General's Advisory Committee on Class Action Reform* (Toronto: Ministry of the Attorney General, 1990).

[10] British Columbia enacted the *Class Proceedings Act* in 1996 (R.S.B.C. 1996, c. 50), while Ontario's *Class Proceedings Act, 1992*, S.O. 1992, c. 6 [hereinafter "CPA"] came into force on January 1, 1993.

[11] *Rumley*, *supra*, note 1.

[12] See, *e.g.*, *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924, 73 O.R. (3d) 401 (Ont. C.A.).

[13] *Hollick*, *supra*, note 1.

[14] *Supra*, note 10.

overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters".[15]

The trilogy remains the point of reference for all class certification decisions since. Between them, *Dutton*, *Hollick* and *Rumley* have been cited with approval in over 1,100 cases.[16] In the decade since their release, the rest of Canada, with the exception of Prince Edward Island, has enacted class proceedings legislation. In all of these jurisdictions, the class action is justified by its tripartite ambition: to promote judicial economy, to ensure behaviour modification and to increase access to justice. In *Dutton*, the Supreme Court made plain the access to justice imperative in particular: justice, for some, could *only* be attained by way of a class action.[17]

The extent to which that ambition is matched by reality is rarely expressed. Surprisingly few government policymakers, legal academics, empiricists and law reform experts have examined class actions and asked some fundamental questions: Do class actions confer substantive justice on class members? Is the class action an efficient compensatory model? Should class actions exercise a regulatory enforcement function? Are they improving access to justice for the economically disadvantaged and other marginalized groups? Have class actions become a commercial enterprise and, if so, does it matter from either a policy or an ethical perspective?

These are the questions that animate this collection of essays.

II. The Role of Class Actions in Canada

Class actions take an enormous amount of resources and occupy significant proportions of court dockets. They require considerable case management by judges. If certified, the likelihood of settlement, usually in the seven or eight figures, increases exponentially. It is a procedural device, but one with enormous potential to effect political, financial and social consequences. Former Ontario Attorney General Ian Scott, who oversaw the drafting of the CPA, attributed a regulatory function to class proceedings: "Through class actions, the government found a cost-effective way to promote private enforcement and thereby to take some of the pressure off enforcement by the budget-restrained government

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15 *Hollick*, *supra*, note 1, at para. 15.

16 Quicklaw search conducted July 13, 2011.

17 *Dutton*, *supra*, note 1, at para. 28.

ministries."[18] At the same time, they are also unquestionably entrepreneurial in nature, and for some counsel represent massive profit-generating devices. The state "in effect designates the agent, underwrites the cost of representation by removing the transactional barrier of having to contract with each client, and allows for a state-enforced taxation of the joint gains to compensate the agent [*i.e.*, by way of contingency fees]".[19] There is no doubt that class actions enable litigation that otherwise would not be brought. Is *this* what we mean by access to justice?

The first paper in this volume tackles that very question.[20] The Honourable Frank Iacobucci was a member of the Supreme Court of Canada when the trilogy was decided. His opening address anchored the conference's panel discussions, and similarly sets the context for the papers in this volume. The Supreme Court's trilogy approached access to justice in a fairly narrow way: access to justice was equated with access to the courts; class actions improve access to justice by making viable claims that individually are uneconomical to prosecute. But other definitions exist. Here and abroad, access to justice scholars view class actions as "an evolutionary response to the existence of injuries unremedied by the regulatory action of the government".[21] Still others go further and attribute to class actions a decidedly social mission — to provide "ready, meaningful justice for the (relatively) disempowered in contemporary, massified societies"[22] — is how one U.S. academic describes it. In order to evaluate whether or to what extent class actions have, in fact, improved access to justice in Canada, we must first ask: *what is access to justice, and how do class actions provide it?* Justice Iacobucci's address asks and answers this question, and also asks another pivotal one: Are class actions trying to achieve too many purposes?

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[18] I. Scott & N. McCormick, *To Make a Difference: A Memoir* (Toronto: Stoddart, 2001), at 182, as cited in Hon. I. Binnie, "Mr. Attorney Ian Scott and the Ghost of Sir Oliver Mowat" (Spring 2004) 22 Advocates' Soc. J. No. 4, at 4.

[19] Samuel Issacharoff & Geoffrey P. Miller, "Will Aggregate Litigation Come to Europe?" (2009) Vand. L. Rev. 179, at 186.

[20] Frank Iacobucci, "What is Access to Justice in the Context of Class Actions?" (2011) 53 S.C.L.R. (2d) 17.

[21] B. Garth, I.H. Nagel & S.J. Plager, "The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation" (1988) 61 S. Cal. L. Rev. 353, at 361, citing *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, at 339 (1980).

[22] Francisco Valdes, "Procedure, Policy and Power: Class Actions and Social Justice in Historical and Comparative Perspective" (2008) 24 Ga. St. U. L. Rev. 627, at 648.

Lorne Sossin's article on class actions against the Crown suggests that class actions may, in some instances, be doing too much.[23] He starts with the premise that such class actions lie somewhere between the private law and public law paradigms; rather than seek judicial review to invalidate government decisions made in the exercise of public duties, litigants pursue compensation and vindication through civil liability based on the breach of a specific private law duty. Dean Sossin contends that class proceedings are not well suited to reviewing government action, because they "gloss over the important balancing and discretionary judgments that are part and parcel of exercising public authority in the public interest".[24] Reflecting on the Supreme Court's rejection of the *Grenier*[25] framework, which required that parties first seek judicial review of impugned government action before bringing a civil claim, Dean Sossin proposes a middle ground between purely public (judicial review) and purely private (civil actions) forms of legal accountability, one that recognizes the power of the certification motion judge to balance the government's public interest commitments against the requirements of compensatory justice for widespread private wrongs. In the context of class actions against the Crown, therefore, access to justice incorporates notions of both public and private justice.

III. ACCESS TO SUBSTANTIVE JUSTICE

Defining "justice", and how we might measure it, preoccupies the authors of the next three articles. In her keynote address at the conference, the text of which is reproduced in the volume,[26] Deborah Hensler returns us to first principles: what are the goals of our civil justice system? If the goal is only monetary compensation, then properly designed administrative schemes may deliver better, less expensive outcomes than civil litigation. If, however, our access to justice mandate requires some measure of public accountability and social recognition of loss, then we can (and do) look to the courts to provide access to substan-

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[23] Lorne Sossin, "Revisiting Class Actions against the Crown: Balancing Public and Private Legal Accountability for Government Action" (2011) 53 S.C.L.R. (2d) 31.

[24] *Id.*, at 33.

[25] *Canada v. Grenier*, [2005] F.C.J. No. 1778, [2006] 2 F.C.R. 287 (Fed. C.A.). The Supreme Court rejected *Grenier*'s approach, primarily on the principle of access to justice, in *Canada (Attorney General) v. TeleZone Inc.*, [2010] S.C.J. No. 62, [2010] 3 S.C.R. 585 (S.C.C.).

[26] Deborah Hensler, "Developing an Empirical Research Agenda on Access to Justice in Class and Mass Actions" (2011) 53 S.C.L.R. (2d) 49.

tive and procedural justice. How effective are our courts in doing so? How do we measure access to justice? These questions are key for policymakers, advocates and judges alike. In appraising class actions, Professor Hensler considers not only their statutory and jurisprudential dimensions, but how they are actually conducted, financed and settled, and all with a view to better understanding the scope for class actions to improve access to justice. Very little of that kind of information has been collected to date in Canada. Professor Hensler's remarks are a call to do better.

In order to mete out fair outcomes, a number of actors play critical roles. Catherine Piché discusses the roles and responsibilities of class counsel, class representatives and settlement judges in the class action enterprise.[27] Because class members are very often absent, representative plaintiffs too often "fictitious",[28] and class counsel's relationship with all of them fraught with ethical challenges, Professor Piché argues that class action judges in Canada must recast their roles. Unlike adjudicators overseeing traditional individual disputes, class action judges are the protectors of the class, exercising inquisitorial functions to ensure the adequacy and fairness of the proposed settlement. Only in this way can the mechanism of the class proceeding deliver a "just" justice.

Professor Piché's prescriptive essay is followed by an empirical look back at settlement outcomes by Paul Morrison and Michael Rosenberg.[29] They posit that substantive justice is fleeting in class actions when measured by the rates at which class members claim settlement proceeds, so-called "take-up rates". They propose that poor class participation is a function not only of poorly designed claims processes, inadequate notice to class members, and disadvantageous settlements, but also of what they term "non-litigious classes", or "members of the class [who] are not interested in having their claims litigated".[30] Morrison and Rosenberg argue that courts should probe for the existence of such classes, because they engender cynicism about entrepreneurial lawyering and ultimately undermine the access to justice rationale of class proceedings as a whole.

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[27] Catherine Piché, "The Class Action Settlement Actors: Who Protects Whom?" (2011) 53 S.C.L.R. (2d) 57.

[28] *Id.*, at 67.

[29] F. Paul Morrison & H. Michael Rosenberg, "Missing in Action: An Analysis of Plaintiff Participation in Canadian Class Actions" (2011) 53 S.C.L.R. (2d) 97.

[30] *Id.*, at 98.

IV. BEHAVIOUR MODIFICATION AS ACCESS TO JUSTICE

Morrison and Rosenberg's vision of substantive justice is rooted in the notion of class actions providing redress for claimants who wish to, but otherwise could not, litigate their claims. Class actions cannot, in their view, be justified on the basis of behaviour modification alone, as "[p]roceedings intended only to deter defendants are the domain of regulatory bodies rather than entrepreneurial lawyers."[31] Jeff Berryman and John Kleefeld, however, offer interpretations of behaviour modification *as a form* of access to justice. In his essay, Professor Berryman accepts that plaintiffs sometimes prefer remedial outcomes other than compensable damages, including punishment and deterrence of wrongdoers.[32] Whether class actions achieve a specific deterrence function, however, has not been empirically proven, a deficit that Professor Berryman, like Professor Hensler, argues ought to be remedied. Professor Berryman focuses on the legal architecture of class actions, and explores how it could be improved if we are serious about behaviour modification as one of the goals of class proceedings, and as a method by which victims of mass harm can be made whole.

As Professor Berryman points out, achieving specific deterrence where the defendant is the Crown, may be altogether impossible.[33] It is an idea that John Kleefeld takes up seriously in "*Homo legislativus*: Missing Link in the Evolution of 'Behaviour Modification'?"[34] He offers a typology of legislative-seeking behaviour — a variety of government responses to actual or perceived threats of class actions other than modifying the wrongful behaviour itself. He explores a number of Canadian cases where government defendants engaged in pre- and post-dispute regulatory behaviour to relieve class action pain rather than to respond to it on its merits; such activity ought to be taken into account when assessing the effectiveness of class actions in achieving both its access to justice and behavioural modification objectives. Professor Kleefeld concludes on a more hopeful note, offering potential legislative and rule-based reforms that could pave the way for the extinction of the purely self-interested *Homo legislativus*.

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[31] *Id.*, at 97.

[32] Jeff Berryman, "Nudge, Nudge, Wink, Wink: Behavioural Modification, Cy-Près Distributions and Class Actions" (2011) 53 S.C.L.R. (2d) 133.

[33] *Id.*, at 156-157.

[34] (2011) 53 S.C.L.R. (2d) 169.

V. BARRIERS TO COLLECTIVE JUSTICE

The impediments to real access to justice and deterrence discussed by Professor Kleefeld are peculiar to litigation against the Crown. Other barriers to justice are explored in the next three articles in this volume. All three authors move beyond the usual paradigm of economic barriers, to focus on more complex barriers related to societal marginalization, workplace power dynamics and communication.

First, Doug Elliott briefly traces the history of class actions in the United States, reminding us that the class action device was used to create positive social change for historically marginalized persons.[35] He then asks why "social justice" class actions have either been unsuccessful in Canada, or viewed as the "fringe" of traditional class actions. In answering this question, Elliott discusses the non-economic barriers that impede historically marginalized groups from turning to class proceedings as an advocacy tool. He also challenges the view expressed by Dean Sossin and others that class actions that seek to advance social reform (typically actions against the Crown) may distort sound public policy or circumvent administrative law processes. He concludes with an analysis of recent Canadian constitutional decisions that suggest a shift in the way courts address access to justice for marginalized people. These modest successes, he hopes, will provide sufficient incentives for lawyers to take on such cases on behalf of vulnerable groups.

In their article, Louis Sokolov and Colleen Bauman focus on the advantages of class proceedings for non-unionized workers who face significant power imbalances and a lax regulatory regime.[36] They provide a detailed overview of employment class actions in Ontario and other parts of Canada. In this relatively nascent area of class action jurisprudence, employment standards, wrongful dismissal and benefits cases have all met with some success, while workplace discrimination cases have not fared as well. While a number of challenges to using class actions in the employment context remain, including overcoming the familiar tension between private enforcement via civil litigation on the one hand, and regulatory enforcement under various employment law regimes on the other, the authors emphasize the distinct benefits of class actions for non-unionized workers.

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[35] R. Douglas Elliott, "Fringe Benefits: Class Actions for Marginalized People in Canada" (2011) 53 S.C.L.R. (2d) 221.

[36] Louis Sokolov & Colleen Bauman, "Common Cause: Employment-Related Class Actions in Canada" (2011) 53 S.C.L.R. (2d) 275.

Todd Hilsee argues that effective communication and notice programs are a condition precedent to providing meaningful justice to workers and other class members, one that is too often overlooked by judges and lawyers alike.[37] While it has long been recognized that plain language requirements can help overcome literacy barriers, only recently has any attention been paid to the question of "reach"; what proportion of the class will actually become aware of the class action in issue, their rights as class members, and their entitlement to a portion of the settlement? The U.S. Federal Judicial Center's 2010 checklist, writes Hilsee, can usefully be imported into the Canadian context to help judges scrutinize notice programs, and ultimately increase the possibility of a substantively just outcome for class members.

VI. Comparative Access to Justice

The last two articles in this volume return us to the question posed by Justice Iacobucci: Are class actions trying to achieve too much? As other authors in this volume point out, responses to failures of regulatory enforcement need not be limited to private actions that fill the regulatory gap; we should also assess whether and how to fix the regulatory system itself. Mass harm redress can take a number of forms, and class actions are but one of them. Some consider compensation schemes, ombudsmen and *ex ante* regulation superior to private enforcement because of the cost and agency problems associated with representative proceedings. Others object on a normative level to using private bargaining as social engineering, especially when the bargaining occurs between lawyers, and class members do not have to consent to the settlements.

As the debate in the European Union rages about whether to include class actions in their choice of tools, such policy considerations become paramount. Dr. Chris Hodges provides an extensive background to EU developments, and then focuses on the three central policy questions that animate the debate: What are we trying to achieve? What are our options? How do we evaluate them?[38] In appraising our own short history of class actions in Canada, these same questions are worth asking and answering. What are the policy goals for class proceedings, given

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[37] Todd B. Hilsee, "Effective Class Action Notice Promotes Access to Justice: Insight from a New U.S. Federal Judicial Center Checklist" (2011) 53 S.C.L.R. (2d) 275.

[38] Christopher Hodges, "The European Approach to Justice and Redress" (2011) 53 S.C.L.R. (2d) 301, at 345-46.

Canadian and provincial legal architecture? Do we wish to prioritize one goal — for example, access to compensation — over others? Are there other techniques, like more robust regulatory schemes, that could achieve those goals? And what are the criteria by which we evaluate techniques, objectives and outcomes? Dr. Hodge's discussion of these questions in the European context is apposite to any thoughtful policy analysis of existing class action regimes.

Joanne Blennerhassett's concluding article highlights the importance of an effective private enforcement mechanism, in light of the Irish experience with multi-party litigation.[39] Although the Irish legal system does not currently provide a viable mechanism for true representative actions, groups of plaintiffs suffering from similar harm have attempted to find redress within the existing litigation framework. Their limited success underscores the need for a user-friendly, efficient form of collective redress to fulfil Ireland's commitment to access to justice, a concept with special legal significance under the European Convention on Human Rights.

VII. GOING FORWARD

The papers in this collection of essays tackle important issues familiar to those acquainted with access to justice literature: access to information as access to justice; access to meaningful, substantive justice and not just access to a procedure; funding and cost barriers; and judicial roles. All authors contribute to an informed conversation about the aims of class action litigation, the extent to which access to justice has been advanced, and how we can maximize class actions' access to justice potential.

Yet the conversation has just begun. If we are serious about measuring the impact of class actions on civil society, there is much to do going forward. Scholars, lawyers, judges and policymakers will have to revisit the aims of our class proceeding statutes and ask whether class action praxis meets them. The distinctive roles of lawyers and judges in this form of litigation must be examined, and the interests that they protect identified. Defining who is the client in a class action becomes key; if class actions have a social mission, and private action is in effect a regulatory enterprise, then interests beyond those of the class need to be

[39] Joanne Blennerhassett, "Is It Time to Get the Multi-Party Started? Exploring the Spectrum of Mass Harm Redress in Ireland" (2011) 53 S.C.L.R. (2d) 347.

examined. Finally, no appraisal can be complete without measuring outputs and costs.

Ensuring that our civil justice system makes good on its access to justice promise is a continuing, important project, fraught with ambiguity and complexity. It is a task made easier by the thoughtful, comparative, interdisciplinary work of the academics and private practitioners both in this volume and at the conference that generated their papers. I hope that our conversation continues.

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Government of Canada / Gouvernement du Canada

Canada

Aboriginal Affairs and Northern Development Canada

Statistics on the Implementation of the Indian Residential Schools Settlement Agreement

Information Update on the Common Experience Payment (From September 19, 2007 to March 31, 2013)

1. Latest Statistics about the Common Experience Payment

99% of the 80,000 estimated former students eligible for the Common Experience Payment (CEP) under the Indian Residential Schools Settlement Agreement (IRSSA) have received payment. A number of applications for the CEP are still under review.

Process Summary	Total
Projected number of Applications at launch of process	**110,000**
Projected number of Eligible Applications at launch of process	**80,000**
Actual number of Applications Received at Service Canada	**105,510**
Applications Completed at Service Canada (% of received)	**102,756 (97%)**
Applications Eligible for Payment (including Reconsideration, Amendments and Appeals)	78,859 (77%)
Applications Not Eligible for Payment (including Reconsideration, Amendments and Appeals)	23,897 (23%)
Original amount of the CEP Designated Amount Fund	**$1,900,000,000**
Total Payments (including Advance Payments)	**$1,613,419,106**
Average CEP Payment (including Advance Payments)	**$19,412**
Total Applications for Reconsideration Received	**27,565**
Reconsideration Applications Resolved (% of received)	**27,442 (99%)**
Applications Assessed as Eligible for Payment after Reconsideration	9,597 (35%)
Applications Assessed as Not Eligible for Payment after Reconsideration	17,845 (65%)
Reconsideration Applications Remaining in Process	**123**
Average Payment for Reconsideration	**$8,392**
Total Appeals to the National Administration Committee (NAC) Received	**5,101**
Appeals to the NAC Resolved (% of received)	**4,814 (94%)**
Applications Eligible for a Payment after Appeal	1,566 (33%)
Applications Not Eligible for a Payment after Appeal	3,248 (67%)

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Process Summary	Total
Appeals to the NAC Remaining in Process	**287**
Average Payment for Appeals to the NAC	**$7,801**
Total Appeals to the Courts Received	**657**
Appeals to the Courts Resolved (% of received)	**120 (18%)**
Applications Eligible for a Payment after Appeal	0
Applications Not Eligible for a Payment after Appeal	120
Appeals to the Courts Remaining in Process	**537**
Average Payment for Appeals to the Courts	**$0**

Applicants' Information

- **The deadline for applying for the CEP was September 19, 2011**. CEP applications continued to be accepted until September 19, 2012, in situations where former students could establish that they were unable to submit their application due to disability, undue hardship or exceptional circumstances.
- If your address has changed since you applied for the CEP and you have not received correspondence since submitting your application, it is important that you advise the CEP Response Centre of this change by calling **1-866-565-4526**. With your permission, they will also ensure the change is noted at Service Canada.

Overall Guiding Principle

- As the Administrator and Trustee of the CEP Designated Amount Fund, Canada is subject to the principles negotiated by the parties and ratified by the supervising courts for the validation of all applications. Canada has adhered to those principles in the assessment of all applications received to date.

Eligibility

- To be considered eligible, one must have been a resident at a recognized Indian Residential School under the IRSSA.

Assessment Principles

- All CEP applications are reviewed to ensure that those entitled to receive CEP are compensated.
- In each stage of the CEP process (initial application, reconsideration or appeal) and when necessary, Aboriginal Affairs and Northern Development Canada (AANDC) will contact applicants to gain clarification or additional information surrounding their residential school experience to help with the research assessment.
- The process accommodates the reality that some case records may be incomplete; and when information is ambiguous or incomplete, interpretation favours the applicant.
- Applications are not approved based on the applicant's declaration of residence alone.
- In all stages of the CEP process, the elderly (65+) and seriously-ill applicants receive priority.

2. Current breakdown of ineligible CEP applications

- Applications received for schools not included in the Settlement Agreement;

- Applications received for students not residents of recognized IRS;
- Applications received for schools in the Settlement Agreement that were closed during requested period;
- Applications received for claimants deceased before May 30, 2005;
- Applications received from day school students; and
- Applications received that contain more than one of the above-noted reasons for ineligibility.

3. CEP Remainder

- The IRSSA stipulates that once all Common Experience Payments have been made, if more than $40 million remains in the trust, the funds are to be made available to CEP recipients who apply in the form of personal credits of up to $3,000 each for educational purposes.
- CEP recipients will be able to choose to transfer their Personal Credit to certain family members as per the IRSSA.
- Terms and conditions for Personal Credits have been developed by Canada and the Assembly of First Nations and by Canada and Inuit Representatives to determine which programs and services and which educational institutions are eligible.
- Once the Court approves the terms and conditions and administration plan, implementation will begin as per the Court Order.
- Once the Personal Credits have been distributed, any amount remaining in the trust on January 1, 2015 is to be paid to the National Indian Brotherhood Trust Fund and the Inuvialuit Education Foundation to be used for educational programs.

Information Update on the Independent Assessment Process (From September 19, 2007 to March 31, 2013)

1. Latest Statistics about the Independent Assessment Process

- As indicated in the table below, the Indian Residential Schools Adjudication Secretariat (IRSAS) and Aboriginal Affairs and Northern Development Canada (AANDC) are making good progress in resolving claims under the Independent Assessment Process (IAP).

Process Summary	Total
Applications Received*	**37,716**
Document Disclosure by Canada to the IRSAS	**24,714**
Hearings Held	**16,700**
Claims resolved (% of received applications)	**20,413 (54%)**
through decisions	15,203

Note: Statistics include Alternative Dispute Resolution (ADR) claims

*The review of claims received is not fully completed and therefore the number of received applications may vary in the next reporting period.

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Process Summary	Total
through negotiated settlements	2,358
withdrawn	686
not admitted	2,166
Total Payments Issued	**$1.951B**
Average Payment, including Legal Costs	**$114,736**

Note: Statistics include Alternative Dispute Resolution (ADR) claims

*The review of claims received is not fully completed and therefore the number of received applications may vary in the next reporting period.

Overall guiding principles

- The IAP is one of five components of the 2007 IRSSA established to compensate former students who choose to come forward to make a claim of abuse at residential schools. The IAP is a claimant centred, non-adversarial, out-of-court process designed to resolve and compensate claims of sexual abuse, serious physical abuse, or other wrongful acts which caused serious psychological consequences.
- The IAP aims to bring a fair and lasting resolution of the legacy of Indian Residential Schools. The court-approved IRSSA was negotiated by representatives from various Aboriginal organizations, church representatives, legal representatives for former students, and the Government of Canada.
- The IRSAS remains committed to implementing and administering the IAP under the direction of the Chief Adjudicator in an independent, objective and impartial manner.
- The Chief Adjudicator is supported by five Deputy Chief Adjudicators and more than 100 Adjudicators who preside over hearings. IRSAS is a neutral office that operates independently from the parties to the Settlement Agreement, including the Government of Canada.
- All parties to the IRSSA encourage claimants to be represented by legal counsel.

Other Updates on the Implementation of the Indian Residential Schools Settlement Agreement From September 19, 2007 to March 31, 2013

Requests to add new Indian Residential Schools to the IRSSA

- Article 12 of the IRSSA sets out a two-part test that is used to assess each requested institution to determine if it should be recognized as an Indian Residential School.
- To date, 9,448 people have asked for 1,521 distinct institutions to be added to the IRSSA. The following nine institutions have been added to the IRSSA by the Government of Canada, bringing the total number of recognized institutions to 139.
    - St. Paul's Hostel, Yukon (Sept 1, 1920 to June 30, 1943)
    - Anahim Lake Dormitory, British Columbia (Sept 1, 1968 to June 30,1977)

- Cote Improved Federal Day School, Sask. (Sept 1, 1928 to June 30, 1940)
- Battleford Industrial School, Sask. (Dec 1, 1883 to May 31, 1914)
- Fort George Hostels, Quebec (Sept 1, 1975 to June 30, 1978)
- Wawanosh Home, Ontario (January 1, 1879 and August 5, 1892)
- Stirland Lake High School (Wahbon Bay Academy), Ontario (Sept 1, 1971 to June 30, 1991)
- Cristal Lake High School, Ontario (Sept 1, 1976 to June 30, 1986)
- Mistassini Hostels, Quebec (September 1, 1971 to June 30, 1978)

Outreach

Advocacy and Public Information Program

- The Advocacy and Public Information Program (APIP) began in 2007 and, is a contribution funding program managed by AANDC to encourage the sharing of information and ensure that the Aboriginal community, particularly former students and their families, are aware of all aspects of the IRSSA, including CEP and IAP. Other objectives include supporting healing and reconciliation, with a particular focus on youth and intergenerational issues.
- AANDC entered into contribution agreements with 25 organizations for a total of $3.7 million in 2012-13.

Commemoration

- The IRSSA identifies $20 million for Commemoration to provide former students, their families and communities the opportunity to pay tribute to, honour, educate, remember, and memorialize their experiences by acknowledging the systemic impacts of the residential school system. AANDC and the Truth and Reconciliation Commission (TRC) are jointly responsible for the development and implementation of Commemoration.
- To date, $14 million has been provided for Commemoration funding. The remaining funding will be provided in 2013–14 to fulfill the $20 million obligation.

Resolution Health Support Program (Health Canada)

- The Indian Residential Schools Resolution Health Support Program (IRS RHSP) provides mental health and emotional support services to former students and their families before, during and after their participation in Settlement Agreement processes, including:
  - CEP
  - IAP
  - Truth and Reconciliation Commission (TRC) events
  - Commemoration activities
- The following services are provided:
  - **Emotional Support**: Resolution Health Support Workers to listen, talk and provide support through all phases of the IRSSA
  - **Cultural Support**: Elders and/or traditional healers for teachings, ceremonies, dialogue and traditional healing

- **Professional Counselling**: Psychologists and social workers that are registered with Health Canada, for individual or family counselling
- **Assistance with transportation** may be offered when professional counselling and cultural support services are not locally available.

- For more information on the program and its services, please visit the **Health Canada website**.

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Canadian Class Action Defence

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Certification Refused Where Individual Issues Overwhelm Systemic Wrong

By Deborah Glendinning and Mary Paterson on July 31st, 2013

Whether an alleged wrong is a "systemic wrong" can decide whether the proposed class action is certified. In Canada, plaintiffs' counsel often describe alleged wrongs as "systemic wrongs" hoping to convince courts that there are common issues. The Court of Appeal for Ontario provided some guidance on the limits of systemic wrongs in *Dennis v. Ontario Lottery and Gaming Corporation* (OLG), confirming that the case before it was not truly systemic and the class action should not be certified.

The Individual Issues Overwhelm The System In Dennis v. OLG

In *Dennis*, the plaintiff was a problem gambler (i.e., he "would become preoccupied with gambling" and "engage in excessive gambling"). He signed a self-exclusion form, in which OLG undertook to use its best efforts to refuse to let the plaintiff into its casinos. OLG took a picture of him and circulated the picture to its security officers, who were supposed to refuse to let the plaintiff in. Since OLG was created, more than 17,000 people have signed a self-exclusion form.

The plaintiff said that OLG's efforts were not "best efforts" and alleged negligence, occupiers' liability and breach of contract, seeking $3.5 billion. The plaintiff characterized the case as one of "systemic wrong," focusing on OLG's alleged wrongdoing rather than the individual issues of each class member's vulnerability.

The Court of Appeal did not agree that the case was one of a systemic wrong. The Court explained that OLG's liability did not turn on the interpretation of the self-exclusion form or its security practices, but rather was "inextricably bound up with the vulnerability of the individual class members." In other words, simply signing the form did not expose all signers to the same risk because not all signers were problem gamblers, not all signers returned to casinos, not all signers who returned were let into the casinos, and not all signers could have been prevented from entering the casinos. Figuring out the shortcomings in OLG's security practices would not address the narrower issue of OLG's legal liability to each person who signed the form. The Court agreed that the class action should not be certified.

Why Is *Dennis v. OLG* Interesting?

First, the concept of a "systemic wrong" remains alive and well: the Court of Appeal confirms that systemic wrongs can and will be addressed through class actions, saying where "a systemic wrong causes harm to an undifferentiated class of individuals, it can be entirely proper to use a class proceeding." The Court explained that class actions can "resolve claims when all class members are exposed to the same risk on account of the defendant's conduct". Once that risk is established, then whether the individual class member was harmed (damages) and whether that harm was caused by the defendant's conduct (causation) can be determined individually.

However, the Court places some limits on how far the concept of "systemic wrong" can stretch before it fragments into individual claims. The systemic wrong has to expose the class to the same risk so that the defendant could theoretically be liable to anyone in the class. In other words, liability should "essentially turn on the unilateral actions of the defendant."

This subtle parsing of "systemic wrong" may be easier to understand by comparing *Dennis v. OLG* with the overtime cases like *Fresco v. CIBC*, a case in which the plaintiff alleged that the defendant had systemic practices resulting in underpayment of overtime pay. In *Fresco*, the Court held that certain elements of the defendant's liability could be determined on a class-wide basis and did "not depend on individual findings of fact." In *Dennis v. OLG*, "it would be impossible to assess whether OLG was at fault" without considering each individual's vulnerability.

Where Do We Stand?

Even comparing the two cases, however, whether the wrong is systemic or not seems to depend on your point of view. In *Fresco*, establishing certain elements of liability would significantly advance the case. In *Dennis*, even establishing certain elements of liability would not significantly advance the case. As the courts encounter more examples of facts that do not constitute a systemic wrong, we will have a better sense of when the wrong is truly systemic and when it is a loose collection of individual claims.

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Article

Gambling 2011

by Katherine Marshall

September 23, 2011

Statistics Canada Statistique Canada

Canada

PERSPECTIVES
ON LABOUR AND INCOME

Standard symbols for Statistics Canada

The following standard symbols are used in Statistics Canada publications:

.	not available for any reference period
..	not available for a specific reference period
...	not applicable
0	true zero or a value rounded to zero
0^s	value rounded to 0 (zero) where a meaningful distinction exists between true zero and the value rounded
^{p}	preliminary
^{r}	revised
x	suppressed to meet the confidentiality requirements of the *Statistics Act*
^{E}	use with caution
F	too unreliable to be published

Gambling 2011

Katherine Marshall

- Net revenue from government-run lotteries, video lottery terminals (VLTs), casinos and slot machines not in casinos rose steadily from $2.73 billion in 1992, before levelling off and remaining at around $13.7 billion since 2007 ($13.74 billion in 2010).[1]

- Net revenue from pari-mutuel betting (horse racing) dropped from $532 million to $315 million over the same period (1992 to 2010).

- Net revenue from casinos continued to represent one-third of the gambling industry (34%) in 2010, while revenue and representation were up for lotteries (27%), stable for slot machines outside casinos (mainly at racetracks) (21%) and down for VLTs for the fifth straight year (19%).

- Average gambling revenue per person 18 and over in 2009 ranged from $120 in the three territories to $855 in Saskatchewan, with a national average of $515.[2]

- Compared with workers in non-gambling industries, those in gambling were more likely to be between age 15 and 34 (42% versus 36%), be paid by the hour (80% versus 65%), be paid less ($21.95 hourly versus $24.05), and receive tips at their jobs (27% versus 7%).

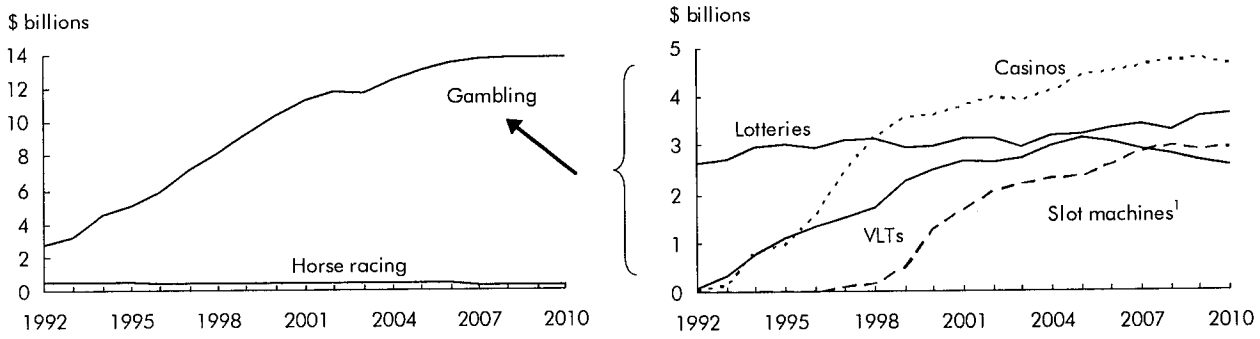
- Men increased their share of employment in the gambling industry from 35% in 1992 to 53% in 2010. Similarly the rate of full-time jobs increased from 60% to 81% between the two years.[3]

- Around 6 in 10 women and men living alone reported spending money on at least one gambling activity; however, on average men spent almost twice as much as women—$615 compared with $335.

- Gambling participation and average expenditures increased with household income. For example, 46% of households with incomes of less than $20,000 gambled in 2009 and spent an average of $390, while equivalent figures for those with incomes of $80,000 or more were 75% and $620.

For further information on any of these data, contact Katherine Marshall, Labour Statistics Division. She can be reached at 613-951-6890 or at perspectives@statcan.gc.ca.

Chart A Net revenue from government-run gambling has levelled off recently



1. Refers to those found outside government-run casinos.
Source: Statistics Canada, National Accounts.

Table 1 Gambling revenues and profits

	Gambling revenue[1]		Gambling profit[2]		Share of total revenue[3]		Revenue per capita (18 and over)[4]	
	1992	2009	1992	2009	1992	2008	1992	2009
	$ millions (current)				%		$	
Canada	**2,734**	**13,752**	**1,680**	**6,634**	**1.9**	**4.4**	**130**	**515**
Newfoundland and Labrador	80	204	42	108	2.3	2.6	190	490
Prince Edward Island	20	43	7	16	2.7	3.1	210	385
Nova Scotia	125	315	72	139	2.8	3.6	180	415
New Brunswick	117	220	49	133	2.7	2.9	210	360
Quebec	693	2,772	472	1,400	1.8	3.4	130	440
Ontario	853	4,713	529	1,713	1.9	4.9	105	455
Manitoba	153	641	105	306	2.5	5.2	185	685
Saskatchewan	62	675	39	331	1.1	5.2	85	855
Alberta	225	2,110	125	1,428	1.6	5.2	120	740
British Columbia	403	2,051	239	1,054	2.2	5.5	155	570
Yukon, Northwest Territories and Nunavut	5	10	1	6	0.3	0.3	80	120

1. Total revenue from wagers on all government-controlled gambling, such as lotteries, casinos and VLTs, minus prizes and winnings. Revisions to provincial estimates will occur in November 2011.
2. Net income of provincal governments from total gambling revenue, less operating and other expenses (see Data sources and definitions).
3. The 2008 share of total revenue calculation is based on 2008 gambling revenue and 2008 total provincial revenue. The 2009 provincial revenue will be available in November 2011.
4. Persons 18 and over were selected as this is the legal age of gambling in most provinces.
Sources: Statistics Canada, National Accounts, Public Institutions (Financial management statistics) and post-censal population estimates.

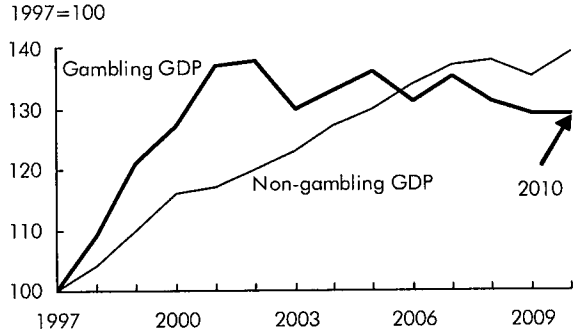
Table 2 Characteristics of workers

	Gambling[1]		Non-gambling	
	1992	2010	1992	2010
	thousand			
Total employed	**11**	**41**	**12,720**	**17,000**
	%			
Sex				
Men	35	53	55	52
Women	65	47	45	48
Age				
15 to 34	57	42	45	36
35 and over	43	58	55	64
Education				
High school or less	66	43	57	39
Postsecondary certificate or diploma	21	35	27	35
University degree	13	23	16	26
Work status				
Full-time	60	81	81	81
Part-time	40	19	19	19
Provinces				
Atlantic provinces	8	5	7	6
Quebec	F	23	24	23
Ontario	28	37	39	39
Prairies	30	23	17	19
British Columbia	25	12	13	13
Class of worker				
Employee	99	99	85	84
Self-employed	F	F	15	16

1. Employment at racetracks and 'racinos' (racetracks with slots and/or other gaming activities) is excluded. These activities are coded under 'spectator sports.'

Source: Statistics Canada, Labour Force Survey.

Chart B Gambling GDP still flat since the recent economic downturn



Note: The price, at basic prices, of the goods and services produced. The GDP figures for the gambling industry refer strictly to wagering activities, such as lottery ticket sales, VLT receipt sales, and bets at casinos. Other economic spinoffs, such as hotel and restaurant business, security services and building and equipment maintenance are not included.

Source: Statistics Canada, National Accounts.

Table 3 Characteristics of jobs

	Gambling		Non-gambling	
	1997	2010	1997	2010
	thousand			
Employees[1]	**33**	**41**	**11,331**	**14,330**
	%			
Unionized[2]	29	31	34	32
Non-unionized	71	69	66	68
Permanent job	91	93	89	87
Temporary job	9	7	11	13
Usually receive tips	27	27	7	7
No tips	73	73	93	93
Paid by the hour	80	80	61	65
Not paid by the hour	20	20	39	35
Average hourly earnings,[3] full-time			$	
Both sexes	13.30	21.95	16.55	24.05
Men	13.50	24.20	17.85	25.55
Women	13.05	18.85	14.80	22.25

1. More detailed questions on employees were introduced with the 1997 revision of the Labour Force Survey.
2. Includes persons who are not union members, but whose jobs are covered by collective agreements.
3. Includes tips and commissions.

Source: Statistics Canada, Labour Force Survey.

Table 4 Household expenditures on gambling activities

	At least one gambling activity		Government lotteries		Other lotteries/raffles, etc.		Casinos, slot machines and VLTs		Bingos	
	$	%	$	%	$	%	$	%	$	%
All households										
2000	490	74	245	64	85	31	545	21	745	9
2001	515	72	255	62	100	30	555	20	815	9
2002	570	73	265	63	130	30	680	21	905	8
2003	505	74	245	66	95	29	670	19	800	8
2004	515	71	265	61	100	28	665	19	805	6
2005	550	69	255	61	140	27	720	18	965	6
2006	495	73	255	64	110	28	685	19	520	6
2007[1]	645	52	280	48	125	17	850	17	790	4
2008	480	70	250	62	110	25	695	18	655	5
2009	495	67	265	58	110	26	710	17	530	6
One-person households[2]	460	57	210	49	80	17	890	13	515	6
Men	615	59	270	53	100	16	1,430	14	315	3
18 to 44	740	52	160	44	55	13	1,915	16	F	F
45 to 64	525	68	295	62	135	20	915	16	F	F
65 and over	570	57	375	55	110	14	1,165	7	F	F
Women	335	56	160	46	65	19	440	13	570	8
18 to 44	160	46	95	37	50	19	175	13	F	F
45 to 64	270	64	155	56	80	26	355	12	295	8
65 and over	475	57	200	45	50	14	670	13	715	12
All households										
Newfoundland and Labrador	425	68	290	55	95	36	310	6	575	13
Prince Edward Island	530	67	290	49	110	39	485	14	1,160	9
Nova Scotia	495	75	250	65	95	41	660	13	895	9
New Brunswick	440	70	260	60	95	35	535	9	780	9
Quebec	375	67	250	61	70	16	425	12	495	7
Ontario	490	66	280	59	115	24	595	19	370	5
Manitoba	540	75	255	61	95	41	610	25	735	8
Saskatchewan	735	76	250	62	135	51	1,315	23	720	5
Alberta	785	67	285	53	145	36	1,535	19	705	4
British Columbia	450	63	240	54	110	23	660	17	445	3
Income after tax										
Less than $20,000	390	46	170	39	65	10	845	8	625	7
$20,000 to $39,999	415	62	255	54	80	17	435	14	600	7
$40,000 to $59,999	495	70	295	60	90	26	655	17	515	6
$60,000 to $79,999	465	76	265	69	120	32	535	21	465	4
$80,000 and over	620	75	280	65	135	38	1,025	21	340	4

1. New screening questions were added in 2007 to reduce the response burden, but for some categories, including games of chance, the response rate was lower than expected. These screening questions were modified for 2008. See catalogue no. 62F0026M, no. 1 for more details.
2. Using one-person households allows examination of individual characteristics. Persons 18 and over were selected as this is the legal age for gambling in most provinces.

Note: Expenditures are per spending household. Unless otherwise indicated, figures are for 2009.
Source: Statistics Canada, Survey of Household Spending.

Data sources and definitions

Labour Force Survey: a monthly household survey that collects information on labour market activity, including detailed occupational and industrial classifications, from all persons 15 years and over.

National Accounts: The quarterly Income and Expenditure Accounts (IEA) is one of several programs constituting the System of National Accounts. The IEA produces detailed annual and quarterly income and expenditure accounts for all sectors of the Canadian economy, namely households, businesses, governments and non-residents.

Survey of Household Spending (SHS): an annual survey that began in 1997 and replaced the Family Expenditure Survey and the Household Facilities and Equipment Survey. The SHS collects data on expenditures, income, household facilities and equipment, and other characteristics of families and individuals living in private households.

Gambling industries: This industry group covers establishments primarily engaged in operating gambling facilities, such as casinos, bingo halls and video gaming terminals, or providing gambling services, such as lotteries and off-track betting. It excludes horse race tracks and hotels, bars and restaurants that have casinos or gambling machines on the premises.

Gambling profit: net income from all provincial and territorial government-controlled gambling, such as lotteries, casinos and VLTs after prizes and winnings, operating expenses (including wages and salaries), payments to the federal government, other System of National Accounts adjustments, and other expenses are deducted. Other expenses includes categories such as 'special payments' or 'win contributions,' which vary by province and can influence profit rates.

Gambling revenue: all money wagered on provincial and territorial government-run lotteries, casinos and VLTs, less prizes and winnings. Gambling revenue generated by and for charities and on Indian reserves is excluded.

Government casino: a government-regulated commercial casino. Permits, licences and regulations for casinos, both charity and government, vary by province. Government casinos, now permitted in several provinces, also vary by the degree of public and private involvement in their operations and management. Some government casinos are run entirely as Crown corporations, while others contract some operations—for example, maintenance, management or services—to the private sector.

Video lottery terminal (VLT): a coin-operated, free-standing, electronic game of chance. Winnings are paid out through receipts that are turned in for cash, as opposed to cash payments from slot machines. Such terminals are regulated by provincial lottery corporations.

Table 5 Household expenditures on all gambling activities by income group, 2009

	Average expenditure			Gaming as % of total income	
	All households	Reporting households	Percentage reporting	All households	Reporting households
	$			%	
Income after tax	**330**	**495**	**67**	**0.4**	**0.6**
Less than $20,000	180	390	46	1.3	2.7
$20,000 to $39,999	255	415	62	0.8	1.4
$40,000 to $59,999	345	495	70	0.7	1.0
$60,000 to $79,999	355	465	76	0.5	0.7
$80,000 and over	465	620	75	0.4	0.5

Source: Statistics Canada, Survey of Household Spending.

Notes

1. Refers to total money wagered on all non-charity government-controlled gambling, such as lotteries, casinos and VLTs, minus prizes and winnings.
2. Survey of Household Spending (SHS) and National Accounts rankings of provincial expenditures differ, in part because the SHS includes both charity and non-charity gambling activity.
3. Employment at racetracks and 'racinos' (racetracks with slots and/or other gaming activities) is excluded. These activities are coded under 'spectator sports.'

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Opinion

Gambling: A Unique Policy Challenge

Robert I. Simpson

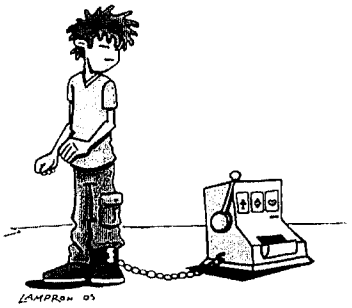
Over the past 15 years, provincial governments across Canada have consistently demonstrated their willingness to expand the availability of gambling (Campbell et al. 2010). Most recently, the Ontario Lottery and Gaming Corporation (OLG) unveiled expansion plans that included eliminating 17 slots-at-race track venues and replacing them with 29 casinos nested more closely to population centres. The singular driving force for expansion is government's quest for non-tax revenue, largely in response to an ideologically based disaffection for tax increases. The trade-off is that, without precedent, government becomes *directly* involved in providing an activity that knowingly harms the population it is elected to serve. This fact alone demands unique policy consideration in relation to how government implements and manages its gambling agenda (Smith and Rubenstein 2009). Using the current Ontario initiative as a case in point, this article explores several of these considerations.

First Principles

Three core principles frame the context for policy consideration:

1. **Gambling is addictive.** As with drinking, gambling involvement occurs along a continuum from problem free, at one extreme, to very harmful at the other. Unique to gambling, however, is that the harm can include extreme financial duress that may profoundly affect family well-being over the long term, if not permanently.

   In Ontario, there are about 330,000 problem gamblers of moderate to high severity (Wiebe et al. 2006). About 20% quit or substantially cut back each year, largely due to financial duress, and are replaced by an equal number of new gamblers (Schellinck and Schrans 1998; Single and Wiebe 2002). This rate of "churn" produces as many as one million "lifetime" problem gamblers over a decade.



2. **All gambling is loaded against gamblers.** This fact guarantees that the more gamblers play, the more they will lose (Hannum and Cabot 2001). Thus, gambling's primary function is to extract money from patrons (Adams 2008). Despite this reality, Ontario has no evidence-supported mechanisms in place to limit patrons' losses or to stop foreseeable harm (Williams et al. 2012).

   Loyalty program data show gamblers playing 26 days a month, 24 hours a day, betting up to $15,000 per hand, losing more than $100,000 per day and losing more than $700,000 in a year (Priest 2005, October 5), none of which has been subject to any intervention whatsoever.

3. **Government assumes all significant roles.** It simultaneously acts as legislator, regulator, operator, profit taker *and* guardian of public health. This creates an inescapable conflict of interest, parallel to the "perverse incentive" faced by licensed premises, where maximizing profit necessarily increases harm to patrons (Hancock et al. 2008).

   Thirty-five percent of all revenue comes from problem gamblers, with even higher rates of revenue from slot machines (60%) and horse racing (53%) (Williams and Wood 2007). Loyalty program data from Australia show that 0.5% of members generate 50% of all gambling revenue (Banks 2011, March). Although easily identified through loyalty program data and observation, the only response to mounting losses is to introduce increasingly powerful incentives to gamble more ("comps").

In light of these principles, the overriding policy imperative should be to embrace all possible measures to prevent harm to gamblers. Moreover, prevention should be operationally defined as measurably reducing known risk factors, including motivations for gambling, erroneous cognitions and loss-inducing gambling practices (Williams et al. 2012). In addition, gambling providers should be required to monitor patrons and intervene when early signs of foreseeable harm appear. Sadly, despite assertions of being world leaders in "responsible gaming," the record of Ontario and other Canadian provinces in adopting evidence-supported prevention measures falls substantially short of global leadership (Williams et al. 2012).

Eight Steps to Effective Prevention

Should provincial governments decide to effectively minimize harm from the provision of gambling, they should start with the following eight promising measures.

Make Loyalty Programs Less Harmful

Current loyalty programs actively fuel the transition to problem gambling and maximization of harm. Four changes will help contain the damage:

1. Set an annual spending threshold (e.g., $1,000) after which the points awarded are substantially reduced. (The median expenditure for all slots gamblers is about $450 per year [for casino and slots-at-racetrack venues] and $650 per year for all casino table gamblers [Wiebe et al. 2006].) Gamblers who exceed a second threshold (e.g., $5,000) should receive no further points. Excessive gambling should be neither encouraged nor rewarded.
2. Send past-month and past–12 month statements to all members. Using the whole membership as the base, provide normative feedback using percentiles and median values for frequency of gambling, duration of gambling and monthly expenditure.
3. Require casino staff to intervene when gamblers exceed thresholds for (a) frequency of gambling, (b) duration of sessions, (c) average bet size and (d) cumulative losses. Loyalty programs currently track these measures to calculate inducements to gamble more.
4. Eliminate inducements (comps) that directly encourage more gambling. Examples include limousine transport, coupons (which can reach $500) to

prime gambling, offering overnight stay during play and making last minute offers (e.g., free rooms and/or tickets for entertainment).

Remove ATMs
Automated teller machines (ATMs) should be removed from the gambling floor, if not from venues. OLG tells gamblers to "know your limit, stay within it," yet it places ATMs within reach of all gamblers. Such placement fulfills heat-of-the-moment impulses for more money to chase losses. An overlapping approach is to limit ATM withdrawals to $250 per day, as recommended by the Australian Productivity Commission (Banks 2011).

Modify Slot Machines
At 16.4%, slots have the highest rate for problem gambling (Wiebe et al. 2005; Williams and Wood 2007) due in part to the many built-in features that induce excessive play. Three harm-inducing features include these:

1. **Near misses.** Slots are programmed to show winning outcomes above and below the pay line 12 times more often than actual wins occur (Dixon et al. 2011). Gamblers are led to believe the machine is "close to winning" or "due for a win any time now" and play beyond their limits.
2. **Stop buttons.** The outcome of any spin is determined the moment it starts; the stop button merely reveals this outcome. But, the button (a) gives the illusion that gamblers have control over the outcome and (b) speeds up play and losses (Harrigan and Dixon 2009).
3. **Losses disguised as wins.** As much as 66% of the time, bells and noises sound announcing a win when the amount "won" is less than the amount bet (Jarick et al. 2012). This practice constantly reinforces patrons' beliefs that wins occur far more frequently than they in fact do (Dickson et al. 2010).

End 24/7
Without cool-down time, heavy/problem gamblers will play all night, every day (24/7) and binges of two or more days go unchecked. A minimum six-hour daily closing is needed.

Eliminate Credit
Between 2000 and 2009, Ontario casinos extended more than $86 million in credit to patrons (Priest 2005, October 2). There is no defensible reason for casinos to offer credit, given that the odds of every game are stacked against the gambler. Credit accounts, which can reach $100,000, are a sure way to increase losses and debt.

Reduce Recruitment Budgets
Ontario spends well over $500 million annually on advertising, marketing and promotions (not including an estimated $250 million by the four commercial casinos) to encourage more gambling. If gambling is such an enjoyable a pastime and government has a monopoly, why is this necessary? Halving these budgets would transfer an additional $375 million to public coffers.

Reduce Maximum Bets
Casinos allow bets up to $20,000 per hand at table games (T. Trinci, personal communication, December 18, 2010). Some hands, as in baccarat, take barely a minute to play. Why would any *entertainment* involve such incredible risk? Maximum bets should be substantially lower. In addition, the Australian Productivity Commission recommended limiting maximum bets on slot machines to one dollar (Banks 2011).

Eliminate Holding Accounts
"Front-end" accounts at casinos let gamblers store large amounts of money (often well in excess of $100,000) to draw from during play, ostensibly to "eliminate the inconvenience" of continuously transporting money from home. They also facilitate gambling until all deposited money is lost.

Further Suggestions and Conclusion

Two additional measures should be contemplated. First, government should adhere to the precautionary principle before introducing any change to gambling delivery (Hancock et al. 2008; Banks 2011). This principle, as with the introduction of new drugs, requires research showing that, as a condition for adoption, proposed changes will not increase harm. Drugs can be harmful, as can gambling, and parallel approval procedures are warranted.

Second, it is a little-known fact that consumer protection laws currently exempt gambling. There is no reason why an enterprise that explicitly incorporates deceptive and exploitive practices should not be subject to the same standards and oversight as any consumer product. A body independent of government influence, such as the provincial ombudsman, should be charged with monitoring compliance and initiating remedial action as necessary (Smith and Rubenstein 2009).

From a policy perspective, gambling is a unique and glaring departure from accepted standards and principles (Smith and Rubenstein 2009). An enlightened policy framework would establish a standard of care by which gamblers would be protected from exploitation and harm. Unfortunately, there appears to be no mechanism to persuade governments to embrace such a framework and forgo substantial revenue accrued from those being harmed.

In the absence of effective action by government, it will be left to individual gamblers who have suffered harm to turn to the civil courts for redress (Sasso and Kalajdzic 2007). As occurred in 1973 in relation to the sale of alcohol, a precedent-setting ruling that gambling operators owe a duty of care to their patrons may be the last option for social justice (Sasso and Kalajdzic 2007). Failure by government to adopt voluntary standards of care is short sighted and opens the way for more stringent standards to be imposed by the courts. As the legal community is wont to say under such circumstances, "Govern your actions accordingly."

About the Author

Robert I. Simpson was the chief executive officer of the Ontario Problem Gambling Research Centre from its inception in 2000 until 2010. He is not against gambling but stands squarely against gambling harm. He served as co-editor of the journal *International Gambling Studies* from 2005 to 2010 and has written extensively on problem gambling. He co-authored the definitive document *Prevention of Problem Gambling: A Comprehensive Review of the*

Evidence, and Identified Best Practices (Williams et al. 2012), which was prepared for the Ontario Problem Gambling Research Centre and the Ontario Ministry of Health and Long-Term Care. Much of the content for this article was drawn from this document, which can be accessed at http://hdl.handle.net/10133/3121.

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When does gambling become "compulsive"?

INTRODUCTION

Gambling in one form or another has been with us since the dawn of time. Certainly, today, gambling is widespread throughout North American society.

For most people, gambling is a pleasurable pursuit, providing relaxation for some, a release from tension to others.

To a certain percentage of the adult population, however, gambling is much more than that. It is a way of life, one which is bound to cause growing problems in many areas.

While exact statistics are not readily available, estimates point to some three percent of the adult population being pathological (compulsive) gamblers.

It may seem like rather a small statistic but it translates into hundreds of thousands of Canadians!

This pamphlet is aimed at those people, their families, friends and employers. Unfortunately, many of them are probably not even aware of the problem and have an urgent need to be informed.

WHAT IS COMPULSIVE GAMBLING?

Compulsive gambling may be most easily described as a progressive behavioural disorder in which an individual has a psychologically uncontrollable preoccupation and urge to gamble. This results in excessive gambling, the outcome of which is the loss of time, money and self-esteem.

The gambling reaches a point at which it compromises, disrupts and ultimately destroys the gambler's personal life, family relationships and vocational pursuits.

These problems in turn lead to intensification of the gambling behaviour. The cardinal features are emotional dependence on gambling, loss of control and interference with normal functioning.

Compulsive gamblers develop a need to gamble, just as an alcoholic has a need to drink or a heroin addict has the need to "shoot up." What he or she is looking for is the "high" that comes from being involved in gambling activities.

This feeling of elation is more important to the compulsive gambler than winning or losing. It's the action that counts!

THE EARLY SIGNS OF COMPULSIVE GAMBLING

The American Psychiatric Association has officially labeled compulsive gambling as a disorder of impulse control. In other words, a person may be diagnosed as a compulsive gambler if he or she has been unable to control chronic gambling and if the gambling has continued despite causing harm to family, friends or employers.

Unfortunately, many compulsive gamblers are not diagnosed as such until the late chronic stages of the disorder. In most cases, family members, friends, co-workers and employers simply are not able to recognize the symptoms.

But this does not have to be the case!

Definite patterns of compulsive gambling manifest themselves early in a person's life and can be readily observed by anyone familiar with the telltale signs. These early signs are invaluable in recognizing the need for intervention.

WHAT TO LOOK FOR SPECIFICALLY

How much time is spent gambling? This is a key element in judging a person's addiction to gambling. He or she may have a real problem if the amount of time spent gambling is excessive as perceived by general standards or, if the time spent gambling is out of proportion with the person's other activities. Listening to, or watching several sports events at the same time, could spell trouble even if the person does not admit to having wagered on a number of events.

Increasing the size and frequency of wagers. This is often the telltale sign of a person chasing lost money and trying to get even. The tendency to bet larger amounts more frequently often characterizes the real onset of compulsive gambling.

Absenteeism: Frequent, unexplained absences from work or home are common signs of a gambling problem, particularly if the person is secretive about how the time is spent. A compulsive gambler will often spend an inordinate amount of time making telephone calls which he tries to conceal. Absence from work or normal home activities to attend the races or play cards may also indicate a gambling problem.

Bravado: A social gambler may talk jokingly of a bet he won but he never belabors the point. Boasting about winning and minimizing losses are signs of compulsive gambling. The need for recognition of power, the big shot image, is a vital ingredient to a compulsive gambler.

Mercurial Mood Changes: Compulsive gamblers experience highs when they win and lows when they lose. Severe mood swings are common characteristics of all addictive behaviour but compulsive gambling is at the head of the class. Often, a compulsive gambler will be able to shake the blues merely by the thought of going into action again soon. The problem gambler is under constant pressure for action. If he is unable to get it, he takes out his hostility on those close to him - his family, friends and co-workers.

Financial Resources: A compulsive gambler always is in need of money. He will do anything, often of an anti-social nature, to acquire it to feed his habit. Secret loans, withdrawals from family bank accounts and hidden deals are surefire signs of compulsive gambling. While a social gambler will work to make up for money lost gambling, an addicted gambler will come up with a variety of schemes to acquire funds. When he has exhausted legal means, he will invariably turn to criminal actions. Embezzling money from an employer is common. The compulsive gambler, however, never considers his action as stealing. He rationalizes it by claiming he is merely borrowing the money and will return it as soon as he makes a big score. Unfortunately, of course, this rarely happens. Sooner or later the compulsive gambler's actions are discovered and he, as well as his family and friends, have to pay the consequences.

Special Occasions: A person may be diagnosed as having a gambling problem if he or she insists on spending free or vacation time where some form of gambling is available. Compulsive gamblers have been known even to plan their honeymoons to coincide with the availability of a casino or race track.

Good Time to Gamble: A compulsive gambler doesn't need much of an excuse to gamble. He will do it under almost any circumstances, good or bad. He will gamble to feel better when facing a crisis. He will gamble when facing a disappointment. But he will also gamble to celebrate good fortune such as a birth, a promotion, a pay raise.

The Compulsive Trait: Compulsive gamblers often are people with high energy levels who are intolerant of boredom. They are usually charming and attractive personalities but have low self-esteem. They are often overachievers.

The Big Score: A common characteristic of a compulsive gambler is his quest for the "big score." It is this faith in his or her future ability to hit it big that keeps them going, often enduring countless heartaches. There is no evidence that any compulsive gambler ever hit it big. On the contrary, compulsive gamblers often wind up at the extreme other end of the social scale, - destitute, bereft of family and friends and alone!

Canadian Self-Exclusion Program Features

PROGRAM FEATURES

	Ban Length Options	Detection/ Enforcement Methods	Breaches	Information Management	Counselling/ Education/Referral
AB	6 months 1 year, 2 year or 3 years	The pictures, personal information and agreement expiry date for all people who have self-excluded are shared with all casinos/REGs through a centralized computer system. Detection is reliant on venue and RGIC staff using information in the computer system.	Individuals are escorted off the premises and may be charged with a general offence under the Gaming and Liquor Act (maximum penalty is a $10 000 fine and/or 6 months imprisonment). RGIC staff will also take the opportunity to discuss the situation with the individual and provide problem gambling resource materials and offer a referral to AADAC or other problem gambling services.	Information is kept confidential and is stored in a centralized computerized database: the Gaming Information Network (GIN). People who have self-excluded may be contacted for feedback during program evaluations.	The program does not have any reinstatement conditions. However, in 2008, AGLC in partnership with AADAC, will be developing a mandatory reinstatement program.
BC	6 months 1 year 2 year or 3 years	Facial recognition software	Patron asked to leave and escorted out. Charges/fines possible but not used in practice. After 3 breaches patrons are contacted and reminded of their bans and encouraged to seek treatment.	iTrak Databank collects information (smaller venues don't have iTrack): breaches are recorded: venues have books with patron photos and bulletins	Referral to counselling provided on the form and offered at time of self-exclusion.
MB	2 years (indefinite if patron does not reinstate)	Visual detection from photographs on the iTrak system (electronic security report system), facial recognition was implemented in December 2007.	Shift manager involved with all breaches and encourages patron to seek treatment. Shift manager often asks RGIC staff to speak with the patron about support and referral. Charges/fines are possible but rare.	Patron photos on the computerized iTrak system, an electronic security reporting system	Mandatory attendance at half-day education program operated by the AFM prior to reinstatement.
NS	Lifetime/ indefinite	Visual detection by photos	There is currently no penalty for breaching. A person who is detected breaching will be removed from the property and issued a Protection of Property Act notice. If the person violates this notice, the police are called and they issue a Summary Offence Ticket, which carries a maximum fine of $500.	A binder with patron information and photos, returned to on regular basis	Not applicable
ON	Lifetime/ indefinite (minimum 6 month term)	Visual detection by photos Player's cards are flagged using computer software.	First breach receives a verbal warning. Repeated breaches may result in a site trespass and/or trespassing charges (fine of $120), at the discretion of security staff.	Hard copies of paperwork and photographs kept; electronic database being developed	Patrons provided with brochures on treatment options
PEI	6 months – 3 years	Visual detection by photos; surveillance team uses cameras	On the first breach, the person is reminded of the agreement's conditions. Repeated breaches will result in criminal charges.	Reports and tracking forms are printed and given to security; surveillance has access to photos and incident reports	Referrals to addiction services, credit counselling, mental health services; provides information on GA meetings and contacts
PQ	3 months – 5 years	Visual detection by photos	No legal ramifications	Patron information and photos stored on computer database	Mandatory (1-2 hr) session with counsellor to evaluate gambling behaviour if the participant opts for the "gateway treatment model" pilot project
SK	Up to 5 yrs	Facial recognition software: ICore flags the player cards of people who have self-excluded	Patron receives a warning letter for the first breach. Repeated breaches result in charges under the Alcohol and Gaming Act ($150 fine).	Information updated in iTrak at the time of self-exclusion; data password protected and available to Level 2 trained staff and security	Prior to self-exclusion RGIC staff may work with at-risk patrons to help develop personal responsible gambling strategies; referrals provided in the information package they receive at the time of self-exclusion registration or from RGIC staff

* There are currently two self-exclusion options in Quebec. The first is the standard option that does not feature counselling, the second is an enhanced option that features counselling and support as part of the "gateway treatment" model.

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Ontario Lottery and Gaming Corporation

Societe des loteries et des jeux de l'Ontario

This is Exhibit II referred to in the affidavit of LORI STOLTZ sworn before me, this 3rd day of APRIL 20 09

Sally Powell

A COMMISSIONER FOR TAKING AFFIDAVITS

Sally Patricia Powell, a Commissioner, etc., Province of Ontario, for Adair Morse LLP, Barristers and Solicitors. Expires October 30, 2011.

RESPONSIBLE GAMING PROBLEM GAMBLING CONSULTATION

Final Report

October 30, 2001

Prepared by: Neasa Martin
Neasa Martin & Associates

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Mandate

The OLGC through this consulting project sought to:

- Research responsible gaming and problem gambling programs & policies within the Canadian Industry, selected American and international gaming and associated industries based on OLGC identified informants.
- Identify existing policies and programs in related industries where social responsibility is critical.
- Develop policy guidelines, which reflect the OLGC commitment to responsible gaming, through a comparative analysis of existing policies and programs.
- Identify options for developing Responsible Gaming program elements and initiatives, which will provide leadership and direction to OLGC staff.

Based on consultation with OLGC staff, the scope and depth of the research was expanded to capture detailed program elements, staff training & self-exclusion trends of importance to the OLGC.[1]

[1] To achieve a comparative review the number of key informants was expanded by approximately 200% with the approval of OLGC management. An ancillary benefit of the expanded research was the creation of a comprehensive contact database for gaming and related industries.

Customer participation in a problem gambling education program is increasingly a requirement for re-instating gaming privileges. In Canada almost every gaming jurisdiction has been threatened with litigation but with no successful outcome. There is every indication that with the rapid growth of gaming and the aggressive expansion of facilities within communities that this will change. As the issue of problem gambling continues to gain increased community and media attention, there is every reason to believe that a court case could be seen as an opportunity by the courts and governments to introduce forced regulation of the industry.

Even more importantly, the OLGC policy of offering "self-exclusion" to its customers brings with it a significant risk and liability to the Corporation as it voluntarily assumes ownership in the restriction of access to its gaming facilities.

If the OLGC had consulted with experts in the treatment of problem gambling it may have learned that self-exclusion undermines a fundamental tenet of treatment. The Corporation's objectives would be better served if it shifted the focus from one of enforced exclusion to an opportunity to link customers to help.

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Staff Training:

Currently, OLGC corporate staff training standards related to Responsible Gaming do not exist. Responsibility, by default, has been left to the individual gaming organizations. As a consequence, staff training is inconsistent across the Corporation.

A clearly defined framework based on agreed body of knowledge and appropriate "skill sets" will guide the OLGC in reaching its objectives. If best practices are applied, then all staff will receive an orientation to social responsibility principles, corporate policies and their role in achieving desired goals. The corporation defines the knowledge base and specific skills required by staff to fulfill their responsibilities, sets minimum standards for training, and monitors and evaluates impact. Specialized training for select staff to respond and link customers to help is common. It is through an organization's staff that its mission is realized.

One of the significant challenges that OLGC faces in its efforts to introduce staff training programmes in responsible gaming is that there is no agreement on who should be trained, to what standards, how training should be delivered and by whom. In spite of this lack of agreement, there is a clear interest on the part of commercial casino staff to develop a comprehensive framework with clearly defined expectations and success criteria as soon as possible.

There is currently a sense of urgency within the Corporation's HR department to address this gap through the issuance of an RFP for staff training in the area of responsible gaming. Unfortunately this urgency is compromised by to the lack of an agreed framework, which to be most effective, requires consultation with leading experts in research, treatment and prevention of problem gambling. The Consultant strongly recommends that the RFP be rescheduled until such time as the consultation process has been completed. In the absence of this consultation and the development of a sound framework, the Corporation is at risk of having training programmes misaligned and or lacking in the desirable impact.

COMPARATIVE ANALYSIS
Detailed Findings

CORPORATE POLICY

The majority of **Canadian** Gaming jurisdictions are undergoing or have recently undergone a comprehensive policy review, which shifts towards responsible gaming as a core – corporate-wide framework. Policy is informed by a review of related industry, key stakeholder and consumer consultation. Close consultation with recognized experts and knowledge of research findings is seen as essential and informs policy decisions. Strategic Plans are in place and guide program development. The trend is to establish a Senior Director of Responsible Gaming with a designated budget. Creation of a Responsible Gaming Committee composed of Senior Department staff to put framework into operation is increasingly the trend.

In **American** jurisdictions the focus on R/G – P/G is considerably more uneven and driven by increased or threatened regulation. Gambling is a commercially owned and operated industry, which is regulated by the State. Lotteries tend to be state run and regulated through commissions. A random Internet site review of 65 casinos (list provided by OLGC staff) revealed only 6 with reference to problem gambling. The most common element was signs & symptoms and link to help. However, there are a few recognized industry leaders with clearly developed R/G- P/G frameworks, Corporate Codes of Commitment, Marketing & Advertisement Codes and clear policies regarding staff responsibility to implement the framework. Groups such as the American Gaming Association & North American Association of State and Provincial Lotteries have created a knowledge base and resources to guide the industry in this area.

OLGC through its Annual Report & Corporate website makes a public commitment to Responsible Gaming and has developed many of the common program elements of a responsible gaming/problem gambling. However it lacks an overarching framework, which clarifies the principle of R/G, vision and values, or strategic plan to guide the organization and direct staff to achieve a shared goal. Nor has it dedicated staff and budget resources to developing this important area of responsibility. Policies appear to develop in reaction to events and not as part of an integrated strategic plan. The lack of staff attention or fiscal resources committed to R/G-P/G brings the degree of corporate commitment into question.

PROGRAM STRATEGIES & ELEMENTS:

Almost all informants recognize that the gaming industry is not the 'expert' in this area. It is considered essential to work closely with research/ health / treatment/ public education experts and collaborate with them in developing and defining program elements. All **Canadian** gaming industries have the following program elements in place: Responsible gaming messages, posters, brochures, and promotion of help-line and self-exclusion programs. The current trend is towards responsible gaming which places increasing focus on informing customers and staff of the odds of play, signs & symptoms of problem gambling, self-assessment strategies, identifying risk groups and risk factors for developing problem gambling. Prevention of problem gambling, early identification and active linking of customers & staff to help is seen as the priority.

Public Awareness activities, which emphasis prevention and help are almost always, delivered in partnership with health departments and community partners. Many jurisdictions have identified and targeted special risk groups for greater education i.e. youth- school based programs. The most commonly used strategy includes: print and radio media, posters, brochures, and community forums.

Within the **American** sector industry leaders (Anchor- Harrah's etc.) similar program elements are in place. Experts in R/P-P/G work closely with industry leaders to define and develop program strategies and elements. There is more emphasis placed on personal responsibility and choice. Posters, brochures, signage tag lines on products and machines and promotion of help-lines are common program elements. Also included are signs & symptoms of problem gambling and self-assessment. Lotteries also include these elements in marketing, point of sale posters and tag lines on products. Public Awareness is most often coordinated through the National Problem Gambling Awareness Week sponsored by the American Gaming Industry. In some jurisdictions Regulatory Agencies require casinos and gaming establishments to develop PG programs and a failure to do so will result in loss of licence.

OLGC has divided responsible gaming and problem gambling between three different staff that collectively commits less than one day a week (on project basis). As a consequence the responsibility, authority and accountability necessary to create a proactive, comprehensive and integrated responsible gaming program is not in place. Ontario is the only jurisdiction that does not actively included health, research and awareness experts into defining, designing and developing R/G –P/G programs, including staff training.

Prior to amalgamation many initiatives in P/G were under way within the commercial casino sector that built upon community expertise and partnership. Staff training was being offered, although not in a consistent or comprehensive manner. Following amalgamation the operators have waited for OLGC to develop an organizational framework that would provide principles, direction, and a strategic plan outlining priorities and define expectations of them as operators. In the absence of this previous initiatives have stalled.

STAFF TRAINING:

In nearly all-Canadian jurisdictions treatment/ health experts take an active role in designing and delivering staff training in consultation with the industry. A number of provinces sub-contract staff training to private companies. The trend within the Canadian industry is moving towards three levels of training- 1) all staff to receive orientation/ training in R/G-P/G principles including odds of play, signs & symptoms, self-assessment, responsible play; corporate framework and policies, which emphasised shared responsibility. 2) Staff with customer contact receives training in identification of signs & symptoms, and strategies for respectful response to link customers to help. 3) Selected supervisory staff is trained in intervention and referral. Employee Assistance Programs were often emphasised as important and increasing staff awareness of R/G & P/G helped link vulnerable staff to help.

Some **American** states (Nevada) require staff training for licensing. However, within the industry intervention with customers remains a controversy. Recognized industry leaders include an orientation to all staff on hire of R/G- P/G (Operation Bet Smart- Red Flags & Referrals etc.) and shared responsibility for recognizing underage, improper drinking and problem gamblers. Direction on how to offer assistance to guests is provided. Supervisors receive specialized response training. The focus is link to help. P/G experts developed staff training. Training continues through workshops, seminars, paycheque inserts, industry newsletter, back-of-the-house messaging etc.

OLGC currently lacks an overall framework for staff training or even basic agreement of what knowledge and skills staff should possess to meet their obligation is a major impediment to moving forward. Staff training has been left to the gaming operators. Staff training is inconsistent in its frequency of delivery, content or agreement about who requires training.

SELF-EXCLUSION:

Within the **Canadian** Gaming Industry (not Lotteries) self-exclusion programs forms a core element of R/G-P/G programs. In some jurisdictions the regulatory body administers the program. All SE programs, with the exception of Ontario, were developed by or in close consultation with treatment/ health experts. There are similarities in the way the program is structured, managed and duration of exclusion varies. An important trend is to see SE as the last step of a more comprehensive R/G program with the emphasis on linking customers to help rather than enforcing exclusion. A number of provinces are moving towards mandatory education as a requirement for re-entry. Only Quebec has an evaluation component and reports the highest degree of satisfaction with the program. They escort but do not charge customers on re-entry and the focus is to link people to care. There have been no successful legal challenges mounted regarding this program. The most common legal threat is for failing to restrict access and resulting financial losses.

In **America** the focus is on Self-Restriction rather than Self-Exclusion and stress individual rights and responsibilities. The most common elements include removal from marketing, special club privileges, denial of cheque and credit privileges. Some states (Missouri, N.J) have imposed regulations that require S/E and in some jurisdictions it is the regulating body, which administers the program. In these states customers can be denied play privileges and winnings for both customers and casinos are denied. Arrest for trespassing is used to encourage customers to get help.

OLGC's offers a province wide SE program. The move to create a province-wide harmonized program has created complex operational problems. The large number of customers on the program makes effective recognition across sites relatively impossible. The SE program stresses the OLGC's responsibility to enforce the restriction. This shifts responsibility for managing problem gambling away from the individual and on to OLGC, and undermines the basis tenant of effective treatment. There is currently no research to support this program but many continue to see it as having an important last step role in a responsible gaming strategy. However, the program needs a careful re-thinking to bring it in line with what recognized research and treatment experts think would give it utility. Refocusing the Self-Exclusion Program's goal to linking customers

to help would make a more efficient, operationally sound program and reduce liability for the OLGC.

COMMUNICATIONS:
The trend within the **Canadian** industry is to active promote policies and programs through a strategic communications plan to create greater transparency. Most common vehicles mentioned include corporate website, production of branded brochures, posters and signage with corporate identified tag lines and media releases. Industry representatives participating in forums, workshops and conferences were mentioned as valuable for communicating corporate commitment.

A note of caution was frequently mentioned not to make responsible gaming part of marketing or public relations activity. It. must be seen to have integrity. Develop your framework and define and implement your programs before communicating them to the public. Within the **American** market those that have a R/G-P/G program actively promote their program and aggressively position themselves as industry leaders in ways mentioned above.

COMMUNITY PARTNERSHIPS:
Across **Canada** the importance of community consultation and partnerships was strongly and repeatedly emphasised. Developing partnerships with organizations with high public credibility, expert knowledge, community reach and capacity was thought to be essential for developing and delivering programs. Public Awareness Programs without community partnerships was found to have little reach and low credibility. Some jurisdictions have formal structures (annual round table, public surveys, community forums) in place to involve community partners but for most it is project based and ad hoc in nature. The need to understand and listen to public concerns without defensiveness was seen as important to building confidence and trust.

In **America** the trend is towards creating industry based Associations that develop the knowledge base, create policy framework and define program elements and strategies based on research and expert knowledge.

Through this research the **OLGC** has been identified, as an organization that works in isolation, is defensive about its programs and closed to new ideas. There are few mechanisms in place to garner input or understand issues and concerns. Communications have been seen as part of marketing or public affairs. The actions of the corporation are often seen to be out-of-sync with stated commitment to responsible gaming. This is most evident in the area of advertisement & marketing.

INTERNATIONAL INTERNET REVIEW:
A desktop search of Australia, Britain & European websites within the gaming & lottery industries was undertaken. There are pockets of information to be found but is not as prolific or developed as in North America. In Australia little attention is paid to responsible gaming- problem gambling on casino and lottery sites. More information can be found on public debate sites (church groups, citizens groups, municipal counsels) and focus on the need for greater control & restrictions of gaming operations. Policy documents, position papers, Codes of Ethics etc. are readily accessible. Those sites

COMPARATIVE REVIEW- DRAFT

Self-Exclusion- Canadian Jurisdictions

British Columbia	BCLGC-Administers SE, 500 people on program/year. 6-month minimum. Written application- photographed. Apply thru casinos & BCLGC corp. office Security Department manages program. Escorted off premises- if refuse charge with trespassing. No marketing material. Written request for re-entry. Considering mandatory education. Signs & staff promote SE program. Voluntary nature of program stressed- last steps in RG program- stress personal responsibility of customers. No successful legal action- threats re: re-entry & $ loss. No evaluation- Question efficacy. MOH consulted in program development.
Alberta	Alberta Gaming &Licensing Commission administers program. 225 people/year. 1-year minimum. Written application- 24 hour cooling off. Apply thru casinos or AG&LC offices. Security Department manages program. Escorted off premises- if refuse charge with trespassing. No marketing material. Written request for re-entry. Considering mandatory education. Signs & staff promote program. Voluntary nature of program emphasised - last step in R/G program- stress personal responsibility of customers. No successful legal action- threats re: re-entry & $ loss. No evaluation done. Not seen as effective but satisfied. AADAC developed program.
Saskatchewan#	Casino Regina administers program. Written application through casino – photographed and circulated through Security Department who manages program. Promoted through website
Manitoba	Manitoba Lottery Corporation administers program. Program currently under review. 400 people/year. Written application required through casino or MLC offices. Customer photographed. Security Department manages program. Escorted off premises- if refuse charge with trespassing. No marketing material. Mandatory ½ day education required thru AFM for reinstatement. Signs, staff & treatment providers promote. Personal responsibility- Voluntary nature of program emphasized with emphasis on linking customers to help. Legal threats- no action re: re-entry & $ loss. No evaluation beyond tracking #'s. MLC questions efficacy of program. AFM consulted re: program design.
Ontario	Commercial casinos developed program. In '99. OLGC created a province wide program administered by OLGC staff. 2,000 people on program with 1,000 added yearly. Minimum 6 months exclusion. Written application through all gaming sites. Customers photographed and circulated across all sites to security staff. Three requests by customer results in an automatic 5-year ban. Security Department manages programs at site level. Re-entry results in trespassing charges with increasing penalties. No marketing material- loss of special players privileges. Written request for re-instatement- interview- automatic 30 days. Program not actively promoted. Volunteer program. Customer privacy and enforcement stressed. No formal evaluation. Internal review (2001) has identified deficiencies, need for overhaul of program identified. Difficult to enforce.

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* Only works if everyone takes equal responsibility. Must be corporate wide.
* Must be proactive. Don't wait for the media to push you into responsible gaming activities.
* EAP programs are essential as an aspect of RG strategies.
* Public education through school programs, PSA's and information programs important.
* Treatment must be available despite ability to pay. The industry must establish a special treatment fund for those who can't pay.
* Child safety falls under RG.
* Pitfall is to develop a program and not monitor or enforce it.
* Apathy & complacency- after initial program instituted signage deteriorates staff turn over, media attention shifts.
* Work in partnership.
* Don't be reactive- regulate or be regulated. Enlightened self interest.
* Corproate wide response- integrated into every aspect of operations. Understand RG/PG principles.
* Must have buy in from top. Staff must feel empowered .
* Senior role – build the chain with managers and operators, provide direction, set the standard but encourage innovation.
* Don't see this as a marketing tool. That is backwards to what is needed. The public and industry will see immediately efforts to build this around marketing goals. Don't issue a press release until work is well underway and results can be shared. Build support for the program first. .You are inviting criticism will be seen as self serving.
* Experiment with new ideas, evaluate impact and improve.
* Establish a Director of Responsible Gaming with the ear of senior management. Authority to act. Create a RG committee with representation for every department. Include those who have authority and a positive interest.
* 4 R's :Realistic goals, Develop resources- build on what is already being done.
  Take responsibility- hold people accountable- rewards/consequences
  Review & Revise- Measure results based on realistic goals. A results focus improved quality. Research impact of your programs- not just on money spent

RECOMMENDATIONS FROM OLGC CASINO OPERATORS

* The OLGC are the owners of the business and receive the lion's share of revenues. They should take the lead in creating an organizational framework, which is comprehensive. Build on research and expert knowledge.
* We look to OLGC to provide us with principles not how to's. There is a void. Address the larger overarching issues and develop a policy framework and provincial strategy.
* Develop a program and set out clear expectations of operators.
* The OLGC should take the lead in creating education and awareness programs.
* We are in the entertainment not treatment business. Gambling is fun for most people.
* OLGC should be establishing staff orientation, which includes policies and guidelines for response.

* OLGC as owners must provide direction regarding responsible gaming and problem gambling. Operators are not going to act or use their profits to address this issue unless required or given a dedicated budget line for program development.
* OLGC needs to allocate iscal and human resources for program development related to RG/PG. Mandatory training will require financial resources to deliver. Casino operators will not use profits for this. OLGC should develop a resource library on RG/PG.
* Casino operators are looking to OLGC to provide direction re: RG/PG.
* OLGC should set the framework and define the issues. Can't continue to fly blindly. Need a consistent provincial message, core program elements.
* OLGC should define- casinos should implement.
* Provide clear expectations of what OLGC wants from operators in this area.
* We don't want to make staff more than they are. They are in the entertainment not treatment business. Staff struggles with the desire to be helpful to people in distress but can't cross the line. "Respect & Respond".
* OLGC will come under increased scrutiny to see what it is spending on responsible gaming programs. What are they doing? OLGC owns the responsibility- they hold the authority.
* A Senior position for responsible gaming & problem gambling will help programs develop- creates a single point of contact and a knowledge base for casinos to draw upon. Leave local enterprises to develop their own programs building on local interests and resources.
* Must talk the talk AND walk the walk.
* Programs across Ontario should be recognizable, visible, communicated and advertised. OLGC must take the lead in creating a strategic plan.

* SELF-EXCLUSION
* Stop "nibbling at the edges and don't use a hammer to kill a fly". Use a proportional response. This is a voluntary program – ownership for staying out belongs with customer.
* Self-exclusion was extremely effective when managed locally. No longer effective.
* If it must be provincial create a central database to coordinate.
* Intervention is a thorny issue. May be legal issues involved in both intervening and not intervening.
* If it must stay province wide then OLGC must create a centralized database to coordinate both entry and removal. Should have a longer exclusion period. Six months is too short to insure people get help. Mandatory education on problem gambling should be mandatory before re-admission to program is possible.
* We should evaluate the program to see if it is the best approach for helping gamblers.
* SE should be a small component of a larger strategy.
* We should be evaluating the impact of what is being done. Is it helping? Is it really a deterrent? Are there other strategies, which could be more helpful? Ask people who have gone through the program. All participants in SE should be asked to participate in ongoing research.
* Public perception is very important. This is a 'feel good' program.

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OLGC- Summary of Responses- Canadian Jurisdiction

Role: OPGRC is mandated to invest in research, increase capacity for research and to disseminate research findings to enhance our understanding of problem gambling, strengthen treatment, prevention and awareness of problem gambling.

Policy: OPGC has developed a "Problem Gambling Framework" (Sept. 2001) to define its mandate and policy framework. Developed by staff and approved by Board of Directors. OPGRC takes a neutral position on gambling. OPGC recommends that OLGC make its principles more transparent.

Program Strategies & Elements: OPGRC recommends that policies and programs of the OLGC be informed by research findings related to problem gambling. OPGRC define responsible gaming as : "individuals gamble no more than is planned or is affordable" and problem gambling "develop a dependency (consumes more time, impaired control) and has negative consequences (debt, work, family). OLGC can use research to identify gaming practices that will minimize the risk of developing gambling problems and directing those with problems to help. Elements of RG should include: product warnings, signs & symptoms of pg, self-identification, risk and responsible gaming practices, response strategies for staff and links to help. Evaluate your programs and revise to improve. Research findings are showing gambling problems are increasing in proportion to the level of gaming available. When gambling problems increase so does community opposition. Get ahead and be proactive.

Staff Training: Staff training needs to include: general awareness, specific awareness, play interruption and links to help. Must include EAP that are in sync with corporate strategy.

Self-Exclusion: "Feel good" program with no scientific evidence to support it. OLGC should consider getting rid of it because: 1) it is impossible to monitor, 2) conflicts with clinical best practice by diminishing personal responsibility and assuming responsibility for the individuals problem, 3) increases OLGC risk through assumed liability. Not required, voluntarily imposed- if you fail to meet your assumed responsibility courts may award damages and reparations. Look to alcohol & tobacco industry and 4) it is very costly to administer. Resources may be better spent on other strategies with known efficacy.

Communications: Communication plans in development. Will include web site, dissemination of research to interested parties through publication of findings, conferences, seminars and workshops and media releases.

Community Partnerships: Involve recognized experts to inform practice and program development. Link gaming- treatment- research-education & awareness. Take care not to invite anti-gambling activists into planning process because of the potential disruption.

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REQUEST FOR PROPOSAL

PROJECT #: 0708-173

PROJECT NAME: **Self Exclusion & Trespass Database Management System**

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PART A - BACKGROUND AND SCOPE

A 1. BACKGROUND INFORMATION:

Role of the Government of Ontario

As a Crown agency, Ontario Lottery and Gaming Corporation (OLG) reports to the Government of Ontario's Ministry of Public Infrastructure Renewal (PIR) and is responsible for operating the province's lotteries, casinos and slots program. The Alcohol and Gaming Commission of Ontario (AGCO) is responsible for regulating casino gaming and lottery gaming as well as bingo in Ontario.

The Legislative authority of the Corporation is set out in the *Ontario Lottery and Gaming Corporation Act, 1999*. Classified as an Operational Enterprise Agency, OLG has a single shareholder, the Government of Ontario.

Members of OLG's Board of Directors and its Chair are appointed by the Lieutenant Governor in Council from various communities across the Province of Ontario. Neither the Chair nor members are full-time and none are members of management.

OUR PURPOSE

Making life better for people across Ontario. We make it possible by generating revenue provincially and economic and social benefits locally.

OUR VISION

To be the role model for gaming entertainment worldwide, by creating excitement and possibility for customers and generating economic return while upholding the public's best interest.

OUR VALUES

Act with Integrity

This means doing the "right thing." We will balance what our customers and business partners ask of us with what the people of Ontario expect of us.

***Respect* our customers, employees, partners and the people of Ontario.** Respect starts with listening openly and honestly to the diversity of people and ideas around us.

Be *Accountable*

We accept the responsibility of setting and attaining high standards for ourselves in serving our customers and acting in the public interest.

OLG Business Units

OLG consists of the following lines of business:

- **OLG Lotteries** - OLG currently operates thirteen terminal based lottery games and launches over 50 instant lottery products in any given year through nearly 11,000 independent lottery retailers across the province.
- **OLG Bingo** - Bingo Gaming operates 4 Electronic Bingo sites (e-sites) and offers a family of Bingo games in 43 Bingo Centres across Ontario.

- **OLG Casinos** - OLG owns and operates five OLG Casinos in Ontario in Brantford, Point Edward, Sault Ste. Marie, the Thousand Islands and Thunder Bay. OLG also owns and maintains authority over the slot operation at Great Blue Heron Casino, an aboriginal casino owned by the Mississaugas of Scugog Island First Nation in Port Perry.

- **OLG Resort Casinos** - OLG is responsible for four resort casinos - Casino Windsor, Casino Rama, Casino Niagara and Fallsview Casino Resort. These sites are owned and managed by OLG and are operated by the private sector.

- **OLG Slots** - OLG operates 17 slot machine facilities at racetracks across Ontario.

- **OLG Corporate** - The Corporation functions are comprised of a Shared Services Division including the Finance, Information Technology, Human Resources, and Marketing Departments. The Corporation operates head offices in Toronto and Sault Ste Marie, as well as a data centre, prize office and four warehouses in the Greater Toronto Area.

References to OLG may include its affiliate, Ontario Gaming Assets Corporation (OGAC).

For further information regarding OLG, its lottery products, gaming sites, policies and core values, visit the web site at www.OLG.ca

A 2. PROJECT OVERVIEW

This Request for Proposal (the "RFP") seeks to procure a technology solution to administer the Self-Exclusion (SE) program. This RFP will specify the requirements for an integrated system comprised of three interrelated components:

- A Self Exclusion (SE) and Trespass Database
- Facial Recognition (FR) technology with Biometric Encryption (BE) for privacy protection
- The conversion of the existing paper SE database, including the migration of data and static two-dimensional photographs into the new central database.

In addition to these components the RFP will request solutions that address:

- Issues related to connecting the central SE databases with the various existing databases, e.g. marketing, security and surveillance databases at resort casinos.
- The needs of OLG, including working within its regulatory framework and

adhering to industry and corporate standards/best practices used by technology vendors serving the gaming industry.

OLG will be seeking proponents to be the primary supplier(s) of these components to OLG for a minimum of three [3] years. Any supplier contract resulting from this RFP may be extended on an annual basis by OLG for a total period not to exceed five [5] years at a negotiated price agreeable to the successful proponent and to OLG.

This RFP is subject to Chapter Five of the Agreement on Internal Trade (AIT). For more information regarding the AIT go to http://www.ait-aci.ca/index.html.

Background, Terminology:

The Self-Exclusion program is a self-help tool that provides patrons with the opportunity to voluntarily remove themselves from gaming facilities in Ontario. To support people who Self-Exclude, the OLG and Resort Casino operators remove the names of SE patrons from gaming marketing mailing lists and security personnel will help remove any SE patron from a gaming facility should they return, and these staff have the prerogative to "trespass" such patrons. The trespass is a statement that the individual is not permitted to enter the site for a period of time specified in a trespass document. A trespass is an involuntary action and when issued the individual cannot reinstate from it.

The Self-Exclusion process is administered similarly across OLG gaming sites. The high-level process has four steps: Initiate; Process and Validate; Monitor; Report and Analyze. When patrons initiate their entry into the program, they complete and sign a form and have their picture taken. This information is entered into the database, and it is utilized by authorized program users at gaming sites and OLG corporate offices for a few purposes, primarily to verify individuals' identities, and to analyze and report on data. Currently, approximately 11,700 individuals are actively self-excluded (upon signing a Non-Disclosure Agreement, proponents will receive an appendix with complete details on business processes required for the SE program).

The SE program requires a centralized database that will record, store and track records including facial images of Self-Excluded patrons and patron trespass histories at 27 sites: Resort Casinos, OLG casinos, and Slots-at-Racetracks ("sites", "facilities"). The system will manage SE patron information and deliver it to all sites quickly and

accurately.

FR technology is intended to improve OLG's ability to detect SE patrons who contravene the terms of the program by entering a gaming facility. BE is included in the solution to provide a high degree of privacy assurance for the storage and management of patron records and to help establish, through OLG's partnership with the Information Privacy Commissioner of Ontario, a benchmark standard for the use of BE in the province. OLG has contracted with researchers at the University of Toronto to conduct original research into BE algorithms, and this work is underway.

A 3. PROJECT CONSTRAINTS

Proponents are to consider the following constraints in their proposal:

- OLG operates within a highly regulated environment
- The Racetrack and Casino sites are geographically dispersed across the Province of Ontario (visit the web site at www.OLG.ca)
- The services must be performed exclusively by the proponent and the proponent may not delegate, assign or subcontract any of the proponent's obligations to any other person, firm or corporation without prior written approval of OLG.

PART B – RFP PROCESS AND SUBMISSION INSTRUCTIONS

B 1. RFP Schedule

For the purposes of this RFP, OLG has established the following timing deadlines for the completion of the RFP Process.

Schedule	Date & Time
RFP Release	Tuesday April 22. 2008
Non Disclosure Agreement Due	Before 4:00 pm EST Tuesday April 29, 2008
Proponent Briefing Session	10:00 am EST Wednesday April 30, 2008
Last day to submit questions and request clarification (Question Close)	Before 4:00 P.M. EST Wednesday May 14, 2008

DO ONTARIO AND ITS GAMING VENUES OWE A DUTY OF CARE TO PROBLEM GAMBLERS?

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Final Report Submitted to the Ontario Problem Gambling Research Centre

February 2006

Revised January 2007

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"The history of the law of torts has hinged on the tension between the two basic interests of individuals – the interest in security and the interest in freedom of action."[1]

1) OVERVIEW

A "problem gambler" is broadly defined as any person whose ability to resist the impulse to gamble has been impaired, or whose gambling has compromised, disrupted or damaged personal, family or vocational pursuits. In a 2001 study, it was estimated that 4.8% of adults who gamble are problem gamblers, a rate that translates into approximately 340,000 people in Ontario.[2] Problem Gamblers reportedly contribute 35% of Ontario gaming revenue.[3] Clearly, government-sponsored gambling comes at a significant social cost to a vulnerable segment of society.

Is the Government of Ontario responsible at law for the harm suffered by problem gamblers in the province's casinos?

To answer this question, one must address two others: Is there a legal duty imposed on the Government and those involved in the operation of the Province's gaming venues to take positive steps to lessen or eliminate situations of danger or to prevent further financial and other harm to the problem gambler? If such a duty exists, what form of assistance is required to meet that duty?

There are no ready or easy answers to these difficult questions. This novel cause of action has not been considered by Canadian courts. No answer is provided in the Ontario gaming legislation. Problem gamblers do not have any express statutory right of action or remedy nor are they prohibited from seeking redress.

In this paper, the authors examine the legal issue of whether and in which circumstances the Government of Ontario, its agency, Ontario Lottery and Gaming Corporation (OLG), and/or the casinos and the other gaming venues operating under its authority may be obligated at law to compensate problem gamblers or their dependents. The authors conclude that, notwithstanding the absence of express statutory rights and remedies, it is arguable that Ontario, the OLG and gaming venues owe a positive duty of care to assist the problem gambler in certain circumstances. This area of the law will likely develop incrementally, on a case by case basis, with the first successful claim by a problem gambler arising in circumstances where the gaming venue knows the problem gambler and his or her need for assistance but, rather than assisting, continues to profit from the problem gambler's addiction.

2) GAMING LEGISLATION IN ONTARIO

The starting point under Canadian law is that gambling is a common and public nuisance, contrary to public policy, inherently criminal in nature and prohibited under the *Criminal Code.*[4] The *Criminal Code* provides for certain exemptions, making lawful certain gaming activities where only prescribed

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[1] Fleming, *The Law of Torts*, 9th ed. (1998).
[2] E. Single, J. Wiebe, A. Falkowski-Ham (2001) "Measuring Gambling and Problem Gambling in Ontario". Toronto: Canadian Centre on Substance Abuse and Responsible Gambling Council (Ontario).
[3] R. Williams and R. Wood (2004) "The Demographics of Ontario Gaming Revenue". Final Report to the Ontario Problem Gambling Research Centre.
[4] *Criminal Code*, R.S. 1985, c.C-46, s. 201 and 206.

conditions are met.[5] Gaming activities that do not fall clearly within the permitted exemptions contravene the *Criminal Code* prohibition and are illegal.

The Federal Parliament enacted the Bill respecting Criminal Law, Canada's first *Criminal Code*, in 1892. That *Code* banned almost all lotteries and made them criminal offenses. It was not until 1969, when an omnibus bill was passed by the House of Commons, that certain lottery schemes became lawful. The bill constituted a complete recasting of many aspects of the *Criminal Code*. It permitted four categories of groups or individuals to legally operate lotteries: the Government of Canada, the Government of a Province, certain charitable or religious organizations, as well as agricultural fairs and any organization or person holding a permit duly issued by a Province. In 1985, the Federal Government removed itself from this field and granted to the Provinces and their agencies the sole legal right to conduct or have conducted lotteries and games of chance. The Federal Government did retain, however, the authority to permit and regulate pari-mutuel betting on horse races. Amendments to the *Criminal Code* in 1985 reflected this and clarified the law that the use of electronic gaming machines, video devices and slot machines was to be within the exclusive domain of the Provincial Governments.[6]

Judicial pronouncements in Canada make it clear that gaming activities continue to be illegal and are not to be condoned unless clearly carried on within the exemption provisions under the *Criminal Code*.

The Manitoba Court of Appeal in *Keystone Bingo Centre Inc. v. Manitoba Lotteries Foundation*[7] decided that a commercial bingo hall operator was conducting and managing bingo lottery events. The court stated as follows:

> Lotteries have been declared by statute to be common and public nuisances ... and they have been categorized as offenses against decency and morality. Apart from the decriminalization of certain lotteries conducted under government regulation, lotteries today remain prohibited by Parliament. [8]

In a 1994 judgment, *R. v. Andriopoulous*,[9] the Court of Appeal for Ontario determined that unlicensed gaming activities – operating video lottery devices in cafés and social clubs – were illegal. The court stated:

> Section 207 [of the Criminal Code] defines the reach of the crime by stating that it does not extend to lotteries licensed under authority of the province under prescribed conditions. The clear intent is not to condone gaming but to decriminalize it in circumstances where regulations will minimize the potential for public harm. In doing so, section 207 gives no hint that provinces were to regulate such commercial gaming as is here alleged, nor is there any basis for saying that such activity does not remain offensive and under the Criminal Law power of Parliament. 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 been changed or that it is any less criminal in nature than it has ever been.[10]

---

[5] *Criminal Code*, s. 207.
[6] *Ibid.*
[7] *Keystone Bingo Centre Inc. v. Manitoba Lotteries Foundation* (1991), 76 D.L.R. (4th) 423.
[8] *Keystone Bingo Centre Inc. v. Manitoba Lotteries Foundation, ibid.* at 430.
[9] *R. v. Andriopoulous*, [1994] O.J. No. 2314.
[10] *R. v. Andriopoulous, ibid.* at para. 5.

The Ontario Court of Appeal in an earlier judgment commented on the legislative purpose of the *Criminal Code* relating to offences in relation to lotteries and games of chance. Cory J.A., as he then was, stated:

> This section ... it is to be noted, is found under the heading "Offence in Relation to Lotteries and Games of Chance." It is designed to protect persons from those who would exploit people who understandably dream of substantial monetary gains that materialize overnight. Surely, this is a weakness that is common to most members of the family of mankind. The mathematics of pyramid schemes is such that for most participants other than the instigators the end result must be the loss of their investment.[11]

The *Criminal Code* provides for certain exemptions in section 207 making lawful gaming activities where the prescribed conditions are met. Section 207 of the *Criminal Code* reads in part as follows:

> 207(1) Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful
>
> (a) for the government of a province, either alone or in conjunction with the government of another province, to conduct and manage a lottery scheme in that province, or in that and the other province, in accordance with any law enacted by the legislature of that province...[12]

The essential requirement under this exemption provision of the *Criminal Code* is that the lottery scheme be "conducted and managed" by the Government of a Province.

In December, 1993 the Ontario Government, acting under the exemption provided in section 207(1)(a) of the *Criminal Code*, enacted new legislation establishing the Ontario Casino Corporation (the "OCC"). The *Ontario Casino Corporation Act, 1993* created the OCC which had among its objects:

> (i) to conduct and manage games of chance, and
>
> (ii) to provide for the operation of casinos.[13]

The Ontario Government at the same time enacted complementary amendments to *The Gaming Control Act* (the "GCA") to establish a regime for the regulation of casinos, being places in which lottery schemes conducted and managed by the OCC, were to be carried out. The Gaming Control Corporation ("GCC") created under the provisions of the GCA was charged with the legislative mandate to administer the GCA and the regulations "in the public interest and in accordance with the principles of honesty and integrity."[14] The role of the GCC as regulator included, among other things:

> (i) enforcing registration requirements and regulating the conduct of persons who supply goods or services to a casino operation;
>
> (ii) approving the actual goods and services supplied in a casino operation;
>
> (iii) approving the games of chance used in a casino operation; and
>
> (iv) approving the operation of a casino.[15]

---

[11] *R. v. MacKenzie*, [1982] O.J. No. 415 at para. 8.
[12] *Criminal Code*, Part VII, section 207(1)(a).
[13] *Ontario Casino Corporation Act, 1993*, S.O. 1993, c.25, s. 5.
[14] *Alcohol and Gaming Regulation and Public Protection Act, 1996*, S.O. 1996, c.26, s.3(3).
[15] *Gaming Control Act, 1992*, S.O. 1992, c.24.

On the basis of this legislative framework, the Ontario Government adopted the "government ownership/private operator model" for the operation of casinos and the management of games of chance. Under casino operating agreements, the operator is to establish and the OCC is to approve policies with respect to the operation of a particular casino. The OCC appoints the private operator as OCC's sole and exclusive agent to operate on its behalf the games of chance to be carried on in the casino. The operator's activities are subject to the provisions of the operating agreement, the approved operating policies and the operating budget. The casino's games of chance are defined as a lottery scheme conducted and managed by the Ontario Government under section 207(1)(a) of the *Criminal Code*.

The OCCA was repealed on April 1, 2000 and replaced with the *Ontario Lottery and Gaming Corporation Act*, 1999[16], replacing the OCC with the newly created OLG which was granted similar objects and responsibilities as its predecessor in respect of casino operations.

It is beyond the scope of this report to examine in any further detail the agency relationship between the casino operator, OLG and the Ontario Government and the responsibility of the Government for the conduct of the private operator. It should suffice for present purposes to consider the relationship between the operator and OLG/Ontario as that of principal and agent as would appear to be required under the provisions of the *Criminal Code*, thereby making Ontario responsible for any actions or omissions of the agent. Indeed, because the obligation to conduct and manage under section 207(1)(a) of the *Criminal Code* is conferred exclusively on the government of a province, it would appear that Ontario must bear responsibility for the manner in which the casinos are managed and operated. Given the creditworthiness of Ontario's casinos, the issue of vicarious liability may prove to be only a matter of academic interest in a civil action. However, the political ramifications of judicial pronouncements on the Government's responsibility towards problem gamblers may be another matter.

3) DEFINITION OF PROBLEM GAMBLING

The American Psychiatric Association (APA) has recognized "compulsive" or "problem" gambling as a mental disorder. APA's Diagnostic and Statistical Manual of Mental Disorders ("DSM") classifies "pathological" gambling as an impulse control disorder. An impulse control disorder is a failure to resist an impulse, drive, or temptation to perform some act that is harmful to the person or others. The APA states:

> The essential features of this disorder are a chronic and progressive failure to resist impulses to gamble, and gambling behaviour that compromises, disrupts or damages personal, family or vocational pursuits. The gambling preoccupation, urge and activity increase during periods of stress. Problems that arise as a result of the gambling lead to an intensification of the gambling behaviour. Characteristic problems include extensive indebtedness and consequent default on debts and other financial responsibilities, disrupted family relationships, inattention at work, and financially motivated illegal activities to pay for gambling.[17]

---

[16] *Ontario Lottery and Gaming Corporation Act*, 1990, S.O. 1999, Chapter 12, Schedule L.

[17] American Psychiatric Association, "Diagnostic and Statistical Manual of Mental Disorders" Fourth Ed. (Washington, D.C.APA), (www.apa.org).

The DSM definition of pathological gambling as an impulse control problem has been accepted by the Canadian mental health community. Similarly, the World Health Organization also recognizes compulsive gambling as a mental disease.[18]

At least one province has expressly recognized problem gambling in its gaming legislation and regulations. Under section 2(c) of its *Gaming Control Act*,[19] Nova Scotia specifically states that one of the purposes of the Act is to "ensure that any measures taken with respect to casinos and other lottery schemes are undertaken for the public good and in the best interests of the public, and, without limiting the generality of the foregoing, to minimize the opportunities that give rise to problem gambling and other illness, crime and social disruption." Pursuant to its Casino Regulations, casino operators are prohibited from permitting certain categories of persons to play games of chance, including "**individuals who appear to be addicted to gambling**, and the casino operator shall implement policies and procedures designed to **identify individuals exhibiting behaviour evidencing a problem with gambling**."[20]

In contrast, the Government of Ontario has referred to problem gambling only fleetingly in its legislation: under section 32(3) of Ontario Regulation 385/99 pursuant to the *Gaming Control Act*, an operator is required to implement and comply with a program to "identify players who may have a problem with or addiction to gambling", but only if so required by the Registrar of Alcohol and Gaming. The Registrar has not demanded such a program. In other ways, however, the Province has acknowledged that pathological gambling is a social problem. The Government provides for a percentage of the gross revenues from Ontario gambling operations in charity casinos and rack track slot operations to be used to fund research, prevention and treatment of problem gambling. One of the recipients of that funding is the Ontario Problem Gambling Research Centre which uses the funding to develop and apply knowledge about problem gambling.

The Government has also created a program known as the "Ontario Problem Gambling Helpline", which program is sponsored by the Drug and Alcohol Registry of Treatment (DART) and is managed by the Ontario Ministry of Health and Long-Term Care.[21] The Ontario Problem Gambling Helpline operates at all time and its "Directory of Problem Gambling Treatment Services in Ontario" lists no less than 48 problem gambling treatment services centres currently operating in Ontario.[22]

There are also pilot projects funded by the Ontario Ministry of Health and Long-Term Care which focus on problem gambling specific to ethno-cultural populations, seniors, women, and youth.[23] Services such as individual and group counseling, assessment and treatment are offered, and such services are available in 140 languages.[24] These examples of the widespread public recognition of problem gambling and the need for the treatment of the significant social and medical problems caused by problem gamblers may be considered by the court in any future claim relating to problem gambling.

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[18] Rychlak and Jarrell, "Compulsive Gambling as a Criminal Defence" (2000) 4 *Gaming Law Review* 333-334.
[19] 1994-95, c.4.
[20] N.S. Reg. 40/95 as amended up to O.I.C. 2005-559 (Dec. 15, 2005), N.S. Reg. 226/2005, section 20(1)(c) (emphasis added).
[21] Ontario Problem Gambling Helpline (http:/www.opgh.on.ca/main.htm).
[22] *Ibid* (http://www.opgh.on.ca/DART/owalive/opgh_dir_intro_newDB.intro_page_newDB).
[23] Ontario Substance Abuse Bureau (http://sano.camh.net/resource/specpop.htm).
[24] *Ibid.*

4) VOLUNTARY SELF-EXCLUSION AND OTHER MEANS OF IDENTIFYING PROBLEM GAMBLERS

Another approach to dealing with problem gambling that has been undertaken by the OLG is the Self-Exclusion Program.[25]

The Request to be Placed on the Self-Exclusion List and Release ("Self-Exclusion Request") is a written request made by a person who recognizes that he or she has a control problem with respect to gambling and should be refused entry to all OLG gaming venues. The period of exclusion in the Form is indefinite, but reinstatement will not be considered until a minimum of six months have passed from the date of self-exclusion. Following that minimum period, the person may request reinstatement in writing to any of the OLG gaming venues. After a further thirty-day waiting period, he or she will again become eligible for re-entry to all OLG gaming venues.

The Self-Exclusion Request reads, in part, as follows:

> I request to be placed on the Ontario Lottery and Gaming Corporation's (OLGC) list of self-excluded persons (the "List"). I acknowledge that it is solely my responsibility to refrain from visiting an OLGC gaming facility and gambling in the future. I also acknowledge receipt of the toll-free phone number for the Ontario Problem Gambling Hotline, and that it is my responsibility and decision whether or not to seek treatment or counselling.
>
> I understand that, as a result of being placed on the List, OLGC and the commercial casinos will, within a reasonable time period, remove me from their mailing lists. I understand, however, that I may receive marketing materials to the extent mailings have already been initiated and cannot be stopped. I understand that I will become ineligible to participate in any players' programs, and promotional offers. I confirm that I have either returned all players' cards in my possession or undertake to destroy them.
>
> I acknowledge and agree that OLGC, the private operators of OLGC gaming facilities, and their respective agents and employees, have no responsibility or obligation to keep or prevent me from entering an OLGC gaming facility, to remove me should I enter, or to stop me from gambling.
>
> I confirm that this form constitutes written notice under the *Trespass to Property Act* that my entry onto an OLGC gaming facility is not permitted, and that I may be arrested and charged for trespass without further notice or warning should I enter an Ontario gaming facility.
>
> In consideration for being placed on the List, I agree to release and not to sue the Province of Ontario, the OLGC, all private operators of OLGC gaming facilities and their respective agents and employees, from and for any claims or causes of action that I have or may have arising out of any act or omission, relating to the processing, implementation or enforcement of this request to be placed on the List, including the forwarding of the contents of this request to any OLGC gaming facility, private operator of such facilities, or their agent or employees, or for any financial loss, physical injury or emotional distress or any breach of confidentiality that may occur as a result.

---

[25] A copy of the Request to be Placed on the Self-Exclusion List and Release, and the accompanying description of the Program entitled "Over Your Limit?", is included in Appendix A of this report.

In the Self-Exclusion Request, OLG expresses no commitment to make any effort to exclude entry to the person signing the Request, nor to stop the self-excluded person from gambling if he or she gains entry. The Self-Exclusion Request also purports to release OLG, the commercial operator and their respective agents and employees from any liability arising from the "implementation and enforcement" – or presumably, the lack thereof– of the Request. Whether this language insulates OLG from liability in a breach of contract claim is not at issue in this report. For the purposes of tort law, it may be argued that the Request's exculpatory language does not release OLG and the commercial operators from liability resulting from their failure to use best efforts to exclude entry to that person, as required by the relevant standard of care. Indeed, by regulation the operator is mandated not to permit self-excluded persons to play games of chance at the premises.[26] The execution and receipt of the Self-Exclusion Request is, at the very least, evidence of the knowledge possessed by casino operators and OLG of a problem gambler's condition, and is relevant, therefore, to the determination of the existence of a duty of care.

In practice, the Self-Exclusion Request is signed by the person requesting exclusion and by a representative of the casino, and the self-excluded person's patron file is marked accordingly. The casino requires that photographs be taken and personal information be obtained from that person for the purpose of identifying the person requesting the voluntary ban. The Request and the photographs are then given to security and surveillance personnel at all OLG gaming sites, who keep the information in large binders. There is no statistical evidence available to measure the success rate of casino security personnel in identifying self-excluded persons who attempt to gain entry. Anecdotal evidence provided to the authors by several problem gamblers and casino employees, however, suggests that the success rate is very low. Other than removing the self-excluded person's name from mailing lists, it appears that no other steps are taken by the casino receiving the Request for the purpose of preventing self-excluded persons from further entry during the period of voluntary ban. Ultimately a court will have to determine whether these actions on the part of the casino receiving the self-exclusion form are sufficient to establish that the operator met the reasonable standard of care in circumstances where a problem gambler has identified himself or herself as such and has expressly asked the casino for assistance.

In addition to the aforementioned self-identification program, there are a number of prescribed active monitoring provisions.[27] As examples, when gambling in amounts that exceed $2,500, gamblers are required to register with the casino. When gambling in amounts that exceed $10,000, gamblers are required to register with the casino and provide some further personal financial information. The aforementioned information is collected and monitored.

Casinos also monitor gamblers to whom they provide credit. Applications for credit are made in writing to the casino and, where credit is provided, it is done after a "cool-down" period between the time of the application for credit and the provision of credit to that applicant. Casinos additionally have a great deal of information concerning the gambling habits of those who participate in programs, such as Players Prestige Club and Winner's Circle, that are designed to encourage gambling and provide "perks & privileges" for frequent use. For example, a Players Prestige gambler who uses his card in the card reader of his favourite slot machine and leaves it inserted for the duration of play will accumulate points which can be redeemed for "Cash Back" for additional slot play and will also earn reward points for food, beverages, rooms and other perquisites at the casino.[28] These cards also disclose the number

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[26] *Gaming Control Act, 1992*, S.O. 1992, c.24 – O. Reg. 385/99, s.32(1)4.
[27] *Gaming Control Act, 1992*, S.O. 1992, c.24, s.9; O-Reg. 385/99, sections 28 and 29.
[28] www.casinowindsor.com/PPClub/PPClub.asp.

of visits, the duration of the visit, and the amount of money spent – all indicators that could be used to identify a person with a gambling control problem.

Regardless of the manner in which or the purpose for which the information is obtained, casinos possess a great deal of information on the gambling habits of their patrons or a significant number of them. They have the ability, of course, to obtain such additional information on the gambling habits of every person who gambles at their establishments as they may require, using the same monitoring techniques, for example, that are currently used to identify cheaters.

5) ACCIDENTAL, NEGLIGENT, OR INTENTIONAL MISCONDUCT

Generally speaking, any legal cause of action will depend on where the conduct at issue falls along the continuum of accidental, negligent or intentional conduct.

(a) Accidental

Where the person acts and produces consequences which are either not reasonably foreseeable or not reasonably preventable, the conduct that produced the result may be seen as accidental. Applied to a problem gambler's claim, casinos are aware that, collectively and on average, gamblers always lose and the gaming venue always wins. Studies would appear to indicate that for all bets on slots, roulette, blackjack, craps, video poker and Texas Hold'em, the average percentage of loss by gamblers and gain by gaming operators per bet is between 3% and 15%.[29] Whether it is $1 in $20, $5 in $50, or any other percentage of the total bets placed, gamblers must collectively lose a certain percentage of the total amount bet in every game of chance.

Problem gambling is recognized as a disorder that reduces the person's ability to stop gambling when it is causing significant economic harm. It therefore appears to be virtually certain that ready access to gaming venues will provide the temptation and opportunities that will be difficult to resist for the problem gambler and inevitably lead to gambling losses by them. Moreover, they will be particularly susceptible to inducements and other forms of encouragement to gamble.

Problem gamblers are generally recognized as a group that is at particular risk when there is public access at large to gaming venues in Ontario. Moreover, the venue operators may be taken to have reasonably foreseen that, in permitting unlimited access to problem gamblers, there will be losses or harm to them. In this respect, the casino operators' conduct in permitting access to known problem gamblers cannot be considered as accidental. Moreover, because inducements to gamble increase with one's losses by virtue of programs like the Winner's Circle, casino operators may, in fact, be viewed as actively soliciting gamblers with a higher probability of dependency.

The determination of whether the adverse consequences to problem gamblers are reasonably preventable may be a more difficult analysis for the court. As a result of their disability, problem gamblers desire to engage in the activity that is causing them harm. The objective of the law is not to absolve addicts or persons with a disorder from all responsibility; rather, it is to protect them from abuse by those in special positions of power over them. In order for the casino operator to prevent

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[29] Turner, N. and Horbay, R. "How Do Slot Machines and other Electronic Gaming Machines Actually Work?" (2004) 11 *Journal of Gambling Issues*; Thorpe, E.O. *Beat the Dealer: A Winning Strategy for the Game of Twenty-One*, 2nd ed. (New York: Vintage, 1966)

harm, the operator must not only be able to identify them as likely problem gamblers but also be able to take steps in a reasonable manner to prevent the problem gamblers from harming themselves.

(b) Intentional

The deliberate conduct at the other end of the continuum may be dealt with more summarily. Where a casino operates either knowing with substantial certainty what the consequences of its actions will be or desires them, the casino operator can be said to have intended those consequences. There may be cases where an unscrupulous casino operator or employee engages in such conduct as targeting a known problem gambler, enticing him to come to the establishment, providing him with credit, plying him with alcohol to further impair his judgment, and does such things with the intended purpose of causing him to lose money gambling. Where such an operator, for its own profit, has victimized a person who cannot help himself, the law will have little difficulty in fashioning a remedy for the problem gambler to prevent his victimization and the corresponding enrichment of the operator.

(c) Negligence

While there may be some cases of intentional misconduct, the vast majority of cases will undoubtedly arise in situations that are not at the opposite ends of the conduct continuum and will be left to be determined applying principles of negligence law.

In framing the issue in negligence, it must be determined whether the casino operator ought to have reasonably foreseen and avoided the conduct that led to the loss or harm to the problem gambler. That loss results from giving the problem gambler access to the gaming venues. That loss can apparently only be prevented by denying the problem gambler access to the gaming venues that is provided to the public at large, assuming that he can be identified as a problem gambler before he begins to gamble, or by confronting him and facilitating access to assistance if the person exhibits the characteristics of a problem gambler while gambling at the establishment.

At its essence, the issue is whether the operator is under a legal duty to exclude or otherwise respond to those who exhibit the characteristics of a problem gambler in order to prevent them from causing further harm or loss to themselves and/or to others who may reasonably suffer as a consequence of their continuing losses. It is worth noting that in 2004, an appeals court in Austria decided this issue in favour of a pathological gambler who lost his business and tried to take his life after running up huge debts on casino blackjack tables and roulette wheels. The court ruled that Christian Hainz, who had visited two casinos belonging to Casinos Austria more than one hundred times between 1997 and 2000, should be reimbursed the equivalent of about $682,000, representing approximately 20% of his gambling losses. The court upheld the trial judge's findings that Casinos Austria was guilty of "gross malfeasance and negligent behaviour" by not doing enough research into their patron's financial resources, and for failing to restrict the actions of a person who had all the signs of a pathological gambler.[30]

6) DUTY OF CARE

The framework within which the existence of a novel tort of negligence in respect of problem gamblers must be considered is the so-called "Anns test", flowing from the decision of the House of Lords in *Anns v. London Borough of Merton*[31], as applied and restated in Canada in *Cooper v. Hobart*[32] and

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[30] Michael Leidig, "Gambling addict wins a fortune in court ruling against casino", *The Telegraph* (22 February 2004) (available on line at news.telegraph.co.uk)

[31] *Anns v. London Borough of Merton* , [1977] 2 All E.R. 492, [1977] W.L.R. 1024 (H.L.)

Odhavji Estate v. Woodhouse.[33] These cases stand for the proposition that in order to establish the existence of a duty of care, a person must establish, as expressed by Iacobucci J. in *Odhavji Estate* at para. 52:

> (i) that the harm complained of is a reasonably foreseeable consequence of the alleged breach; (ii) that there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and (iii) that there exist no policy reasons to negative or otherwise restrict that duty.[34]

The real focus of debate surrounding whether there should be a novel tort is the second branch of the *Anns* test, as reflected in the third factor listed in *Odhavji Estate* – are there policy reasons for denying the existence of a duty of care? In *Cooper v. Hobart* at paras. 37-38, the Supreme Court of Canada articulated several criteria to be considered under the second branch of the *Anns* test: Does the law already provide a remedy in respect of the loss complained of? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Is the impugned conduct operational in nature, or is it in the nature of governmental or legislative policy making? Did the impugned conduct take place in the performance of a quasi-judicial function?

There are no alternative remedies provided at law to the problem gambler. In circumstances where the casino operator knows the problem gambler and his need for assistance but, rather than assisting, continues to profit from the gambler's addiction, the recognition of a duty of care to the problem gambler would not appear to create the spectre of unlimited liability to an unlimited class. Finally, the conduct is operational in nature relating to the management of gaming venues in the public interest in accordance with the principles of honesty and integrity. In summary, none of the policy arguments mentioned in *Cooper v. Hobart* appear to favour casino operators' immunity from the law of negligence.

In *Cooper v. Hobart*, McLachlin C.J.C. and Major J. observed that "the second stage of *Anns* will seldom arise and...questions of liability will be determined primarily by reference to established and analogous categories of recovery."[35] There are two analogous categories relevant to this analysis: the more established category of commercial host liability with respect to the sale of alcoholic beverages; and the more recent, but more directly applicable, category of lottery ticket purchasers.

7) LOTTERY TICKET PURCHASERS

In late October 2006, the CBC news show *Fifth Estate* made public a 2005 mid-trial ruling on the existence of a duty of care by OLG to a lottery ticket winner named Edmonds. In *Edmonds v. Laplante*[36], the plaintiff alleged that a retail seller of lottery tickets defrauded him out of a $250,000 winning ticket. He brought suit against the retailer but also named OLG as a party defendant on the basis that OLG was negligent in failing to prevent its agents – retail vendors of its lottery tickets – from causing harm to the buying public. In the course of the trial, OLG asked the judge to determine if OLG owed a duty of care to Mr. Edmonds as a matter of law. The answer, of course, was critical to the case. If answered in the negative, Mr. Edmonds could not succeed in a negligence action against OLG and the case would be dismissed.

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[32] *Cooper v. Hobart,* [2001] 3 S.C.R. 537
[33] *Odhavji Estate v. Woodhouse,* [2003] 3 S.C.R. 263
[34] *Ibid.*
[35] *Cooper v. Hobart, supra* note 33 at para. 39
[36] *Edmonds v. Laplante, Ontario Lottery and Gaming Corporation et al.,* Court File No. 02-CV- 226280 (Ont. S.C.J.).

Sachs J. determined that OLG did owe a duty of care. In coming to her conclusion, she engaged in the very analysis explored in this report. She performed an *Anns* analysis to determine if the relationship between OLG and Mr. Edmonds gave rise to a duty of care.

Applying the first branch of the *Anns* test, Sachs J. concluded that both reasonable foreseeability of harm and proximity were established. With respect to foreseeability, she found that OLG has "acknowledged the real possibility that a retailer could gain an unfair advantage in the conduct of the games and try to claim a customer's ticket as their own."[37] She construed OLG's adoption of the "insider win policy", which subjected retailers and their employees to a higher level of scrutiny when they come to claim a prize, was sufficient evidence of such acknowledgement.

As to proximity, Sachs J. concluded that the relationship between OLG and Mr. Edmonds was analogous to one of the recognized categories listed in *Cooper v. Hobart*,[38] namely, governmental authorities who have undertaken a policy of road maintenance and who are obligated to execute the maintenance in a non-negligent manner.

Sachs J.'s analysis of the first branch in *Anns* is as applicable in a problem gambling context as it is in the context of lottery ticket purchasers. By adopting self-exclusion policies, funding treatment and prevention resources, the Ontario Problem Gambling Research Centre and other related initiatives, it could well be argued that OLG has acknowledged the risk posed to problem gamblers by unrestricted access to gaming venues. Further, having undertaken to provide gaming activities in a socially responsible manner, it could also be argued that proximity is proven.

Moreover, there would be no need to establish proximity by analogy to the category of government authorities undertaking road maintenance. A problem gambler can now forcefully argue that there is proximity by analogy to the category recognized by Sachs J.: lottery ticket purchasers.

Sachs J. also dealt with policy arguments, as she was required to do under the second branch of *Anns*. She rejected three arguments raised by OLG. First, she found nothing in the governing legislation and regulations that exempts that OLG from liability. Second, she rejected the argument that OLG should not be liable for policy decisions, stating that OLG's alleged negligent execution of its "insider win policy" was an operational decision that was not immune to suit. Finally, Sachs J. summarily dismissed the off-repeated warning that the recognition of a duty would create the spectre of an unlimited liability to an unlimited class of people.

The judge's policy analysis is apposite to the problem gambling context. If nothing in the governing legislation exempts OLG from liability in the lottery case, there is likely nothing in the legislation to exempt OLG from liability in the problem gambling context. The authors' findings in regard to the statutory context support this conclusion and are explained part (2) of this report.

Similarly, failing to act on data available to gambling providers and ignoring empirical and social science evidence of the indicia of problem gambling could well be construed as operational decisions, not government policy. And if the spectre of unlimited liability to an unlimited class is rejected vis-à-vis lottery ticket purchasers, whose numbers and losses do not obviously differ in a significant way from those of problem gamblers, there may similarly be no such fear to drive a court to reject a duty of care on policy grounds.

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[37] *Edmonds v. Laplante et al.* (March 15, 2005) [unreported] at p. 5.

[38] *Cooper v. Hobart, supra* note 33.

The importance of the *Edmonds* case, which settled midway through Sachs J.'s charge to the jury, should not be underestimated. Not only does the decision confirm the likelihood that, given the right facts, a plaintiff could satisfy the *Anns* test and establish a duty of care owed to him or her, but it also raises the question as to whether a court needs to engage *Anns* at all. It is worth repeating that a court need not proceed with the *Anns* analysis if the relationship between the parties falls within a category of relationships that case law has recognized as giving rise to a duty of care. A problem gambler might establish a duty of care simply by convincing a court that *Edmonds* determined that all patrons of the gaming activities and lotteries provided by gaming venues fall within the category of those to whom OLG owes a duty of care.

8) COMMERCIAL HOST LIABILITY

The other, more developed category of recovery to which a court will turn in its analysis of duty of care is the commercial host category. When a problem gambler claim is brought to trial in an Ontario court, one of the first questions that will be asked is whether the principles of law applicable to commercial host liability with respect to the sale of alcoholic beverages in Ontario may evolve into the arena of gambling liability.

It has been confidently predicted that the law will fashion remedies for the problem gambler "that will be needed to bring this risky behaviour into line with the responsibilities that have been imposed upon the alcohol industry."[39] That confident prognostication requires careful analysis.

The leading Canadian case on commercial host liability for those who are licensed to serve alcohol is *Jordan House Limited* v. *Menow*.[40] Over three decades have passed since the Supreme Court of Canada delivered that landmark decision in which the court determined that an innkeeper and his staff owed a duty of care[41] in certain circumstances to its patrons. That decision provides a useful framework to consider the issue of whether the operator of a casino may be charged with a similar duty of care to a known problem gambler to take reasonable care to safeguard that gambler from the likely risk of economic loss and other harm or damage.

The facts of the *Menow* case are straightforward. The hotel fronted on a much traveled highway between Hamilton and Niagara Falls, Ontario. Menow was a frequent patron of the hotel's beverage room and was well known to the owner/operator of the hotel and to his staff. Menow was employed by a fruit farmer and lived alone on his employer's farm, which was on a side road about 2½ miles from the hotel, with the direct route to his residence being along the highway to the side road. Menow regularly drank to excess at the hotel and then acted recklessly. The hotel management and the beverage room employees knew of his propensities. About a year before the events out of which the case arose, Menow had been barred from the hotel for a period of time because he annoyed other customers after drinking excessively. Thereafter, the hotel's employees were instructed not to serve him unless he was accompanied by a responsible person.

On the winter night in question, Menow arrived at the hotel with others and was permitted entry. His companions departed within a short time leaving him there to drink alone. He drank for a period of

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[39] H.B.T. Hillyer, "Representing Injured Parties: Alcohol, Social Host and Gambling Liability Today" in *Tort Law: New Trends and Causes of Action* (Toronto: LSUC, 2003).

[40] [1974] S.C.R. 239

[41] A full analysis on duty of care and novel causes of action has been examined by the Supreme Court of Canada in *Kamloops (City)* v. *Nielson*, [1984] 2 S.C.R. 2

approximately five hours, the hotel having sold alcohol to him well past the point of visible or apparent intoxication. When Menow began to wander around the beverage room, to the annoyance of other customers and staff, he was ejected from the hotel with the hotel owner/operator and the staff who ejected him knowing that: (i) he was unable to take care of himself by reason of intoxication; and (ii) he was required to find his way to his residence, probably traveling by foot, along the dangerous route of the main highway. A short time later, Menow was struck by a vehicle as he was staggering near the centre of the highway.[42]

The trial judge found that the hotel owed and was in breach of a common law duty of care to Menow. The trial judge placed the duty of care on two grounds, each related to the breach of certain statutory obligations:

(a) the breach of section 53(3) of *The Liquor Licence Act,* R.S.O. 1960, c.218 and section 81 of *The Liquor Control Act,* R.S.O. 1960, c.217, which prohibit the sale by a licensed hotel operator of alcohol to a visibly intoxicated person; and

(b) the breach of section 53(4) and (6) of *The Liquor Licence Act*, which imposes a duty on a licensed hotel operator to eject an intoxicated patron, as qualified by trial judge's determination that, when ejecting an intoxicated patron, there was an implied duty not to subject that patron to danger of personal injury foreseeable as a result of the ejection.

The trial judge found that these statutory provisions indicated a standard upon which a common law duty could be grounded and that the hotel owner/operator and its employees conducted themselves in breach of that duty on the facts of the case. The trial judge did not hold that the mere breach of the statutory enactments and the fact that Menow suffered personal injury were enough to attach civil liability to the hotel, but rather considered the statutory enactments in determining, on common law principles, whether a duty of care should be raised in favour of Menow against the hotel.

In brief oral reasons, the Ontario Court of Appeal dismissed the appeal stating that "we place our dismissal of the appeal on the simple ground that, so far as the hotel is concerned, there was a breach of the common law duty of care owed to the plaintiff in the circumstances of this case".[43]

On appeal to the Supreme Court of Canada, the court unanimously dismissed the appeal and agreed with Menow that the hotel had an obligation to take reasonable care to protect him, in his intoxicated condition, from personal injury. Laskin J. (as he then was) stated that the applicable principles of law were as follows:

> The common law assesses liability for negligence on the basis of breach of a duty of care arising from a foreseeable and unreasonable risk of harm to one person created by the act or omission of another. This is the generality which exhibits the flexibility of the common law; but since liability is predicated upon fault, the guiding principle assumes a nexus or relationship between the injured person and the injuring person which makes it reasonable to conclude that the latter owes a duty to the former not to expose him to an unreasonable risk of harm. Moreover, in considering whether the risk of injury to which a person may be exposed is one that he should not reasonably have to run, it is relevant to relate the probability and the gravity of injury to the burden that would be imposed upon the prospective defendant in taking avoiding measures. *Bolton v. Stone*, [1951] A.C. 850 in the House of Lords and *Lambert v. Lastoplex Chemicals Co. Ltd.*, [1972]

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[42] *Jordan House* v. *Menow*, *supra* note 41 at 241-243

[43] *Jordan House v. Menow*, *ibid.* at 244.

> S.C.R. 569 in this Court illustrate the relationship between the remoteness or likelihood of injury and the fixing of an obligation to take preventive measures according to the gravity thereof.[44]

Laskin J. observed that Menow created a risk of injury to himself by excessive drinking on the night in question and stated that, if the hotel's only involvement was the supplying of the alcohol consumed by Menow, it would be difficult to support the imposition of common law liability for the injuries suffered by him. Laskin J. further commented that a special relationship is required before a duty of care can be imposed at law and that, as an example, the mere observance of an intoxicated person by other patrons or users of the highway imposes at law no common law duty upon them to be a Good Samaritan and steer the intoxicated person out of harm's way. Rather, liability was imposed in the circumstances because the hotel was in an invitor-invitee relationship with Menow as one of its patrons, and it was aware, through its employees, of his intoxicated condition, a condition which, on the findings of the trial judge, it fed in violation of applicable liquor licence and liquor control legislation.[45]

In next considering the consequences of imposing an obligation upon the hotel to take preventive measures, Laskin J. observed that there is nothing unreasonable in calling upon the hotel in such circumstances to take reasonable care to see that Menow is not exposed to injury because of his intoxication and that no inordinate burden would be placed upon the hotel obliging it to respond to Menow's need for protection. He stated:

> Given the relationship between Menow and the hotel, the hotel operator's knowledge of Menow's propensity to drink and his instruction to his employees not to serve him unless he was accompanied by a responsible person, the fact that Menow was served not only in breach of this instruction but as well in breach of statutory injunctions against serving a patron who was apparently in an intoxicated condition, and the fact that the hotel operator was aware that Menow was intoxicated, the proper conclusion is that the hotel came under a duty to Menow to see that he got home safely by taking him under its charge or putting him under the charge of a responsible person, or to see that he was not turned out alone until he was in a reasonably fit condition to look after himself. There was, in this case, a breach of this duty for which the hotel must respond according to the degree of fault found against it. The harm that ensued was that which was reasonably foreseeable by reason of what the hotel did (in turning Menow out) and failed to do (in not taking preventive measures).[46]

Laskin J. concluded his reasons with the observation that the result to which he came in that case does not mean that he would impose "a duty on every tavern owner to act as a watchdog for all patrons who enter his place of business and drink to excess". In concurring reasons, however, Ritchie J. went further by suggesting that the staff violated their duty once they served Menow past the point of intoxication. Their obligation was to prevent intoxication and not, as Laskin J. had ruled, simply to protect patrons once they became intoxicated.[47]

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[44] *Jordan House* v. *Menow*, *ibid.* at 247.
[45] *Jordan House* v. *Menow*, *ibid.* at 248.
[46] *Jordan House* v. *Menow*, *ibid.* at 249.
[47] *Jordan House* v. *Menow*, *ibid.* at 251.

9) APPLYING *MENOW* TO THE PROBLEM GAMBLER CONTEXT

It is abundantly clear from the reasons in *Menow* that, in determining commercial host liability, a great deal turns on the knowledge of the operator (or his employees) of the patron and the patron's condition at the time of the events in issue.

In the evolution of the common law, the casino operator's liability to the problem gambler will be considered in light of the principles on which liability was founded in the *Menow* case. In so doing, the court must first deal with the specific relationship between the problem gambler, on the one hand, and the casino operator and its staff, on the other. To found liability on *Menow* principles, the casino management and/or employees would be required to have specific knowledge of the propensities of the problem gambler advancing the claim. Menow was well known to the hotel owner/operator and its employees and, similarly, there will be problem gamblers who have identified themselves as such to the casino management and/or employees and have either sought their assistance through the execution of the Self-Exclusion Request or in some other manner. There will also be persons who have been identified as problem gamblers by their doctors, families, employers or law enforcement authorities or who have been observed by casino management staff as having the control problems exhibited by problem gamblers. Regardless of the manner in which the casino operator and its staff become aware of the identity of the problem gambler and his need for assistance, that knowledge would appear to be a prerequisite for founding liability on *Menow* principles.

A less conservative approach on the issue of knowledge of the casino operator would be to impute knowledge on the basis of data available to casinos by reason of the Winner's Circle and other preferred customer or loyalty programs. By virtue of those programs, a gambler's frequency of visits, gambling losses and duration of play are all known to the casino operators. That casino operators ignore such data may be no more a defence than is a barkeeper's installation of a screen between the bartender and his patrons. In *Picka Estate v. Porter*,[48] the Ontario Court of Appeal confirmed a finding of liability against the Legion club stating it had a duty not to supply the patron with so much beer as to intoxicate him and that it had "failed in its duty by making no effort to see Mr. Porter's condition and by having a system of distributing beer which made seeing the condition of Mr. Porter extremely difficult."[49]

Second, the court will be required to consider the issue of the responsibility of the problem gambler for his own actions. Similar to Menow and other persons with a drinking problem, the problem gambler is not being forced to either drink or gamble or do both. The problem gambler goes to the casino because he wishes to gamble. His gambling losses are self-imposed. Like Menow, the problem gambler advancing the claim will be required to overcome the natural propensity of judges to, quite understandably, require the claimant to provide some cogent reason why he should not be required to assume full responsibility for the consequences of his own actions. Ontario judges may be more inclined to provide remedies where, on the facts of a particular case, the casino operator may be found to be taking advantage of persons whose condition renders them less capable of helping themselves. A middle ground may be to apportion liability for the gambler's harm between the problem gambler and the casino; the extent of the problem gambler's contributory negligence would necessarily depend on the circumstances of the case.

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[48] *Picka Estate v. Porter*, [1980] O.J. No. 252 (C.A.).
[49] *Ibid,* at para. 13, per Zuber J.A.

While the *Menow* case may provide an analytical framework for the imposition of a duty of care in circumstances where the problem gambler is known as such to the casino operator and/or its staff, it does not support the imposition of a legal duty upon a casino operator to engage actively in a process of pre-screening all patrons for the purpose of identifying persons that exhibit the characteristics of a problem gambler and to take positive steps to exclude them, any more than the liquor laws would impose a duty on hotel operators to pre-screen patrons for the purpose of determining whether they exhibit the characteristics of a problem drinker and take positive steps to exclude them.

Menow is also distinguishable from the problem gambling context in several important ways; unlike the circumstances in *Menow* where the danger was on the dark public highway outside the hotel, the danger to the problem gambler lies in wait within the casino. Is there a duty not to serve problem gamblers implied in the gambling statutes that is akin to the duty not to serve apparently intoxicated persons provided for in the liquor statutes?[50] As stated by Laskin J., the common law assesses liability for negligence on the basis of a breach of a duty of care arising from a foreseeable and unreasonable risk of harm to one person created by the act or omission of another. The foreseeable and unreasonable risk of harm to the problem gambler is found at the gaming table or machine. The court will be required to determine in the circumstances of the particular case that the casino owed a duty to the problem gambler not to expose him to an unreasonable risk of harm by permitting him to either start or continue to gamble.

Like the hotel operator, the casino operator has the power to eject patrons. In the case of the hotel operator, he has not only the power but the duty to eject intoxicated patrons. The only practical way to prevent harm to the problem gambler appears to be his or her exclusion from the gaming venue. If that is correct, does the casino operator have a corresponding duty to eject problem gamblers for their own safety, or to confront the gambler, express concern about his level of losses and facilitate access to a treatment program? Having particular regard to the probability and the gravity of injury to the problem gambler, the burden that would be imposed upon the casino in taking this avoidance measure does not appear to be unduly onerous. But this duty to take affirmative action to eject would be confined to self-identified problem gamblers and any other person who has clearly demonstrated to the casino operator and staff that he or she is a problem gambler with impaired ability to resist the impulse to gamble even after suffering significant financial losses.

The legislative context in *Menow* is also unique. In the *Menow* case the court looked to specific liquor laws both for the purpose of determining whether: (i) there was a duty of care on the hotel operator based on common law principles; and (ii) the hotel operator and his employees had breached that duty in the circumstances at issue. The provisions of the liquor law statutes relied upon in *Menow* are quite specific in dealing with the conduct of the hotel operator in contrast to the vague and general statutory provisions governing the operation of Ontario casinos and other gaming venues. As an example, section 53(3) of *The Liquor Licence Act*, 1960, relied upon in *Menow* provided that "no liquor shall be sold or supplied on or at any licensed premises to or for any person who is apparently in an intoxicated condition". Section 81 of *The Liquor Control Act,* 1960, was to the same effect. The liquor law statutes also expressly provided for civil remedies for certain breaches by the hotel operator which breaches resulted in loss or damage. In circumstances:

(a) where a person who is apparently in an intoxicated condition continues to be sold liquor and, as a result, commits suicide or meets death by accident, an action under *The Fatal Accidents Act* lies against the person who sold the liquor; and

[50] Courts in New Jersey have found that it is at least incumbent on the casino not to permit an intoxicated patron to gamble. See for example, *Greate Bay Hotel & Casino v. Tose* 34 F.3d 1227 C.A.3 (N.J.), 1994.

(b) where a person who is in an intoxicated condition continues to be sold liquor, causes injury or damage to the person or property of another, such other person is entitled to recover an amount to compensate him for his injury or damage from the person who sold the liquor.[51]

In comparing the statutes governing the operation of Ontario gaming venues, it is noteworthy that:

(a) unlike the intoxicated patron, there is no specific reference to problem gamblers in any of the statutes or regulations governing the operation of an Ontario casino or other gaming venue;

(b) the casino operator is not prohibited from permitting problem gamblers entry to casinos or to gamble therein;

(c) the casino operators are not prohibited from serving or permitting apparent problem gamblers to continue to gamble in their establishment; and

(d) there are no express rights of action or other civil remedies provided to problem gamblers or persons affected by their conduct for any breach of any statute governing the operation of gaming venues by the casino operator or his staff.

Rather than providing specific duties, rights and remedies, the legislation concerning gaming venues provides only a vague and undefined duty on Ontario to regulate gambling "in the public interest and in accordance with the principles of honesty, integrity and social responsibility."[52] In furtherance of that duty, section 15(1)(e) of the *Ontario Lottery and Gaming Corporation Act,* 1999, permits the Lieutenant Governor in Council to make regulations "prohibiting classes of individuals from entering or remaining in a gaming premises during the playing of games of chance in the premises". No regulations have been passed prohibiting casino operators from permitting entry to known problem gamblers or requiring casino operators to eject the problem gamblers after they have shown themselves to be unable to control their gambling habit.

As stated above, only the Province has the authority to conduct and manage this gambling activity. That it has failed to enact specific regulations to implement its general duty to promote gambling in a socially responsible manner may be relevant to the court's examination of the legislative context from which a duty of care may arise.

Ontario provides funding for problem gambling research, treatment and education. It will undoubtedly be argued in a problem gambler claim that this funding for problem gambling research, treatment and education may be taken as an implied recognition of some duty owed to problem gamblers on the part of Ontario and the agents operating Ontario's gaming venues. However this funding may be construed, it is far from clear that the legislation was intended to impose any duty upon casino operators to prohibit entry or service to problem gamblers or to take any other form of affirmative action to limit economic harm to problem gamblers.

The emphasis in *Menow* was on the knowledge of the hotel operator or his employees of the patron and the patron's condition. It is likely that the law concerning liability for problem gamblers will develop step by step having regard to the knowledge of the operator or his employees of the condition of the specific problem gambler. Absent specific knowledge, however acquired, of the problem gambler's

[51] *The Liquor Control Act,* R.S.O. 1960, c.217, s. 67.
[52] *Alcohol and Gaming Regulation and Public Protection Act, 1996,* S.O. 1996, c. 26, s. 3(3).

condition, it is unlikely, given the current state of the law, that Ontario's courts will make casino operators responsible for losses or damages suffered by the problem gambler.

That Canadian judges will be cautious in extending commercial host liability to other contexts is evidenced by the Supreme Court of Canada's consideration of commercial host liability and whether it should be extended to the social host. In *Childs v. Desormeaux*,[53] the social hosts hosted a pot-luck supper and bring your own bottle party. The party was attended by Desormeaux, a person with a history as a heavy drinker. Desormeaux drank to excess at the party and, after an altercation with another guest, left the party in his automobile. Shortly afterwards, Desormeaux's vehicle crossed the center line of the highway into the path of an oncoming vehicle and collided with it. Childs, a passenger in the other vehicle, was rendered a paraplegic and sued Desormeaux and the social hosts.

In these circumstances the trial judge held that the social hosts had a duty to monitor Desormeaux' drinking while at the party because of his history of being a heavy drinker. The trial judge declined, however, to impose a duty of care on the social hosts for policy reasons and dismissed the action.

The Court of Appeal for Ontario agreed with the trial judge that the action should be dismissed against the social hosts but, unlike the trial judge, determined that the social host did not on the facts of the case owe a duty of care to users of the road.

In determining that there was not a duty of care the Court of Appeal examined the statutory framework and considered whether the statute showed intention on the part of the legislature that those who breached the statutory duty imposed upon them should be liable to the individuals affected. Writing for the court, Weiler J. stated:

> In cases involving the service of alcohol by a commercial establishment, the underlying liquor licence statutes have played a role in the imposition of a duty of care: *Jordan House*, supra. In other regulatory cases involving pure economic loss, a legislative intent not to impose a private law duty of care has been inferred: *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 and *Cooper v. Hobart*, [2001] 3 S.C.R. 457. The existence and nature of any statutory obligations is also relevant to the expectations of the parties, which is another factor in considering whether it is just and fair to impose liability.[54]

Later in her decision, Weiler J. remarked that commercial hosts are closely regulated by statute and have a statutory duty not to serve alcohol to a visibly intoxicated person. To comply with their statutory duty, commercial hosts must monitor the alcohol consumption of their patrons and control the structure of the environment in which alcohol is served. While alcohol consumption is a prevalent feature in the ordinary day to day social interaction between social hosts and their guests, Weiler J. observed there are no corresponding statutory standards against which to judge the imposition of a duty at common law on social hosts.

The Supreme Court of Canada unanimously dismissed Childs' appeal. The Court held that social hosts of parties where alcohol is served do not owe a duty of care to third parties who may be injured by intoxicated guests. In distinguishing the social host context from the commercial host situation, McLachlin C.J.C. stated for the Court:

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[53] *Childs v. Desormeaux* (2002), 217 D.L.R. (4th) 217 (Ont. Sup. Ct.), aff'd (2004), 71 O.R. (3d) 195 (C.A.), aff'd [2006] 1 S.C.R. 643.

[54] *Childs v. Desormeaux* (2004), 71 O.R. (3d) 195 at 204-205 (C.A.).

...Three differences in the plaintiff-defendant relationship suggest that the possibility of a duty of care on commercial hosts does not automatically translate into a duty of care for social hosts.

[18] First, commercial hosts enjoy an important advantage over social hosts in their capacity to monitor alcohol consumption. As a result, **not only is monitoring relatively easy for a commercial host, but it is also expected by the host, patrons and members of the public.** ...[N]ot only is monitoring inherently part of the commercial transaction, but [...] servers can generally be expect to possess special knowledge about intoxication.

[19] Second, the sale and consumption of alcohol is strictly regulated by legislatures, and the rules applying to commercial establishments suggest that they operate in a very different context than private-party hosts. This regulation is driven by public expectations and attitudes towards intoxicants, but also serves, in turn, to shape those expectations and attitudes. In Ontario, where these facts occurred, the production, sale and use of alcohol is regulated principally by the regimes established by the *Liquor Control Act*, R.S.O. 1990, c. L.18, and the *Liquor Licence Act*, R.S.O. 1990, c. L.19. The latter Act is wide-ranging and regulates how, where, by and to whom alcohol can be sold or supplied, where and by whom it can be consumed and where intoxication is permitted and where it is not.

[20] **These regulations impose special responsibilities on those who would profit from the supply of alcohol. This is clear by the very existence of a licensing scheme, but also by special rules governing the service of alcohol and, as noted above, special training that may be required.** Clearly, the sale of alcohol to the general public is understood as including attendant responsibilities to reduce the risk associated with that trade.

...

[22] Third, the contractual nature of the relationship between a tavern keeper serving alcohol and a patron consuming it is fundamentally different from the range of different social relationships that can characterize private parties in the non-commercial context. ... **Unlike the host of a private party, commercial alcohol servers have an incentive not only to serve many drinks, but to serve too many. Over-consumption is more profitable than responsible consumption. ... This perverse incentive supports the imposition of a duty to monitor alcohol consumption in the interests of the general public.**[55]

It may be successfully argued that the commercial gaming context is much more analogous to the commercial host context than the private host situation at issue in *Childs*. Casinos have a variety of tools with which to monitor the gambling habits and losses of their patrons. They operate in a unique legislative regime which, though not specifically regulating the manner in which games of chance will be delivered, impose a general duty to operate in "the public interest and in accordance with the principles of honesty and integrity."[56] Finally, casinos and problem gamblers enjoy a contractual relationship in which, like the tavern keeper, the casino has a "perverse" incentive to maximize gambling activity and patron losses.

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[55] *Childs v. Desormeaux*, [2006] 1 S.C.R. 643 at paras. 18-22 [emphasis added].

[56] *Alcohol and Gaming Regulation and Public Protection Act, 1996, supra* note 15 at s. 3(3).

That a court will simply extend the duty on the part of commercial providers of alcohol by simple analogy to gambling providers is, nevertheless, unlikely. More probable is that judges will take a conservative approach and determine whether a novel duty is established by reference to the two-part *Anns* test.[57] In so doing, the Court will have to balance competing policy considerations averted to in *Childs v. Desormeaux*: the plaintiff's personal responsibility for the consequences of voluntary behaviour[58] versus the defendant's obligation to prevent foreseeable harm in an inherently risky commercial enterprise that includes responsibilities to the public at large.[59]

10) RECOVERY OF PURELY ECONOMIC LOSSES

Even though it is likely that, with the right constellation of facts, a duty of care will be imposed on Ontario and its casinos vis-à-vis a problem gambler that is not negated by public policy concerns, it is less likely that those who suffer financially as a result of the problem gambler's losses and psychological injury will recover damages. Purely economic claims arise when individuals who have suffered neither personal injury nor property damage assert that another's negligence has resulted in their financial detriment and, in the absence of contractual or fiduciary rights, seek compensation. As a general proposition, the common law has not been willing to treat recovery for economic loss on the same basis as it does for recovery for physical damages. Where the recovery of purely economic loss has been permitted, it has been on the basis of rules fashioned to meet the concerns of the particular situation.

The major policy concern, which applies in varying degrees to all categories of economic loss claims, is that the claim will open the floodgates to lawsuits by an indeterminate class in respect of indeterminate liability. Economic loss, unlike physical harm, has been dealt with in terms of categories because appropriate criteria for liability must be worked out for each distinct type of case. The Supreme Court of Canada adopted the categories approach to purely economic loss in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*[60] In that decision, LaForest J. stated the following:

> ... the question of recoverability for economic loss must be approached with reference to the unique and distinct policy issues raised in each of these categories. That is because ultimately the issues concerning recovery for economic loss are concerned with determining the proper ambit of the law of tort, an exercise that must take account of the various situations where that question may arise.[61]

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[57] *Anns v. London Borough of Merton, supra* note 32 and accompanying text.

[58] *Childs v. Desormeaux, supra* note 56 at para. 45: "A person who accepts an invitation to attend a private party does not park his autonomy at the door. The guest remains responsible for his or her conduct. Short of active implication in the creation or enhancement of the risk, a host is entitled to respect the autonomy of a guest. The consumption of alcohol, and the assumption of the risks of impaired judgment, is in almost all cases a personal choice and an inherently personal activity. Absent the special considerations that may apply in the commercial context, when such a choice is made by an adult, there is no reason why others should be made to bear its costs."

[59] *Ibid.* at para. 37: "The third situation where a duty of care may include the need to take positive steps concerns defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large: *Dunn v. Dominion Atlantic Railway Co.* (1920), 60 S.C.R. 310; *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239; *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 O.R. (3d) 487 (Gen. Div.). In these cases, the defendants offer a service to the general public that includes attendant responsibilities to act with special care to reduce risk. Where a defendant assumes a public role, or benefits from offering a service to the public at large, special duties arise."

[60] *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85.

[61] *Ibid.* at para. 12.

Recovery for economic losses has been recognized in the following category of cases:

(i) reliance on negligence statements;

(ii) negligent performance of services;

(iii) relational economic losses; and

(iv) economic losses caused by defective products.

It is difficult to see where a claim for recovery of purely economic losses by the problem gambler or his dependents against the allegedly negligent casino operator would fit within this framework.

Such a claim clearly does not fall within the category of cases dealing with economic losses caused by defective product, unless the loss is caused by some defective gaming device or machine. It also does not fall within the negligent statement category of cases unless the problem gambler can somehow argue that he was misled by casino advertisement into believing that he could gamble without risk of significant financial loss.

In a relational economic losses claim, such as that by an employer or a family member against a casino, it must be argued that the injury to the problem gambler will detrimentally affect the financial situation of the others and that their losses were reasonably foreseeable. However, as Lewis Klar cautions, "one may confidently state that as a general rule a person cannot claim recovery for relational economic losses based solely on a test of reasonable forseeability".[62] Recovery for purely economic losses has been permitted only when the court's concerns for indeterminate liability have been allayed. It is difficult to avoid the specter of indeterminate liability in any claim advanced by persons who have suffered a loss because of the problem gambler's losses. The number of potential claimants may be as varied as the number of problem gamblers. Generally, the casino operator will not know the source of the problem gambler's funds and/or the persons who would benefit from a more appropriate use of those funds.

The category of negligent performance of services may be considered as a possible basis for the problem gambler claim. It has been described as a wide and rather ambiguous category of cases similar to negligent statement cases where a duty can be imposed on an individual to take reasonable care to perform gratuitous services.[63] The crux of this duty has been described as the defendant's voluntary undertaking to carefully perform a service for the plaintiff's benefit coupled with the plaintiff's detrimental reliance on this undertaking. In this situation, the fact that the plaintiff's loss is purely economic is not a bar to recovery once the necessary relationship has been found to exist.

How does this description fit the relationship between the casino operators and the problem gambler? The only gratuitous service that comes to mind is arguably the voluntary commitment to exclude the self-identified problem gambler. But there are significant difficulties even with this self-excluder claim. The law traditionally has stressed the unenforceability of gratuitous undertakings. It is problematic whether any commitment is made by the casino to provide a voluntary service with respect to the self-exclusion request. As earlier stated, there is no express agreement made on the part of the casino to enforce the provisions of the self-exclusion request. Even if such a commitment can be implied, the form may be interpreted as excluding any liability in either contract or tort for failure to assist. The claimant also faces the difficulty of finding a sufficient relationship of reliance based upon a clear

[62] Lewis Klar, *Tort Law*, 3rd ed., (Toronto: Thomson Carswell, 2003) at 243.
[63] Klar, *ibid.* at 235.

promise to render a service by the casino, voluntary or otherwise, coupled with adequate communication of the casino's intentions to render such services and detrimental reliance by the problem gambler on that promise.[64]

In summary, recovery by a problem gambler for purely economic loss, or recovery by third parties for consequential loss, would require significant innovations in this area of the law.

11) CONCLUSION

As stated at the beginning of this paper, there are no ready answers to the questions of whether Ontario and its gaming venues may be held responsible, and in what circumstances they may likely be held responsible, for the financial and other harm suffered by problem gamblers. The policy arguments on both sides of this vexing social problem are strong.

In this paper the authors have examined the legal framework within which these issues will be decided by the court, both by reference to the statutory framework within which Ontario casinos operate and in light of existing jurisprudence, particularly vis-à-vis commercial hosts.

On balance, it is the authors' view that a problem gambler will likely succeed in establishing that the casino operator, and vicariously the Ontario Government, owes him a duty of care in circumstances where the casino operator knew or ought reasonably to have known based on the existence of a Self-Exclusion Request or other evidence, that the gambler was a problem gambler. Whether a breach of that duty gives rise to liability for a pure economic loss claim is more problematic.

Given the current uncertain state of the law, the outcome of any problem gambler's claim is by no means a safe bet, but it is at least certain that an Ontario court will permit such a claim to proceed to trial. To use the words of the Supreme Court of Canada, "only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our ... society."[65]

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[64] See *Maxi v. Canada Trust Co.* (1983), 149 D.L.R. (3d) 32 (Man. Q.B.), rev. (1984) 9 D.L.R. (4th) 380 (Man. C.A.).
[65] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 990-991.

Appendix A. OLG Self-Exclusion Form

OVER YOUR LIMIT?

For the majority of people gaming is an enjoyable form of entertainment; unfortunately, for a small number of people, it can become a problem. If you are experiencing difficulties, you should seriously consider taking positive action. There are resources available to individuals who want to - or need to - stop gambling. Immediate referral to help is available by calling The Ontario Problem Gambling Helpline (1-888-230-3505). Counseling and treatment services are also available in many communities across Ontario. Individuals may also contact self-help groups such as Gamblers Anonymous and Gam-Anon in their communities. Assistance is confidential and services are free of charge. Contacting such community services is an important step in changing your life for the better.

SELF-EXCLUSION

What is self-exclusion?

Another step that you can take is self-exclusion. It is a self-help tool and demonstrates that you acknowledge that you are responsible for your gambling actions and their implications and are taking positive action to address the problems you may be experiencing with gambling. By signing a Request to be Placed on a List of Self-Excluded Persons and Release (the "Request"), you acknowledge that it is solely your responsibility to ensure that you will not enter an Ontario Lottery and Gaming Corporation ("OLGC") gaming facility and you agree to release OLGC and its gaming facilities from any liability should you decide to re-enter an OLGC gaming facility and gamble. After signing the Request, OLGC gaming facilities will remove you from their mailing lists and deny you the ability to participate in players' programs or receive other promotional benefits. Should you re-enter an OLGC gaming facility and are discovered and identified, you will be asked to leave and you may be charged with trespass.

If you decide to self-exclude

If you decide to self-exclude, identify yourself to a member of staff at one of our gaming facilities – or you may call in advance and make an appointment. Self-exclusion must be done in person at any OLGC gaming site, including any of the commercial casinos. You can bring a friend or family member with you. Say that you want to self-exclude. You will be asked to read and sign a form, a photograph will be taken and you will be asked to return your players card(s). You will also be given information materials about problem gambling and how you can get more information and help. It is your decision whether to take those next steps.

What happens next?

We will take your name off of mailing lists so that marketing and promotional mailings are no longer sent to you. (Note that a mailing might already be in process that cannot be stopped, so this might not be effective immediately.)

You will not return to our gaming facilities. If you find this difficult, remember your commitment to yourself and why you made that commitment. And consider contacting the services available to you in your community to help you keep that commitment to yourself.

We do not want you to return if you have taken this step. Please remember, it is solely *your* responsibility to not return to our gaming facilities after you have self-excluded. We cannot prevent you from returning if you decide to do so. If you do, and are discovered and identified, you will be asked to leave and you may be charged and arrested for trespass without any further warning or notice.

Features

- Self-exclusion applies to all OLGC gaming sites including Casino Rama, Casino Niagara, Niagara Fallsview Casino Resort, Casino Windsor, Great Blue Heron Charity Casino and OLGC's charity casinos and slot machine facilities at racetracks.

- A person must exclude him or herself; no one can exclude another person (the only exception is under power of attorney).

- The self-exclusion is for an indefinite time period – there is no date of expiry. Reinstatement may be possible after a period of time has elapsed. A request must be submitted in writing to a gaming site. The request will not be considered until six months have passed from the date of self-exclusion. The site staff make an appointment for the individual to come to the facility to complete a reinstatement form. The individual must wait an additional 30 days after signing the form at this meeting before returning to a gaming site to play. OLGC does not promote reinstatement.

Request to be Placed on the Self-Exclusion List and Release

I request to be placed on the Ontario Lottery and Gaming Corporation's ("OLGC") list of self-excluded persons (the "List"). I acknowledge that it is solely my responsibility to refrain from visiting an OLGC gaming facility and gambling in the future. I also acknowledge receipt of the toll-free phone number for the Ontario Problem Gambling Hotline, and that it is my responsibility and decision whether or not to seek treatment or counselling.

I understand that, as a result of being placed on the List, OLGC and the commercial casinos will, within a reasonable time period, remove me from their mailing lists. I understand, however, that I may receive marketing materials to the extent mailings have already been initiated and cannot be stopped. I understand that I will become ineligible to participate in any players' programs, and promotional offers. I confirm that I have either returned all players' cards in my possession or undertake to destroy them.

I acknowledge and agree that OLGC, the private operators of OLGC gaming facilities, and their respective agents and employees, have no responsibility or obligation to keep or prevent me from entering an OLGC gaming facility, to remove me should I enter, or to stop me from gambling.

I confirm that this form constitutes written notice under the *Trespass to Property Act* that my entry onto an OLGC gaming facility is not permitted, and that I may be arrested and charged for trespass without further notice or warning should I enter an Ontario gaming facility.

In consideration for being placed on the List, I agree to release and not to sue the Province of Ontario, the OLGC, all private operators of OLGC gaming facilities and their respective agents and employees, from and for any claims or causes of action that I have or may have arising out of any act or omission relating to the processing, implementation or enforcement of this request to be placed on the List, including the forwarding of the contents of this request to any OLGC gaming facility, private operator of such facilities, or their agents or employees, or for any financial loss, physical injury or emotional distress or any breach of confidentiality that may occur as a result.

I have read this Request to be Placed on the Self-Exclusion List and Release and understand all of its terms. I sign it voluntarily and with full knowledge of its consequences and significance.

I have signed this Request to be Placed on the Self-Exclusion List and Release at _____ on the _____ day of _____, 20___.

First Name _____ Last Name _____

Street _____ City/Town _____

Province/State _____ Postal Code _____

Form of Identification _____ I.D. Number _____

Date of Birth _____ Signature _____

Name of Issuing Gaming Establishment _____

Employee Name _____ Employee Number _____

Personal information contained on this form is collected and retained pursuant to the Ontario Lottery and Gaming Corporation Act and will be used for the purpose of responding to your request. Questions about this collection should be directed to the Freedom of Information and Privacy Coordinator at the OLGC.

For information about problem gambling, and/or referral to treatment resources in Ontario, contact:
ONTARIO PROBLEM GAMBLING HELP LINE 1-888-230-3505

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