File No. CT 2005-006

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

IN THE MATTER OF an application by B-Filer Inc, B. Filer Inc. doing business as GPAY GuaranteedPayment and NPay Inc. for an order pursuant to section 103.1 granting leave to make application under sections 75 and 77 of the *Competition Act*;

AND IN THE MATTER OF an application by B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and NPay Inc. for an interim order pursuant to section 104 of the **Competition Act**.

BETWEEN:

B-FILER INC., B-FILER INC. doing business as GPAY GUARANTEEDPAYMENT and NPAY INC.

Applicants

- and -

THE BANK OF NOVA SCOTIA

Respondent

AFFIDAVIT OF STANLEY SADINSKY
(Sworn November 22, 2005)

I, **STANLEY SADINSKY**, Barrister and Solicitor, of the City of Kingston, in the Province of Ontario, **MAKE OATH AND SAY**:

Professional Qualifications and Experience

1. I currently hold the position of Professor Emeritus, Faculty of Law, Queens University. I have held this position since 2003. Prior that, I was a Professor of Law at Queens University. While a Professor at Queens University, I taught courses in, among other things, Gaming Law.

2. In addition to my position as a Professor of Law at Queens University, I have, in the past, held the position of Chair of the Ontario Racing Commission and Chair of the Board of Directors of the Ontario Lottery and Gaming Corporation, in addition to numerous other appointments.

3. I have written extensively on a number of legal topics, including Gaming and Gambling in Canada. Attached hereto and marked as **Exhibit 'A'** is a copy of my Curriculum Vitae.

4. In considering the material provided to me and in formulating the opinions contained herein, I did so for the purpose of providing an opinion to the Respondent, The Bank of Nova Scotia ("Scotiabank"), as to whether it would be in breach of the *Criminal Code of Canada* (the "*Criminal Code*") if it were to be required to offer banking services to the Applicants. That opinion is expressed in this Affidavit.

Material Reviewed

5. For the purposes of preparing this Affidavit, I have reviewed the following documentation prepared by the Applicants and submitted to the Competition Tribunal:

(a) Notice of Application for Leave pursuant to Section 103.1 of the *Competition Act*;

(b) Notice of Application pursuant to Sections 75 and 77 of the *Competition Act*;

(c) Affidavit of Raymond Grace affirmed June 15, 2005, and the Exhibits attached thereto;

(d) Second Affidavit of Raymond Grace affirmed September 1, 2005, and the Exhibits attached thereto;

(e) Affidavit of Joseph Iuso, affirmed August 29, 2005, and the Exhibits attached thereto;

I have reviewed the following documents on behalf of the Respondent:

(a) Affidavit of Robert Rosatelli, sworn July 12, 2005, and the Exhibits attached thereto;

(b) Affidavit of David Metcalfe, sworn July 12, 2005, and the Exhibits attached thereto;

(c) Responding Affidavit of Robert Rosatelli, sworn September 21, 2005, and the Exhibits attached thereto;

(d) Representations of The Bank of Nova Scotia in response to the Application for Leave, pursuant to Section 103.1 of the *Competition Act*;

6. In addition to the foregoing, I was also provided with the Decision of the Honourable Mr. Justice Lefsrud, dated September 22, 2005 with respect to the Motion by the Applicants for an Injunction in the Alberta Civil Court.

Brief Overview of the Facts

7. Based on my review of the above-noted documentation, I believe that the following is a brief summary of the facts that are relevant to my opinion on the issues that I have been asked to consider. The source of my information and belief with respect to the following factual issues is derived from the materials reviewed.

8. The Applicants, together with UseMyBank, operate a joint venture business enterprise which facilitates the transfer of money from banking customers' accounts and ultimately to third

parties. If a banking customer wishes to transfer money to a third party through the services of the Applicant and UseMyBank, the banking customer would click on the UseMyBank icon. The banking customer would be prompted to provide the banking customer's bank card and the internet password. The Applicants and UseMyBank, through the use of their computers, would take the customer's bank card number and password and would enter into the customer's bank account and effect a transfer of money from the customer's bank accounts to the Applicants' account at Scotiabank by way of e-mail money transfer. The Applicants could also effect transfers of money from banking customers' accounts by entering into the banking customers' accounts and transferring money to GPay as a bill payee on Scotiabank's list of bill payees, and these funds would later be released from Scotiabank's suspension accounts to the Applicants' accounts at Scotiabank.

9. Based on my review of the materials, I do not believe that there is any dispute that some of the Applicants' business involved transferring funds from Canadian banking customers' accounts to the Applicants' Scotiabank accounts, and ultimately out to off-shore internet casinos. The Applicants' service in conjunction with UseMyBank facilitates Canadian customers in placing bets at off-shore internet casinos.

10. I have assumed for the purposes of my consideration of this matter that the Applicants' computer servers are located in Canada, as there is no information to the contrary in the Applicants' materials.

11. I further understand from a review of the documentation that the Applicants, pursuant to the terms contained on UseMyBank's website, have asserted that an agency relationship exists between the banking customer and UseMyBank. Whether or not the terms and conditions

contained on UseMyBank's website are sufficient to create an agency relationship between the banking customer and the Applicants is not relevant for the purposes of my opinions stated herein.

Overview of Gaming Regulation in Canada

12. The federal Parliament's power to enact criminal law in Canada has resulted in criminal sanctions for a broad range of gambling activities. However, a number of exemptions have been enacted and negotiated and, ultimately, this has lead to the legalization of the activities of provincial governments in the operation and management of, among other things, lottery schemes. Such schemes include games operated through a computer, video device or slot machine.

13. The regulation of lottery schemes is also reserved for provincial governments. Gambling in Canada that is not permitted under the Criminal Code and/or regulated by federal or provincial authorities is illegal.

Opinion

14. In the balance of the Affidavit, I provide my expert opinion with respect to the following overarching issue, namely, whether Scotiabank would be in breach of the *Criminal Code* if it were required to provide banking services to the Applicants. In considering this opinion, it is first necessary for me to consider two preliminary issues:

(a) Is it illegal for Canadians located in Canada to place bets with off-shore internet gambling sites?

(b) Is the activity being conducted by the Applicants and their joint venture partner, UseMyBank, in breach of the provisions of the *Criminal Code*?

(a) Relevant Provisions of the *Criminal Code*

15. The provisions of Part VII of the *Criminal Code of Canada* appear under a section entitled "*Disorderly Houses, Gaming and Betting*". Attached hereto and marked as **Exhibit "B"** is a copy of Part VII of the *Criminal Code*.

16. Pursuant to section 197(1) of the *Criminal Code*, "bet" is defined to mean

> "*a bet that is placed on any contingency or event that is to take place* ***in or out of Canada****, and without restricting the generality of the foregoing, includes a bet that is placed on any contingency relating to a horse-race, fight, match or sporting event that is to take place* ***in or out of Canada*** [emphasis added].

17. Pursuant to section 202(1) of the *Criminal Code*, everyone commits an offence, who:

> *(a) uses or knowingly allows a place under his control to be used for the purpose of recording or registering bets ...;*
>
> *(b) imports, makes, buys, sells, rents, leases, hires or keeps, exhibits, employs or knowingly allows to be kept, exhibited or employed in any place under his control any device or apparatus for the purpose of recording or registering bets ... or any machine or device for gambling or betting;*
>
> *(c) has under his control any money or other property relating to a transaction that is an offence under this section;*
>
> *(d) records or registers bets ...;*
>
> *(e) engages in ... the business or occupation of betting, or makes any agreement for the purchase or sale of betting or gaming privileges, or for the purchase or sale of information that is intended to assist in ... betting;*
>
> *(f) prints, provides or offers to print or provide information intended for use in connection with ... betting upon any horse-race, fight, game or sport, whether or not it takes place in or outside of Canada or has or has not taken place;*
>
> *(g) imports or brings into Canada any information or writing that is intended or is likely to promote or be of use in gambling ...*
>
> *(h) ...*

(i) *willfully and knowingly sends, transmits, delivers or receives any message by radio, telegraph, telephone, mail or express that conveys any information relating to ... betting or wagering or that is intended to assist in ... betting or wagering; or*

(j) *aids or assists in any manner in anything that is an offence under this section.*

18. Pursuant to section 202(2) of the *Criminal Code*:

"*Everyone who commits an offence under this section is guilty of an indictable offence and liable:*

for a first offence, to imprisonment for not more than two years;

for a second offence, to imprisonment for a term not more than two years and not less than fourteen days; and

for each subsequent offence, to imprisonment for not more than two years ...

19. Section 204 of the *Criminal Code* provides for a number of exemptions to the Application of Sections 201 and 202 that do not have application to the facts of this case.

20. In addition to the foregoing, sections of the *Criminal Code* specifically relating to gambling, section 21 of the *Criminal Code* is a provision of general application which is also relevant to this case:

"(21)(1) *Everyone is a party to an offence who*

(a) *actually commits it;*

(b) *does or omits to do anything for the purpose of aiding any person to commit it; or*

(c) *abets any person in committing it.*

(2) *Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.*

(b) Is off-shore internet gambling by Canadians located in Canada illegal?

21. In recent years, there has been a vast proliferation of off-shore internet casinos available to Canadians over the internet. While Canadians' access to off-shore gambling has increased, and while there may be a diminishing social taboo with respect to gambling generally, this does not mean that off-shore internet gambling by Canadians located in Canada is legal. Quite to the contrary, the *Criminal Code*, as described above, creates a series of offences in relation to gambling. The fact that law enforcement has not focused its efforts on prosecuting individuals engaged in off-shore internet gambling does not mean that the act itself is not illegal.

22. In my research, I have not been able to find any decided Canadian case law dealing with the prosecution of a Canadian located in Canada who gambles at an off-shore , online gambling site. However in my opinion, there is a very strong argument that a Canadian citizen located in Canada who places a bet with an off-shore internet gambler is committing a criminal offence. In particular, the Canadian located in Canada who is placing bets with off-shore internet casinos may be breach of:

(a) section 202(1)(a), because bets are recorded and registered on the internet gambler's computer by both the gambler and by the operator;

(b) section 202(1)(b), because the internet gambler employs a device (his or her computer) for recording or registering bets;

(c) section 202(1)(e), because the internet gambler makes an agreement for the purpose of betting or gaming privileges with the gambling operator and purchases information intended to assist in betting;

(d) section 202(1)(g), because the internet gambler imports or brings into Canada by means of the internet, information that is intended to be used in gambling; and

(e) section 202(1)(i), because the internet gambler sends messages that convey information relating to betting, provided that the word "telephone" in that section encompasses an internet computer link.

23. As a result of the foregoing, it is my opinion that there is a very strong argument that Canadian citizens located in Canada at the time that they are engaged in off-shore internet gambling are committing a criminal offence.

(c) Are the Applicants committing a criminal offence in facilitating transfers of money between Canadian banking customers' bank accounts and off-shore internet casinos?

24. Having reached the conclusion that Canadians located in Canada engaged in off-shore internet gambling are very likely committing an offence pursuant to section 202 of the *Criminal Code*, I will now consider whether the Applicants, in conjunction with their joint venture partner, UseMyBank, are committing a criminal offence.

25. Pursuant to section 202(1)(c) of the *Criminal Code*, detailed above, it is an offence to have under one's control any money relating to a transaction that is an offence under section 202.

26. Again, in my research, I have not been able to find any decided Canadian case law dealing with the prosecution of a party that facilitates the transfer of funds between a Canadian banking customer's bank account and ultimately to an off-shore online gambling site. However, in my opinion, there is very strong argument that the Applicants, in conjunction with their joint venture partner, UseMyBank, by effecting transfers of money from Canadian customers' bank

accounts to the Applicants' Scotiabank accounts, and ultimately transferring money to off-shore internet gamblers, are very likely committing an offence pursuant to section 202(1)(c).

27. In addition to the foregoing, having concluded that off-shore internet gambling by Canadians located in Canada is likely illegal pursuant to the above-noted sections of the *Criminal Code*, in my opinion, there is a very strong argument that the Applicants are in violation of section 21 of the *Criminal Code* by aiding and abetting the internet gambler to commit those offences. In particular, facilitating the transfer of funds from the internet gambler's bank account to the Applicants' bank accounts at Scotiabank, and ultimately out to the internet casinos, whether or not this occurs through a series of other intermediaries, likely constitutes aiding and abetting the Canadian banking customer in committing an offence.

(d) If Scotiabank were required to offer banking services to the Applicants and these accounts received monies from banking customers that were ultimately transferred to off-shore internet casinos, would Scotiabank be in breach of the *Criminal Code*?

28. Based on the information contained in the Affidavit of Robert Rosatelli, it is my understanding that Scotiabank was initially unaware that the Applicants were requesting customers' internet banking card passwords and were effecting transfers of money from the Scotiabank customers' accounts to the Applicants' Scotiabank accounts, and ultimately out to off-shore internet casinos. I also understand from Robert Rosatelli's Affidavit that Scotiabank began investigating the Applicants' activities in early 2005, and ultimately provided a notice to the Applicants that their accounts would be terminated.

29. I am advised by Lisa Constantine, counsel to Scotiabank, and verily believe that the Applicants' accounts have now been terminated. I am further advised by Lisa Constantine, and

verily believe, that the Applicants are seeking an Order from the Competition Tribunal which would require Scotiabank to provide banking services to the Applicants, including bank accounts, and the ability to transfer money from banking customers' accounts to the Applicants' accounts by way of e-mail money transfer.

30. In my opinion, if Scotiabank were required to provide banking services to the Applicants, knowing that the Applicants used those accounts to effect transfers of money from banking customers' accounts to the Applicants' Scotiabank accounts for the purposes of ultimately funding off-shore gambling accounts, there is a very strong argument that Scotiabank, with the knowledge that it now has about the nature of the Applicants' business, may be in breach of section 21 of the *Criminal Code*. Specifically, by providing accounts in the above-noted circumstances, it is my opinion to Scotiabank that there is a very strong argument that Scotiabank would be aiding and abetting Canadian banking customers in committing a criminal offence by placing bets at off-shore casinos, and may also be aiding and abetting the Applicants who are likely in breach of section 202(1)(c) as described above.

Conclusion

31. In summary, for the reasons set out above, it is my opinion to Scotiabank that there is a very strong argument that:

(a) off-shore internet gambling by Canadians located in Canada is illegal pursuant to section 202 of the *Criminal Code*;

(b) the Applicants' business, which includes effecting transfers of money from banking customers' accounts, to the Applicants' accounts, and ultimately out to

off-shore internet gamblers, constitutes a breach of section 202(1)(c) of the *Criminal Code;*

(c) now that Scotiabank is aware of the nature of the Applicants' business, including its involvement in transferring funds between Canadian banking customers' accounts and off-shore internet casinos, the provision of bank accounts and banking services to the Applicants by Scotiabank would constitute a breach of section 21 of the *Criminal Code*, in that Scotiabank would be aiding and abetting banking customers and the Applicants in their breaches of section 202 of the *Criminal Code.*

SWORN before me)
)
at the City of Toronto)
)
this 22nd day of November, 2005.)
)
)
)
)

Stanley Sadinsky
STANLEY SADINSKY

A Commissioner for taking Affidavits

Lisa M. Constantine

STANLEY SADINSKY's CURRICULUM VITAE

Exhibit 1 referred to in the affidavit of Stanley Sadinsky sworn before me, this 22nd day of November 20 05

A COMMISSIONER FOR TAKING AFFIDAVITS

PERSONAL INFORMATION

Born: Ottawa, Ontario, October 27, 1939

Married to Gillian Mary Margaret Robertson, December 7, 1969

Two children: Elspeth Anna born November 30, 1970
Emily Elder born December 12, 1972

EDUCATION

Ottawa Public Schools and Lisgar Collegiate Institute, Ottawa, 1957

Queen's University, Kingston, B.A., 1960

Queen's University, Kingston, L.L.B. 1963 (Honours)

Bar Admission Course, Osgoode Hall, Toronto, 1965 (First Class Honours)

LANGUAGES SPOKEN

English and French

PROFESSIONAL PRACTICE

Articles at Law, 1964, Mason, Foulds, Arnup, Walter, Weir & Boeckh, Toronto

Lawyer, 1965 - 1971, Weir & Foulds, Toronto, (Partner, 1970 - 1971)

Private Consulting Practice in Civil Litigation and Gaming Law, Kingston, 1971 -

ACADEMIC APPOINTMENTS

Lecturer in Civil Procedure, Bar Admission Course, Osgoode Hall, Toronto, 1969 - 1971

Associate Professor of Law, Queen's University, 1971 - 1973

Professor of Law, Queen's University. 1973 - 2002

Professor Emeritus, Faculty of Law, Queen's University, 2003 -

Courses Taught in the Faculty of Law, Queens's University, 1971 - 2003
Civil Procedure, Advanced Civil Procedure, Evidence, Advocacy, Legal Profession, Contracts, Equitable Remedies, Gaming Law

Lecturer in the Faculty of Medicine, Queen's University, 1976 - 1993

Lecturer at the National Defence College, Department of National Defence, 1986 - 87

Examiner in Civil Procedure and Remedies, National Committee on Accreditation, Federation of Law Societies, 1991 -

AWARDS AND PRIZES

Tricolour Award, Queen's University, 1960

Entrance Scholarship, Faculty of Law, Queen's University, 1960

Prize in the Conflicts of Laws, 1963

Queen's University Alumni Award for Excellence in Teaching, 1986

The Joan Pew Award, Association of Racing Commissioners International, Lexington, KY, 2002

The Distinguished Service Award, Harness Tracks of America, Tucson, AZ, 2003

PROFESSIONAL APPOINTMENTS

Research Director, Ontario Law Reform Commission, Report on the Solicitor's Act, 1971 - 1973

Member of the Osler Task Force on Legal Aid, Ontario, 1974 - 1975

Academic Consultant to the Canadian Judicial Council, Ottawa, 1976 - 1993

Queen's Counsel, 1977

Member, Faculty Council, Advocates' Society Institute, Toronto, 1989 - 1996

Board of Directors, Ontario Housing Corporation, Ministry of Municipal Affairs and Housing, 1979 - 1981

Member, Canadian Human Rights Tribunal Panel, 1989 - 1998

Ontario Racing Commission, Commissioner (1981 - 1984), Vice Chair (1984 - 1985) and Chair (1994 - 2003)

Chair of the Board of Directors, Ontario Lottery and Gaming Corporation, 2003 - 2004

Consultant, Ministry of Health and Long-Term Care and Ministry of Economic Development and Trade, The Ontario Problem-Gambling and Responsible-Gaming Strategy, 2004 -

Consultant to the Government of Nova Scotia on Gambling Policy, 2005.

UNIVERSITY AND COMMUNITY APPOINTMENTS

President and Permanent President, Arts '61, Queen's University.

President, Law '63, Queen's University, 1963.

Founding Member of the Board of Directors, Frontenac Historic Foundation.

Board of Directors, Kingston Symphony Association, 1983 - 1986

Board of Directors, Queen's University Faculty Club, 1983-1988; Vice-President, 1985-1986; President, 1986-1987; Past President, 1987- 1988

Member, Sexual Harassment Complaint Board, Queen's University, 1986 - 1991

Member, Ethics Review Committee, Faculty of Medicine, Queen's University, 1987

Member, Continuing Legal Education Committee, Frontenac Law Association, 1987 - 1989

Member, Board of Directors, National Film Theatre of Kingston, 1992 - 1994

Member, Board of Directors, Association of Racing Commissioners International, 1994 - 2003

Volunteer Counsellor, The Hole in the Wall Gang Camp, Ashford, Connecticut, 2000-2003, 2005

SELECTED RESEARCH AND PUBLICATIONS

Preparing a Civil Case for Trial, 5 Video Tapes, Queen's Television, (with Professor N. Lyon)

Character Evidence, 1 Video Tape, Queen's Television, (with Professor R.J. Delisle)

The Social Worker in the Family Court, 1982, 8 Video Tapes, Ministry of Community and Social Services, Queen's Television

Cases and Materials on Remedies, 1982 - 1985, Queen's University, Faculty of Law, (with Professor David J. Mullan)

Conduct of a Criminal Jury Trial, 1979 - 1984, Volume 1, Proceedings of the Canadian Judicial Council, Summer Seminars for Superior Court Judges, Canada

Materials on Civil Procedure, 1979 - 1984, Queen's University, Faculty of Law

Selected Readings on the Legal Profession and Ethics, 1979 - 1986, Queen's University, Faculty of Law

Report to the Ministry of Community and Social Services on the Legal Services Department of the Catholic Children's Aid Society of Metropolitan Toronto, 1983.

Judicial Remedies, 1986, Queen's University, (with Professors Berryman, Cassels, Cromwell, Mullan, Sharpe and Waddams

Evidence, 1987, Queen's Television, (with Professor R.J. Delisle)

The Queen v. Benz. The Hearsay Rule: Going... Going... !, (1991), 13 Syd. L.R. 85

Contracts: Supplement 1991-1992, 1992-93, 1993-1994, 1994-1995; Queen's University

Interlocutory Injunctions and Procedures: The Mareva Injunction, Chapter 7 in Berryman, Remedies: Issues and Perspectives, 1991, Carswell

Remedies, Cases and Materials, 1st Edition, 1988, 2nd Edition, 1992, 3rd Edition, 1997, 4th Edition, 2001, Emond, Montgomery, Toronto, (with Professors, Berryman, Cassels, Cromwell, Mullan, Sharpe and Waddams)

Book Review: Berryman, The Law of Equitable Remedies, [2001] Queen's Law Journal

Cases and Materials on Gaming Law, (with John Chalmers), Queen's University, 1998; 2nd Edit. 1999; 3rd Ed. 2001

Numerous Written Decisions, Ontario Racing Commission, 1994 - 2003

Review of the Problem-Gambling and Responsible-Gaming Strategy of the Government of Ontario, Prepared for the Ministry of Health and Long-Term Care and the Ministy of Economic Development and Trade, March, 2005 (found at www.health.gov.on.ca)

SELECTED PAPERS DELIVERED

Engineering and the Law, 1982, Ontario Association of Professional Engineers

Social Work and the Law, 1982, Ontario Association of Professional Social Workers, Kingston

Evidence in the Provincial Court (Family Division), 1982, Ministry of Community and Social Services, Ontario

Patient Care Issues: Decisions and Dilemas, A Lawyer's Point of View , 1983, Proceedings of the Conference on Medical-Moral -Legal Issues, Department of Pastoral Care, Kingston General Hospital

Some Reflections on Legal Issues Relevant to the Treatment of Children, 1983, Beechgrove Regional Children's Centre, Kingston

The Canadian Legal System, 1986, National Defence College, Kingston, Ontari

Engineers and the Law of Tort and Contract, 1986, Association of Professional Engineers of Ontario Undergraduate Conference, Kingston, Ontario

Advertising for Lawyers, 1987, County of Frontenac Law Association, Kingston, Ontario

The Use of Evidence in Prior Proceedings in Child Welfare Matters, 1987, Continuing Legal Education, Law Society of Upper Canada, Toronto.

The Zuber Report, 1987, Faculty of Law, Queen's University

Practice, Administrative Law and Evidence, 1987, Canadian Bar Association - Ontario, Continuing Legal Education, Annual Update, Kington, Ontario

The Canadian Legal System, Courts, Lawyers and Judges, 1988, Learning for Senior Citizens, Kingston, Ontario

Confidentiality and Privilege, 1988, Canadian Bar Association - Ontario, Continuing Legal Education, Kingston, Ontario

Written Examinations for Discovery and Discovery from Non-parties, Law Society of Upper Canada Continuing Legal Education Seminar, Kingston, 1989

Interlocutory Injunctions and Procedures - The Mareva Injunction, International Symposium on the Law of Remedies, University of Windsor, 1989

Pre-paid Legal Services Plans in Canada, the United States and Australia, Faculty Seminar, The University of Sydney, Sydney, Australia, May, 1990, and at The University of Auckland, Auckland New Zealand, June, 1990

The Health Care Professional as an Expert Witness, Department of Community Health and Epidemiology, Faculty of Medicine, Queen's University, 1994

Opening and Closing Addresses, American Association of Trial Lawyers (Queen's University Branch), Queen's University, 1995

Teaching Legal Ethics, Faculty of Law Alumni Association, Queen's University, 1995

The Structure of the Canadian Legal System: Sources of Law, Division of Powers, Structure of the Courts and the Role of the Legal Profession, Later Life Learning, Kingston, Ontario, April, 1998

The Ontario Racing Commission Act, 2000, Annual Meeting of the Association of Racing Commissioners International, Louisville, Kentucky, April, 2001

De-Regulating the Regulator, University of Arizona Symposium on Horse Racing, Tucson, Arizona, December, 2001

Regulating the Regulator, Association of Racing Commissioners International, New York, February, 2002

The Perspective of the Regulator, Harness Tracks of America, Florida, March, 2003

Keynote Speaker, Conference of Problem Gambling, Nova Scotia Gambling Corporation, Halifax 2005

The Future of Gambling in Canada, Conference on Problem Gambling, Nova Scotia Gaming Corporation, Halifax, 2005

November, 2005

MARTIN'S
ANNUAL CRIMINAL CODE
2006

With Annotations by

EDWARD L. GREENSPAN, Q.C.

of the Ontario Bar

and

The Honourable Mr. Justice

MARC ROSENBERG

of the Ontario Court of Appeal

This is Exhibit 3 referred to in the affidavit of Stanley Sadinsky sworn before me, this 22nd day of November 2005

A COMMISSIONER FOR TAKING AFFIDAVITS

CANADA LAW BOOK INC.
240 Edward Street, Aurora, Ontario, L4G 3S9
www.canadalawbook.ca

ANNOTATIONS

Subsection (1) is complied with merely by notifying the person that he was the object of an interception. The person has no right to any wider notification such as receipt of a copy of the authorization: *R. v. Zaduk* (1978), 38 C.C.C. (2d) 349 (Ont. H.C.J.), affd (1979), 46 C.C.C. (2d) 327, 98 D.L.R. (3d) 133 (Ont. C.A.).

The Crown, having informed the accused that they were not the targets of any wiretap investigation in relation to the charges for which they were then being tried, had no obligation to disclose whether or not the accused were named as targets in any other authorizations. Before the Crown would be required to disclose this information, the defence must meet a threshold test of showing some basis which would enable the presiding judge to conclude that there is in existence material which is potentially relevant: *R. v. Chaplin*, [1995] 1 S.C.R. 727, 96 C.C.C. (3d) 225, 36 C.R. (4th) 201.

Part VII / DISORDERLY HOUSES, GAMING AND BETTING

Interpretation

DEFINITIONS / "bet" / "common bawdy-house" / "common betting house" / "common gaming house" / "disorderly house" / "game" / "gaming equipment" / "keeper" / "place" / "prostitute" / "public place" / Exception / Onus / Effect when game partly played on premises.

197. (1) In this Part

"bet" means a bet that is placed on any contingency or event that is to take place in or out of Canada, and without restricting the generality of the foregoing, includes a bet that is placed on any contingency relating to a horse-race, fight, match or sporting event that is to take place in or out of Canada;

"common bawdy-house" means a place that is

(*a*) kept or occupied, or

(*b*) resorted to by one or more persons

for the purpose of prostitution or the practice of acts of indecency;

"common betting house" means a place that is opened, kept or used for the purpose of

(*a*) enabling, encouraging or assisting persons who resort thereto to bet between themselves or with the keeper, or

(*b*) enabling any person to receive, record, register, transmit or pay bets or to announce the results of betting;

"common gaming house" means a place that is

(*a*) kept for gain to which persons resort for the purpose of playing games, or

(*b*) kept or used for the purpose of playing games

(i) in which a bank is kept by one or more but not all of the players,

(ii) in which all or any portion of the bets on or proceeds from a game is paid, directly or indirectly, to the keeper of the place,

(iii) in which, directly or indirectly, a fee is charged to or paid by the players for the privilege of playing or participating in a game or using gaming equipment, or

(iv) in which the chances of winning are not equally favourable to all persons who play the game, including the person, if any, who conducts the game;

"disorderly house" means a common bawdy-house, a common betting house or a common gaming house;

"game" means a game of chance or mixed chance and skill;

"gaming equipment" means anything that is or may be used for the purpose of playing games or for betting;

"keeper" includes a person who

(*a*) is an owner or occupier of a place,

(*b*) assists or acts on behalf of an owner or occupier of a place,

(*c*) appears to be, or to assist or act on behalf of an owner or occupier of a place,

(*d*) has the care or management of a place, or

(*e*) uses a place permanently or temporarily, with or without the consent of the owner or occupier thereof;

"place" includes any place, whether or not

(*a*) it is covered or enclosed,

(*b*) it is used permanently or temporarily, or

(*c*) any person has an exclusive right of user with respect to it;

"prostitute" means a person of either sex who engages in prostitution;

"public place" includes any place to which the public have access as of right or by invitation, express or implied.

(2) A place is not a common gaming house within the meaning of paragraph (*a*) or subparagraph (*b*)(ii) or (iii) of the definition "common gaming house" in subsection (1) while it is occupied and used by an incorporated genuine social club or branch thereof, if

(*a*) the whole or any portion of the bets on or proceeds from games played therein is not directly or indirectly paid to the keeper thereof; and

(*b*) no fee is charged to persons for the right or privilege of participating in the games played therein other than under the authority of and in accordance with the terms of a licence issued by the Attorney General of the province in which the place is situated or by such other person or authority in the province as may be specified by the Attorney General thereof.

(3) The onus of proving that, by virtue of subsection (2), a place is not a common gaming house is on the accused.

(4) A place may be a common gaming house notwithstanding that

(*a*) it is used for the purpose of playing part of a game and another part of the game is played elsewhere;

(*b*) the stake that is played for is in some other place; or

(*c*) it is used on only one occasion in the manner described in paragraph (*b*) of the definition "common gaming house" in subsection (1), if the keeper or any person acting on behalf of or in concert with the keeper has used another place on another occasion in the manner described in that paragraph. R.S., c. C-34, s. 179; 1972, c. 13, s. 13; 1980-81-82-83, c. 125, s. 11; R.S.C. 1985, c. 27 (1st Supp.), s. 29.

CROSS-REFERENCES

In addition to the definitions in this section, see s. 2 and notes to that section. The gaming, betting and lottery offences are found in ss. 201 to 209; bawdy house and prostitution offences in ss. 210 to 213.

SYNOPSIS

Section 197(1) provides exhaustive definitions for a number of terms which are used in several sections throughout Part VII of the *Criminal Code*. The definition of "common gaming house" in subsec. (1) must be read together with subsec. (2) which provides a number of exceptions to the definition.

Section 197(3) provides that the onus of proving that the house comes within one of the exclusions within s. 197(2) is upon the accused.

would seem to render this definition redundant, it is suggested that, in any of the keeping offences, it must be proved as a minimum that the person fell within the definition of keeper in this section and also committed some act as indicated by the court in *Kerim*. Some of the difficulty in interpretation of this section appears to be as a result of its derivation from s. 229(3) of the 1927 Code, which enacted a presumption that a person was a keeper of a disorderly house if he or she "appears, acts or behaves" as, *inter alia*, the person having the care, government, or management of the premises.]

While it has been held that, for premises to be considered a common gaming house, there must be evidence of frequent or habitual use: *R. v. Rockert, supra*, it is not necessary to prove that the person charged with keeping the common gaming house acted as such frequently or habitually, particularly in light of para. (*e*) of this definition which refers to a permanent or temporary use of the place: *R. v. Lamolinara* (1989), 53 C.C.C. (3d) 250 (Que. C.A.).

Social club exemption [subsec. (2)] – It was held in *R. v. MacDonald*, [1966] S.C.R. 3, [1966] 2 C.C.C. 307, 47 C.R. 37 (5:0), that a branch of the Royal Canadian Legion was not entitled to the social club exemption where bingo was carried out on a large scale and on a daily basis. The court held that this was not an "occupation and use by a *bona fide* social club". However, following that decision, this subsection was substantially amended so that the activities carried on in that case might fall within this exemption, provided that the requisite licence was obtained and complied with.

A gaming house, which falls within the definition of "common gaming house" in para. (*b*)(i), being a place kept or used for the purpose of playing games in which a bank is kept by one or more but not all of the players, is not entitled to the exemption in this subsection: *R. v. Pon Chung and Mow Chong Social Club*, [1965] 2 C.C.C. 331, [1965] 1 O.R. 583 (C.A.).

The social club's "*bona fides*" is not lost merely because some of the avowed objects of the club were not carried out: *R. v. Pon Chung and Mow Chong Social Club, supra*.

Presumptions

PRESUMPTIONS / Conclusive presumption from slot machine / Definition of "slot machine".

198. (1) In proceedings under this Part,

- **(*a*) evidence that a peace officer who was authorized to enter a place was wilfully prevented from entering or was wilfully obstructed or delayed in entering is, in the absence of any evidence to the contrary, proof that the place is a disorderly house;**
- **(*b*) evidence that a place was found to be equipped with gaming equipment or any device for concealing, removing or destroying gaming equipment is, in the absence of any evidence to the contrary, proof that the place is a common gaming house or a common betting house, as the case may be;**
- **(*c*) evidence that gaming equipment was found in a place entered under a warrant issued pursuant to this Part, or on or about the person of anyone found therein, is, in the absence of any evidence to the contrary, proof that the place is a common gaming house and that the persons found therein were playing games, whether or not any person acting under the warrant observed any persons playing games therein; and**
- **(*d*) evidence that a person was convicted of keeping a disorderly house is, for the purpose of proceedings against any one who is alleged to have been an inmate or to have been found in that house at the time the person committed the offence of which he was convicted, in the absence of any evidence to the contrary, proof that the house was, at that time, a disorderly house.**

(2) For the purpose of proceedings under this Part, a place that is found to be equipped with a slot machine shall be conclusively presumed to be a common gaming house.

(3) In subsection (2), "slot machine" means any automatic machine or slot machine

(*a*) that is used or intended to be used for any purpose other than vending merchandise or services, or

(*b*) that is used or intended to be used for the purpose of vending merchandise or services if

(i) the result of one of any number of operations of the machine is a matter of chance or uncertainty to the operator,

(ii) as a result of a given number of successive operations by the operator the machine produces different results, or

(iii) on any operation of the machine it discharges or emits a slug or token,

but does not include an automatic machine or slot machine that dispenses as prizes only one or more free games on that machine. R.S., c. C-34, s. 180; 1974-75-76, c. 93, s. 10.

CROSS-REFERENCES

The terms "gaming equipment", "disorderly house", "common gaming house" and "common betting house" are defined in s. 197. The term "peace officer" is defined in s. 2. The offences relating to gaming house, betting house and bawdy house are set out in ss. 201 and 210 respectively. The warrant referred to in para. (1)(*c*) is issued under s. 199.

Wilful obstruction of a peace officer in the execution of duty is an offence under s. 129(*a*).

SYNOPSIS

Section 198 creates a number of presumptions relating to a number of different offences under this Part.

Section 198(3) exhaustively defines "slot machines". Section 198(2) creates an *irrebuttable presumption* that a place found to contain a slot-machine shall be presumed to be a common gaming house.

ANNOTATIONS

Subsection (1)(*a*) – The bare fact that the officer was delayed in entering the premises is not sufficient to invoke this presumption: *R. v. McEwan and Lee* (1932), 59 C.C.C. 75, [1933] 1 D.L.R. 398 (Alta. S.C. App. Div.), distinguishing *R. v. Theirlynck*, [1931] S.C.R. 478, 56 C.C.C. 156 (5:0).

Subsection (1)(*b*) – Evidence that a place is found to be equipped with "gaming equipment" which, however, is not, or may not, be used for betting is not proof that the place was a "common betting house", notwithstanding the definition of "gaming equipment" in s. 197 as anything that is or may be used for the purpose of playing games or for betting: *R. v. Ruskoff, Marbella and Damore* (1979), 45 C.C.C. (2d) 504 (Ont. C.A.).

Twenty-five cent pieces being used to play the game "heads or tails" came within the definition of "gaming equipment" in s. 197 and thus the presumption in this subsection is applicable: *R. v. Lefrancois* (1981), 63 C.C.C. (2d) 380 (Que. C.A.).

Subsection (1)(*d*) – The presumption in this subsection infringes ss. 7 and 11(*d*) of the Charter and is of no force and effect: *R. v. Janoff* (1991), 68 C.C.C. (3d) 454, [1991] R.J.Q. 2427, 41 Q.A.C. 147 (C.A.).

Subsection (2) – While the Courts have held that where a charge although laid under s. 201 could have been laid under s. 206(1)(*f*) or (*g*) the accused may nevertheless rely on the exhibition or fair exemption in s. 206(3), the special relationship which slot-machines bear to common gaming houses by virtue of this subsection must make s. 201 the governing section where such machines are involved and an accused is not entitled to invoke the provisions of

s. 206(3): *R. v. Cross* (1978), 40 C.C.C. (2d) 505, [1978] 4 W.W.R. 644 (Alta. S.C. App. Div.).

It was held in *R. v. Shisler* (1990), 53 C.C.C. (3d) 531 (Ont. C.A.), that the conclusive presumption created by this subsection is of no force and effect being inconsistent with the presumption of innocence as guaranteed by s. 11(*d*) of the Charter.

Subsection (3) – While the amendment of this subsection, so as to deprive the Crown of reliance on the presumption in a case involving a slot machine such as a pinball machine which only gives free games or prizes, would not necessarily foreclose a conviction under s. 201 if the operation otherwise came within the definition of "common gaming house" in s. 197, it was held in *R. v. Zippilli* (1980), 54 C.C.C. (2d) 481 (Ont. C.A.), that a place equipped with such games is not within that definition. "Gaming" requires an element of wagering which is absent in the mere playing of a pinball game for amusement.

A "pull-ticket" vending machine falls within the definition in para. (*b*) where although it always dispenses a ticket it is a matter of chance or uncertainty whether the operator of the machine receives a valuable or worthless ticket: *Charity Vending Ltd. v. Alberta (Gaming Commission)* (1988), 45 C.C.C. (3d) 455 (Alta. C.A.).

Search

WARRANT TO SEARCH / Search without warrant, seizure and arrest / Disposal of property seized / When declaration or direction may be made / Conversion into money / Telephones exempt from seizure / Exception.

199. (1) A justice who is satisfied by information on oath that there are reasonable grounds to believe that an offence under section 201, 202, 203, 206, 207 or 210 is being committed at any place within the jurisdiction of the justice may issue a warrant authorizing a peace officer to enter and search the place by day or night and seize anything found therein that may be evidence that an offence under section 201, 202, 203, 206, 207 or 210, as the case may be, is being committed at that place, and to take into custody all persons who are found in or at that place and requiring those persons and things to be brought before that justice or before another justice having jurisdiction, to be dealt with according to law.

(2) A peace officer may, whether or not he is acting under a warrant issued pursuant to this section, take into custody any person whom he finds keeping a common gaming house and any person whom he finds therein, and may seize anything that may be evidence that such an offence is being committed and shall bring those persons and things before a justice having jurisdiction, to be dealt with according to law.

(3) Except where otherwise expressly provided by law, a court, judge, justice or provincial court judge before whom anything that is seized under this section is brought may declare that the thing is forfeited, in which case it shall be disposed of or dealt with as the Attorney General may direct if no person shows sufficient cause why it should not be forfeited.

(4) No declaration or direction shall be made pursuant to subsection (3) in respect of anything seized under this section until

- **(*a*) it is no longer required as evidence in any proceedings that are instituted pursuant to the seizure; or**
- **(*b*) the expiration of thirty days from the time of seizure where it is not required as evidence in any proceedings.**

(5) The Attorney General may, for the purpose of converting anything forfeited under this section into money, deal with it in all respects as if he were the owner thereof.

(6) Nothing in this section or in section 489 authorizes the seizure, forfeiture or destruction of telephone, telegraph or other communication facilities or equipment that

may be evidence of or that may have been used in the commission of an offence under section 201, 202, 203, 206, 207 or 210 and that is owned by a person engaged in providing telephone, telegraph or other communication service to the public or forming part of the telephone, telegraph or other communication service or system of that person.

(7) Subsection (6) does not apply to prohibit the seizure, for use as evidence, of any facility or equipment described in that subsection that is designed or adapted to record a communication. R.S., c. C-34, s. 181; 1994, c. 44, s. 10.

CROSS-REFERENCES

The terms "justice", "peace officer", "day", "night" and "Attorney General" are defined in s. 2.

Section 29 sets out duties of persons executing a warrant and, *inter alia*, the officer must have it with him, where it is feasible to do so, and produce it when requested to do so.

As to the use of force generally in enforcement of the law, see ss. 25, 26, 27 and 31.

Warrants in relation to the offences described in this section could also be obtained pursuant to ss. 487 and 487.1. The declaration of forfeiture under subsec. (3) may be appealed as a sentence appeal under Part XXI or Part XXVII, as the case may be.

SYNOPSIS

Section 199 creates search, seizure and forfeiture provisions relating to the offences within Part VII listed in s. 199(1). In addition it authorizes taking into custody persons found within the places searched.

Section 199(1) permits a justice who is satisfied by information on oath that there are reasonable grounds to believe that one of the offences listed in the subsection (all "vice"-type offences) is being committed at a place, to issue a warrant authorizing the search of the place. It allows the search to take place day or night and gives the police authority to detain any person or thing found on the premises and then to bring them before a justice.

Section 199(2) permits a police officer who enters a *common gaming house* to detain the *keeper* of the house and all those who are *found in* the house, and to seize all things within the house. There is no requirement that the police have a warrant to enter or seize property from the *common gaming house* at the time the seizures are made under this subsection.

It should be noted that s. 199(6) adds certain restrictions to what may be seized by warrant under this section or s. 489. These restrictions deal basically with communication facilities and equipment.

Section 199(7) permits the seizure of items otherwise included within subsec. (6) if the item is designed or adapted to record conversations and it is seized for evidentiary purposes.

Section 199(3) creates a broad discretion in judicial officers to direct that whatever is seized be forfeited. It appears that the onus is upon the person who seeks to avoid forfeiture to "show sufficient cause" why it *should not be forfeited*. The Attorney General controls how items ordered seized are to be dealt with, including requiring that they be disposed of as directed. Section 199(5) gives the Attorney General the same powers as the owner to convert a forfeited item into money. Section 199(4) provides certain time-limits within which an item seized is not to be the subject of a declaration or direction.

ANNOTATIONS

Forfeiture – For forfeiture of seized funds it is not necessary that the Crown prove their identity with the specific proven offence: *R. v. Owens* (1971), 5 C.C.C. (2d) 125, [1972] 1 O.R. 341 (C.A.).

A declaration for forfeiture may be made only after a hearing in conformity with the provisions of this section, notice of which has been given to all interested parties: *R. v. Tobin* (1982), 69 C.C.C. (2d) 137, 37 Nfld. & P.E.I.R. 182 (Nfld. S.C.T.D.).

A forfeiture order may be made under this section at the conclusion of the trial of an accused for an offence under s. 201. Subsection (4) does not require that the court await the

outcome of any appeal proceedings before making the declaration: *R. v. Anderson and Blackie* (1983), 10 C.C.C. (3d) 183 (B.C.C.A.).

Items, such as money, which may be evidence of the gaming-house offence may be seized from the keeper under subsec. (2) and declared forfeited under subsec. (3) although he is not on the premises at the time of the execution of the warrant: *R. v. Anderson and Blackie, supra.*

A forfeiture order may be made under subsec. (3), where the gaming equipment was seized pursuant to a search warrant issued under s. 487: *R. v. Harb* (1994), 88 C.C.C. (3d) 204, 129 N.S.R. (2d) 123 (C.A.).

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200. [*Repealed*, R.S.C. 1985, c. 27 (1st Supp.), s. 30.]

Gaming and Betting

KEEPING GAMING OR BETTING HOUSE / Person found in or owner permitting use.

201. (1) Every one who keeps a common gaming house or common betting house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who

(*a*) is found, without lawful excuse, in a common gaming house or common betting house, or

(*b*) as owner, landlord, lessor, tenant, occupier or agent, knowingly permits a place to be let or used for the purposes of a common gaming house or common betting house,

is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 185.

CROSS-REFERENCES

The terms "keeper", "common gaming house" and "common betting house" are defined in s. 197(1) and (4). The exemptions for genuine social clubs is set out in s. 197(2). Section 198 sets out certain presumptions which aid in proof that premises are a common gaming house or common betting house. In particular, note s. 198(2) and (3) respecting slot machines. Sections 204 and 207 enact certain exemptions respecting gaming and betting. While s. 206 enacts exemptions for certain kinds of gaming and lotteries, those sections do not in specific terms exempt an accused from liability under this section. Accordingly, the reach of those exemptions is uncertain, see cases below in particular respecting the Agricultural fair exemption. Related offences are found in s. 203, placing bets on behalf of others; s. 206, lotteries and games of chance; s. 209, cheating at play.

The offence in subsec. (1) may be the basis for an application for an authorization to intercept private communications by reason of s. 183 or a warrant for video surveillance under s. 487.01(5) and falls within the definition of "enterprise crime offence" in s. 462.3 for the purposes of Part XII.2. As regards special search and seizure powers in relation to gaming houses and betting houses, see s. 199.

The offence in subsec. (1) is a pure indictable offence, but, by virtue of s. 553, it is an offence over which a provincial court judge has absolute jurisdiction and does not depend on the consent of the accused. That is, the accused does not have an election as to mode of trial, although the provincial court judge may, by virtue of s. 555(1), elect to continue the proceedings as a preliminary inquiry, in which case the accused is deemed to have elected trial by judge and jury pursuant to s. 565(1)(*a*). The trial of the offences in subsec. (2) are conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offences in subsec. (2) are as set out in s. 787 and the limitation period is set out in s. 786(2). For all offences under this section, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

SYNOPSIS

This section creates offences in relation to *keeping a common gaming or betting house.*

Section 201(1) makes it an indictable offence to *keep* such a premises. The maximum punishment upon conviction is two years' imprisonment.

Section 201(2) creates two summary conviction offences. Paragraph (2)(*a*) makes it an offence for an accused to be a *found in* at a *common gaming house* or *common betting house.* It must be shown that the accused had *no lawful excuse* for being present in such a premises.

Section 201(2)(*b*) prohibits *permitting* a place to be used as a *common gaming house* or a *common betting house* if the accused is in the capacity of an owner, landlord, tenant, occupier or agent. It must be shown that the accused *knew* the use being made of the place and permitted it to occur.

ANNOTATIONS

Meaning of "keeps" / *Also see notes under heading "Keeper" in s. 197* – Not every person who falls within the definition of "keeper" within s. 197 "keeps" a common gaming house. To constitute that offence there must be some act of participation in the wrongful use of the place. Thus the accused who was the owner of the premises and rented them out to various charitable organizations but who in no way participated in the promotion, organization or operation of the games was acquitted of this charge. The fact that he operated a refreshment stand for the patrons of the games which was entirely independent of the activities of the organization renting the premises is immaterial. The accused in such circumstances may, however, come within the offence in subsec. (2)(*b*): *R. v. Kerim*, [1963] S.C.R. 124, [1963] 1 C.C.C. 233, 39 C.R. 390 (3:2).

R. v. Kerim, supra, was distinguished and the accused's conviction upheld where the accused leased the premises, provided cards and score pads and sold refreshments, notwithstanding there was no "rake-off". The accused had involved himself in the use of the premises to such an extent that he was participating in the illegal use. His own activities in providing the accommodation and facilities and selling the refreshments made the premises a common gaming house: *R. v. Karavasilis* (1980), 54 C.C.C. (2d) 530 (Ont. C.A.).

Where the game's rules do not preclude some or all of its players from having equal opportunity to becoming its banker and that position does not confer some advantage over the players then the banker cannot be said to be the keeper of a common gaming house: *R. v. Monroe* (1970), 1 C.C.C. (2d) 68, 74 W.W.R. 373 (B.C.C.A.).

Mere participation in an illegal gaming activity, for example through employment at a bingo hall, does not render an individual a party to the offence of keeping a common gaming house: *R. v. Bragdon* (1996), 112 C.C.C. (3d) 91, 3 C.R. (5th) 156 (N.B.C.A.).

Common gaming house / *Also see notes under s. 197* – In *R. v. Rockert*, [1978] 2 S.C.R. 704, 38 C.C.C. (2d) 438, 2 C.R. (3d) 97 (7:2), it was held that premises which are used on only one occasion do not fall within either para. (*a*) or para. (*b*) of the definition of common gaming house in s. 197(1). However, following this decision, subsec. (4) of s. 197 was amended to add para. (*c*) to that subsection with the result that in some cases, in the circumstances therein described, a single use of premises may nevertheless suffice to constitute the premises a common gaming house.

Common betting house / *Also see notes under s. 197* – Use of premises on one occasion will not constitute such premises a common betting house as defined in s. 197: *R. v. Grainger* (1978), 42 C.C.C. (2d) 119 (Ont. C.A.).

The recording of bets, let alone proof of the method of recording, is not an ingredient of keeping a common betting house and there need not even be direct evidence of the accused having received a bet. It is enough that premises were kept by the accused for the purpose of enabling any person to receive bets: *R. v. Silvestro*, [1965] S.C.R. 155, [1965] 2 C.C.C. 253 (3:2).

First Nations gambling – The accused members of the Shawanaga First Nations failed to adduce evidence to demonstrate that gambling, or the regulation of gambling, was an integral part of their distinctive cultures. They therefore failed to demonstrate that the high stakes bingo and other gambling activities in which they were engaged, and their Band's regulation of those activities, took place pursuant to an aboriginal right recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. The accused were properly convicted of offences under this section: *R. v. Gardner; R. v. Jones*, [1996] 2 S.C.R. 821, 109 C.C.C. (3d) 275, 138 D.L.R. (4th) 204, *sub nom. R. v. Pamajewon*.

Agricultural fair exemptions – Notwithstanding there is no exemption clause for offences charged under this section, if the charge could have been laid under s. 206(1)(*f*) or (*g*) and the accused can bring himself within the exemption clause in s. 206(3) (games operated at an exhibition or fair) the accused is entitled to the protection of any exemption set out in that subsection: *R. v. Andrews and five others* (1975), 28 C.C.C. (2d) 450, 32 C.R.N.S. 358 (Sask. C.A.). Also see *R. v. Beasley* (1936), 65 C.C.C. 337, [1936] 2 D.L.R. 377 (Ont. C.A.). But see: *R. v. Cross* (1978), 40 C.C.C. (2d) 505, [1978] 4 W.W.R. 644 (Alta. S.C. App. Div.) where slot machines are involved; noted under s. 198(2), *supra*.

BETTING, POOL-SELLING, BOOK-MAKING, ETC. / Punishment.

202. (1) Every one commits an offence who

(*a*) uses or knowingly allows a place under his control to be used for the purpose of recording or registering bets or selling a pool;

(*b*) imports, makes, buys, sells, rents, leases, hires or keeps, exhibits, employs or knowingly allows to be kept, exhibited or employed in any place under his control any device or apparatus for the purpose of recording or registering bets or selling a pool, or any machine or device for gambling or betting;

(*c*) has under his control any money or other property relating to a transaction that is an offence under this section;

(*d*) records or registers bets or sells a pool;

(*e*) engages in book-making or pool-selling, or in the business or occupation of betting, or makes any agreement for the purchase or sale of betting or gaming privileges, or for the purchase or sale of information that is intended to assist in book-making, pool-selling or betting;

(*f*) prints, provides or offers to print or provide information intended for use in connection with book-making, pool-selling or betting upon any horse-race, fight, game or sport, whether or not it takes place in or outside of Canada or has or has not taken place;

(*g*) imports or brings into Canada any information or writing that is intended or is likely to promote or be of use in gambling, book-making, pool-selling or betting on a horse-race, fight, game or sport, and where this paragraph applies it is immaterial

(i) whether the information is published before, during or after the race, fight, game or sport, or

(ii) whether the race, fight, game or sport takes place in Canada or elsewhere,

but this paragraph does not apply to a newspaper, magazine or other periodical published in good faith primarily for a purpose other than the publication of such information;

(*h*) advertises, prints, publishes, exhibits, posts up, or otherwise gives notice of any offer, invitation or inducement to bet on, to guess or to foretell the result of a contest, or a result of or contingency relating to any contest;

(*i*) wilfully and knowingly sends, transmits, delivers or receives any message by radio, telegraph, telephone, mail or express that conveys any information relating to book-making, pool-selling, betting or wagering, or that is intended to assist in book-making, pool-selling, betting or wagering; or

(*j*) aids or assists in any manner in anything that is an offence under this section.

(2) Every one who commits an offence under this section is guilty of an indictable offence and liable

(*a*) for a first offence, to imprisonment for not more than two years;

(*b*) for a second offence, to imprisonment for a term not more than two years and not less than fourteen days; and

(*c*) for each subsequent offence, to imprisonment for not more than two years and not less than three months. R.S., c. C-34, s. 186; 1974-75-76, c. 93, s. 11.

CROSS-REFERENCES

The terms "bet", "gaming equipment", and "place" are defined in s. 197.

The offence in para. (1)(*e*) may be the basis for an application for an authorization to intercept private communications by reason of s. 183 or a warrant for video surveillance by reason of s. 487.01(5), and the offences in this section fall within the definition of "enterprise crime offence" in s. 462.3 for the purposes of Part XII.2. As regards special search and seizure powers in relation to gaming houses and betting houses, see s. 199. Sections 204 and 207 enact certain exemptions respecting gaming and betting. While s. 206 enacts exemptions for certain kinds of gaming and lotteries, that section does not, in specific terms, exempt an accused from liability under this section. Accordingly, the reach of those exemptions is uncertain, see cases noted under heading **Agricultural fair exemption**, under s. 201.

The offence in subsec. (2) is a pure indictable offence, but by virtue of s. 553 it is an offence over which a provincial court judge has absolute jurisdiction and does not depend on the consent of the accused. That is, the accused does not have an election as to mode of trial, although the provincial court judge may, by virtue of s. 555(1), elect to continue the proceedings as a preliminary inquiry, in which case, the accused is deemed to have elected trial by judge and jury pursuant to s. 565(1)(*a*). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Where the prosecution seeks the higher penalty prescribed by subsec. (2)(*b*) or (*c*), it must comply with the provisions of s. 665. Section 667 provides one method of proof of the prior conviction. Note that no reference to the prior conviction may be made in the information by virtue of s. 664.

Related offences are: s. 201, keeping common gaming or betting house; s. 203, placing bets on behalf of others; s. 206, offences in relation to lotteries and games of chance; s. 209, cheating at play.

SYNOPSIS

This section creates indictable offences prohibiting betting, pool selling, bookmaking, importing equipment to engage in any of these activities, and other similar illicit gambling activities. It also provides for punishment upon conviction for such offences. To determine the scope of liability under this section it is necessary to read it together with s. 204 which provides for a number of exemptions.

Section 202(1) creates a number of specific prohibitions set out in paras. (*a*), (*b*), (*d*) to (*i*), which spell out the prohibited acts and in the case of certain paragraphs also spell out the mental element. One such paragraph is para. (*i*) which specifies certain actions such as sending, transmitting, delivering or receiving any message by one of the means specified in the paragraph which is related to bookmaking, pool-selling, or wagering, or that is intended to *assist* in such activity. It must be shown that the accused's actions were both wilful and done knowingly.

Section 202(1)(*c*) and (*j*) create broad offences which extend the liability created by the more specific paragraphs. Section 202(1)(*c*) makes it an offence for the accused to have *control* over any *money* or property relating to a transaction prohibited by this subsection. Similarly subsec. (1)(*j*) makes it an offence to *aid or assist in any manner* anything which is otherwise an offence under subsec. (1). It must be shown that the accused *knew* that the acts

EXEMPTION / Presumption / Operation of pari-mutuel system / Supervision of pari-mutuel system / Percentage that may be deducted and retained / Percentage that may be deducted and retained / Stopping of betting / Regulations / Approvals / Idem / 900 metre zone / Contravention / Definition of "association".

204. (1) Sections 201 and 202 do not apply to

(*a*) any person or association by reason of his or their becoming the custodian or depository of any money, property or valuable thing staked, to be paid to

(i) the winner of a lawful race, sport, game or exercise,

(ii) the owner of a horse engaged in a lawful race, or

(iii) the winner of any bets between not more than ten individuals;

(*b*) a private bet between individuals not engaged in any way in the business of betting;

(*c*) bets made or records of bets made through the agency of a pari-mutuel system on running, trotting or pacing horse-races if

(i) the bets or records of bets are made on the race-course of an association in respect of races conducted at that race-course or another race-course in or out of Canada, and, in the case of a race conducted on a race-course situated outside Canada, the governing body that regulates the race has been certified as acceptable by the Minister of Agriculture and Agri-Food or a person designated by that Minister pursuant to subsection (8.1) and that Minister or person has permitted pari-mutuel betting in Canada on the race pursuant to that subsection, and

(ii) the provisions of this section and the regulations are complied with.

(1.1) For greater certainty, a person may, in accordance with the regulations, do anything described in section 201 or 202, if that person does it for the purposes of legal pari-mutuel betting.

(2) For the purposes of paragraph (1)(*c*), bets made, in accordance with the regulations, in a betting theatre referred to in paragraph (8)(*e*), or by telephone calls to the race-course of an association or to such a betting theatre, are deemed to be made on the race-course of the association.

(3) No person or association shall use a pari-mutuel system of betting in respect of a horse-race unless the system has been approved by and its operation is carried on under the supervision of an officer appointed by the Minister of Agriculture and Agri-Food.

(4) Every person or association operating a pari-mutuel system of betting in accordance with this section in respect of a horse-race, whether or not the person or association is conducting the race-meeting at which the race is run, shall pay to the Receiver General in respect of each individual pool of the race and each individual feature pool one-half of one per cent, or such greater fraction not exceeding one per cent as may be fixed by the Governor in Council, of the total amount of money that is bet through the agency of the pari-mutuel system of betting.

(5) Where any person or association becomes a custodian or depository of any money, bet or stakes under a pari-mutuel system in respect of a horse-race, that person or association shall not deduct or retain any amount from the total amount of money, bets or stakes unless it does so pursuant to subsection (6).

(6) An association operating a pari-mutuel system of betting in accordance with this section in respect of a horse-race, or any other association or person acting on its behalf, may deduct and retain from the total amount of money that is bet through the agency of the pari-mutuel system, in respect of each individual pool of each race or each individual feature pool, a percentage not exceeding the percentage prescribed by the regulations plus any odd cents over any multiple of five cents in the amount calculated in accordance with the regulations to be payable in respect of each dollar bet.

(7) Where an officer appointed by the Minister of Agriculture and Agri-Food is not satisfied that the provisions of this section and the regulations are being carried out in good faith by any person or association in relation to a race-meeting, he may, at any time, order any betting in relation to the race-meeting to be stopped for any period that he considers proper.

(8) The Minister of Agriculture and Agri-Food may make regulations

(*a*) prescribing the maximum number of races for each race-course on which a race meeting is conducted, in respect of which a pari-mutuel system of betting may be used for the race meeting or on any one calendar day during the race meeting, and the circumstances in which the Minister of Agriculture and Agri-Food or a person designated by him for that purpose may approve of the use of that system in respect of additional races on any race-course for a particular race meeting or on a particular day during the race meeting;

(*b*) prohibiting any person or association from using a pari-mutuel system of betting for any race-course on which a race meeting is conducted in respect of more than the maximum number of races prescribed pursuant to paragraph (*a*) and the additional races, if any, in respect of which the use of a pari-mutuel system of betting has been approved pursuant to that paragraph;

(*c*) prescribing the maximum percentage that may be deducted and retained pursuant to subsection (6) by or on behalf of a person or association operating a pari-mutuel system of betting in respect of a horse-race in accordance with this section and providing for the determination of the percentage that each such person or association may deduct and retain;

(*d*) respecting pari-mutuel betting in Canada on horse-races conducted on a race-course situated outside Canada; and

(*e*) authorizing pari-mutuel betting and governing the conditions for pari-mutuel betting, including the granting of licences therefor, that is conducted by an association in a betting theatre owned or leased by the association in a province in which the Lieutenant Governor in Council, or such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof, has issued a licence to that association for the betting theatre.

(8.1) The Minister of Agriculture and Agri-Food or a person designated by that Minister may, with respect to a horse-race conducted on a race-course situated outside Canada,

(*a*) certify as acceptable, for the purposes of this section, the governing body that regulates the race; and

(*b*) permit pari-mutuel betting in Canada on the race.

(9) The Minister of Agriculture and Agri-Food may make regulations respecting

(*a*) the supervision and operation of pari-mutuel systems related to race meetings, and the fixing of the dates on which and the places at which an association may conduct such meetings;

(*b*) the method of calculating the amount payable in respect of each dollar bet;

(*c*) the conduct of race-meetings in relation to the supervision and operation of pari-mutuel systems, including photo-finishes, video patrol and the testing of bodily substances taken from horses entered in a race at such meetings, including, in the case of a horse that dies while engaged in racing or immediately before or after the race, the testing of any tissue taken from its body;

(*d*) the prohibition, restriction or regulation of

(i) the possession of drugs or medicaments or of equipment used in the administering of drugs or medicaments at or near race-courses, or

(ii) the administering of drugs or medicaments to horses participating in races run at a race meeting during which a pari-mutuel system of betting is used; and

(*e*) the provision, equipment and maintenance of accommodation, services or other facilities for the proper supervision and operation of pari-mutuel systems related to race meetings, by associations conducting those meetings or by other associations.

(9.1) For the purposes of this section, the Minister of Agriculture and Agri-Food may designate, with respect to any race-course, a zone that shall be deemed to be part of the race-course, if

(*a*) the zone is immediately adjacent to the race-course;

(*b*) the farthest point of that zone is not more than 900 metres from the nearest point on the race track of the race-course; and

(*c*) all real property situated in that zone is owned or leased by the person or association who owns or leases the race-course.

(10) Every person who contravenes or fails to comply with any of the provisions of this section or of any regulations made under this section is guilty of

(*a*) an indictable offence and liable to imprisonment for a term not exceeding two years; or

(*b*) an offence punishable on summary conviction.

(11) For the purposes of this section, "association" means an association incorporated by or pursuant to an Act of Parliament or of the legislature of a province that owns or leases a race-course and conducts horse-races in the ordinary course of its business and, to the extent that the applicable legislation requires that the purposes of the association be expressly stated in its constating instrument, having as one of its purposes the conduct of horse-races. R.S., c. C-34, s. 188; 1980-81-82-83, c. 99, s. 1; R.S.C. 1985, c. 47 (1st Supp.), s. 1; 1989, c. 2, s. 1; 1994, c. 38, ss. 14, 25.

CROSS-REFERENCES

Where the prosecution elects to proceed by indictment on the offence under subsec. (10) then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

SYNOPSIS

Section 204 creates *exemptions* from liability which would otherwise arise under s. 201 or 202, and it also creates a system of legalized *pari-mutuel betting*.

Section 204(1) creates *three types* of exemptions. Section 204(1)(*a*) exempts the *custodian* or the *stakeholder of moneys* when such person pays out the stakes or money to one of the class of persons described in subparas. (i) to (iii).

Section 204(1)(*c*) excludes bets made or records of bets made through the *pari-mutuel system* if the conditions in subparas. (i) and (ii) are satisfied.

Section 204(3) to (9.1) permit the setting of and functioning of a pari-mutuel betting operation for *horse races*. It provides for regulations to be made dealing with many aspects of system described in subsec. (8). Subsection (1.1) states that if the person does an act described in ss. 201 to 202 for the *purpose of legal pari-mutuel* betting it is exempt from liability if the acts are done in accordance with the regulations.

Section 204(11) provides an exhaustive *definition* of the word *association* for the purposes of the section.

Section 204(10) creates the *offence* of contravening the section or the regulations made under it. In addition it provides for punishment by way of summary conviction procedure or by way of indictment. In the latter case the maximum sentence is two years.

205. [*Repealed*, R.S.C. 1985, c. 52 (1st Supp.), s. 1.]

OFFENCE IN RELATION TO LOTTERIES AND GAMES OF CHANCE / Definition of "three-card monte" / Exemption for fairs / Definition of "fair or exhibition" / Offence / Lottery sale void / *Bona fide* exception / Foreign lottery included / Saving.

206. (1) Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years who

(*a*) makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal, scheme or plan for advancing, lending, giving, selling or in any way disposing of any property by lots, cards, tickets or any mode of chance whatever;

(*b*) sells, barters, exchanges or otherwise disposes of, or causes or procures, or aids or assists in, the sale, barter, exchange or other disposal of, or offers for sale, barter or exchange, any lot, card, ticket or other means or device for advancing, lending, giving, selling or otherwise disposing of any property by lots, tickets or any mode of chance whatever;

(*c*) knowingly sends, transmits, mails, ships, delivers or allows to be sent, transmitted, mailed, shipped or delivered, or knowingly accepts for carriage or transport or conveys any article that is used or intended for use in carrying out any device, proposal, scheme or plan for advancing, lending, giving, selling or otherwise disposing of any property by any mode of chance whatever;

(*d*) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed to be advanced, lent, given, sold or disposed of;

(*e*) conducts, manages or is a party to any scheme, contrivance or operation of any kind by which any person, on payment of any sum of money, or the giving of any valuable security, or by obligating himself to pay any sum of money or give any valuable security, shall become entitled under the scheme, contrivance or operation to receive from the person conducting or managing the scheme, contrivance or operation, or any other person, a larger sum of money or amount of valuable security than the sum or amount paid or given, or to be paid or given, by reason of the fact that other persons have paid or given, or obligated themselves to pay or give any sum of money or valuable security under the scheme, contrivance or operation;

(*f*) disposes of any goods, wares or merchandise by any game of chance or any game of mixed chance and skill in which the contestant or competitor pays money or other valuable consideration;

(*g*) induces any person to stake or hazard any money or other valuable property or thing on the result of any dice game, three-card monte, punch board, coin table or on the operation of a wheel of fortune;

(*h*) for valuable consideration carries on or plays or offers to carry on or to play, or employs any person to carry on or play in a public place or a place to which the public have access, the game of three-card monte;

(*i*) receives bets of any kind on the outcome of a game of three-card monte; or

(*j*) being the owner of a place, permits any person to play the game of three-card monte therein.

(2) In this section "three-card monte" means the game commonly known as three-card monte and includes any other game that is similar to it, whether or not the game is played with cards and notwithstanding the number of cards or other things that are used for the purpose of playing.

(3) Paragraphs (1)(*f*) and (*g*), in so far as they do not relate to a dice game, three-card monte, punch board or coin table, do not apply to the board of an annual fair or

exhibition, or to any operator of a concession leased by that board within its own grounds and operated during the fair or exhibition on those grounds.

(3.1) For the purposes of this section, "fair or exhibition" means an event where agricultural or fishing products are presented or where activities relating to agriculture or fishing take place.

(4) Every one who buys, takes or receives a lot, ticket or other device mentioned in subsection (1) is guilty of an offence punishable on summary conviction.

(5) Every sale, loan, gift, barter or exchange of any property, by any lottery, ticket, card or other mode of chance depending on or to be determined by chance or lot, is void, and all property so sold, lent, given, bartered or exchanged is forfeited to Her Majesty.

(6) Subsection (5) does not affect any right or title to property acquired by any *bona fide* purchaser for valuable consideration without notice.

(7) This section applies to the printing or publishing, or causing to be printed or published, of any advertisement, scheme, proposal or plan of any foreign lottery, and the sale or offer for sale of any ticket, chance or share, in any such lottery, or the advertisement for sale of such ticket, chance or share, and the conducting or managing of any such scheme, contrivance or operation for determining the winners in any such lottery.

(8) This section does not apply to

- **(*a*) the division by lot or chance of any property by joint tenants or tenants in common, or persons having joint interests in any such property; or**
- **(*b*) [*Repealed*, 1999, c. 28, s. 156.]**
- **(*c*) bonds, debentures, debenture stock or other securities recallable by drawing of lots and redeemable with interest and providing for payment of premiums on redemption or otherwise. R.S., c. C-34, s. 189; R.S.C. 1985, c. 52 (1st Supp.), s. 2; 1999, c. 28, s. 156.**

CROSS-REFERENCES

The term "bet" is defined in s. 197 and "property" and "valuable security" in s. 2. The game of "three-card monte", referred to in subsec. (2), was described in *Re Rosen* (1920), 37 C.C.C. 381 (Que. C.A.), as "a game played with three cards, say, two black ones and a red one, shuffled or manipulated by the dealer and placed face down and the opponent backs his ability to spot the position of a particular card. By sleight of hand or quickness of movement, the dealer endeavours to induce the person backing his opinion to put his hand on the wrong card."

The offences under subsec. (1) are pure indictable offences, but by virtue of s. 553 are offences over which a provincial court judge has absolute jurisdiction and does not depend on the consent of the accused. That is, the accused does not have an election as to mode of trial, although the provincial court judge may by virtue of s. 555(1) elect to continue the proceedings as a preliminary inquiry, in which case, the accused is deemed to have elected trial by judge and jury pursuant to s. 565(1)(*a*). The trial of the offence in subsec. (4) is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence in subsec. (4) is as set out in s. 787 and the limitation period is set out in s. 787(2). For all offences under this section, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. As regards special search and seizure powers in relation to offences under this section, see s. 199.

Section 207 provides for certain types of permitted lotteries. As regards pyramid selling and similar schemes, reference should be made to ss. 55 and 56 of the *Competition Act*, R.S.C. 1985, c. C-34, and respecting the conduct of promotional contests involving a lottery or other game, see s. 59 of the same Act. Section 207.1 authorizes lotteries on international cruise ships.

Related offences are: s. 201, keeping common gaming or betting house; s. 203, placing bets on behalf of others; s. 209, cheating at play.

The offence in s. 206(1)(*e*) is an enterprise crime offence pursuant to s. 462.3.

SYNOPSIS

Sections 206, 207 and 207.1, when read together, create liability for acts in relation to *lotteries and games of chance* and create *exceptions* to such liability.

Section 206(1) creates the indictable offence of doing the acts specified on paras. (*a*) to (*j*). No purpose beyond the doing of the acts described need be proven. The maximum sentence upon imprisonment is two years.

Section 206(2) defines "three-card monte" for the purposes of this section.

Section 204(3) creates an exception from s. 206(1)(*f*) to (*g*) for the use of a board located at an *annual fair or exhibition* or the operator of such a board. However, the exemption does not include dice games, three-card monte, punch board or coin tables. Subsection (3.1) sets out an exhaustive definition of the phrase "fair or exhibition" – see where it is used in subsec. (3).

Section 206(4) creates a summary conviction offence applicable to any one who takes or receives a lot, ticket or other item mentioned in subsec. (1).

Section 206(5) provides that any right of property involved in the specified acts relating to lotteries and games of chance is void and is forfeited to the Crown. However, s. 206(6) is a saving provision which states that if a person acquires the property as a *bona fide purchaser for valuable consideration* without notice their rights are protected.

Section 206(7) sets out that application of this section to a foreign lottery.

Section 206(8) sets out additional general exemptions to the operation of this section.

ANNOTATIONS

Subsection (1)(*a*) – A conviction was upheld where the scheme was that 20 ticket holders would be chosen by chance and then those 20 would compete in a potato-peeling contest to see who would win the 10 cars which were offered as prizes. The court held that the whole scheme was one of chance determining the result, as "the twenty drawn to enter the contest might well be without any real skill in paring a potato, and the cars would go to the ten least unskilful or inefficient ... or what is also important, if any of the twenty should prove skilful, they were chosen as contestants by chance": *R. v. Wallace* (1954), 109 C.C.C. 351, 20 C.R. 39 (Alta. S.C. App. Div.). This case was distinguished in *R. v. Young* (1957), 119 C.C.C. 389, 27 C.R. 226 (B.C.C.A.), where it was held that the selection by chance of the persons entitled to participate in the contest of skill did not render the whole scheme a lottery.

The burden is on the Crown to prove that the proposed disposition of property was by mode of chance alone, involving the absence of any genuine skill and if the "skill testing question" constitutes an exercise of skill then the scheme is not a prohibited lottery. Where the police halt the lottery before the draw is held there is no burden on the accused to prove that the intended question would be a genuine test of skill: *R. v. Young* (1978), 45 C.C.C. (2d) 565, [1979] 2 W.W.R. 231 (Alta. S.C. App. Div.).

This provision prohibits the sale of a share of lottery tickets: *R. v. Stromberg* (1999), 131 C.C.C. (3d) 546, 192 W.A.C. 182 (B.C.C.A.), leave to appeal to S.C.C. refused 140 C.C.C. (3d) vi, 252 N.R. 396*n*.

Furthermore, a new element of risk or chance in addition to that already implicit in the lottery itself need not be established in relation to a scheme for the sale of shares in a lottery: *R. v. World Media Brokers Inc.* (1998), 132 C.C.C. (3d) 180 (Ont. Ct. (Prov. Div.)).

Subsection (1)(*d*) – Where the lucky draw and skill-testing scheme was found to simply be a device to attempt to avoid prosecution, a conviction for operating a lottery was affirmed: *R. v. Robert Simpson (Regina) Limited* (1958), 121 C.C.C. 39 (Sask. C.A.).

A scheme which is one of skill or mixed skill and chance does not contravene this subsection: *R. v. Roe* (1949), 94 C.C.C. 273, 8 C.R. 135, [1949] S.C.R. 652.

The Montreal voluntary tax plan was reviewed under appeal in *Montreal (City) v. Quebec (Attorney General)*, [1970] 2 C.C.C. 1, 10 D.L.R. (3d) 315 (S.C.C.). The court, agreeing that the prize offering of silver ingots was a cash prize and that the scheme was based essentially on chance, held (7:0) that the plan was a lottery.

The accused's belief that the *Criminal Code* lottery provisions did not apply to bingo games held on an Indian Reserve was a mistake of law and, thus, no defence to the charge under this paragraph: *R. v. Jones*, [1991] 3 S.C.R. 110, 66 C.C.C. (3d) 512, 8 C.R. (4th) 137 (7:0).

The accused members of the Eagle Lake First Nations failed to adduce evidence to demonstrate that gambling, or the regulation of gambling, was an integral part of their distinctive cultures. They therefore failed to demonstrate that the bingo operation in which they were engaged, and their Band's regulation of that activity, took place pursuant to an aboriginal right recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. The accused were therefore properly convicted of offences under this section: *R. v. Gardner; R. v. Jones*, [1996] 2 S.C.R. 821, 109 C.C.C. (3d) 275, 138 D.L.R. (4th) 204, *sub nom. R. v. Pamajewon*.

Any aboriginal rights the First Nations may have in relation to economic activity on the reserves did not include the right to regulate high-stakes gambling on the reserve. By the valid exercise of the criminal law power, Parliament has made such activities a criminal offence: *R. v. Gardner; R. v. Jones* (1994), 95 C.C.C. (3d) 97, 120 D.L.R. (4th) 475, 21 O.R. (3d) 385 (C.A.).

Subsection (1)(*e*) – Chance and skill are not factors in the offence of conducting a lottery as the offence is committed if a purchaser stands to receive back a larger amount than he contributed because other persons have contributed. Further, the offence was committed even where the accused deposited with the trust company running the contest sufficient funds to pay for the prize even if only one ticket was sold. The deposit of the funds with the trust company was only made by the accused by reason of the fact that it was part of a scheme by which contestants would pay money to enter the contest and such contest clearly contemplated, at its inception and throughout, that the prize would be awarded at the conclusion of the contest by reason of the payments for tickets of all the non-successful contestants: *R. v. Dream Home Contests (Edmonton) Ltd.; R. v. Hodges*, [1960] S.C.R. 414, 126 C.C.C. 241 (5:0). Folld: *R. v. Canus Of North America Ltd.*, [1965] 1 C.C.C. 91, 43 C.R. 321 (Sask. C.A.).

The legitimacy of a business is not a factor to be considered if a part of its operation is a lottery scheme. Furthermore, the key to this offence is that a participant shall become entitled to receive from others under the scheme an amount larger than his investment, and accordingly it does not matter whether that larger amount was in existence in the scheme before or after he joined it: *R. v. Golden Canada Products* (1973), 15 C.C.C. (2d) 1, 43 D.L.R. (3d) 251 (Alta. C.A.).

The essential element of this offence is the scheme and it is not necessary that money has been paid by the new recruits so long as it is contemplated that it will be payable and that a participant will receive a larger sum than he paid in as a result of the participation of others. It is not a requisite of the scheme that there be a banker: *R. v. Mackenzie, Ennis and Meilleur* (1982), 66 C.C.C. (2d) 528, 135 D.L.R. (3d) 374, 36 O.R. (2d) 562 (C.A.); *R. v. Fehr* (1983), 4 C.C.C. (3d) 382 (B.C.C.A.).

The value of the product in relation to the price for which it is sold is one of many relevant factors in determining whether a multi-marketing scheme violates this provision. The entire scheme must be examined to determine whether it is a recruitment scheme which will inevitably lead to loss by some who have paid into it by way of contribution in the expectation of receiving a larger amount from amounts paid in by subsequent recruits: *R. v. Friskie* (2003), 177 C.C.C. (3d) 72, 299 D.L.R. (4th) 670, [2004] 4 W.W.R. 223 (Sask. C.A.).

The Crown is not required to prove that at the time of the alleged offence other people had already paid money so that one of the persons in the scheme had already been paid a sum greater than what he had earlier paid. It is sufficient that the Crown establishes that the scheme whereby that result could obtain was in existence: *R. v. Stead* (1981), 60 C.C.C. (2d) 397 (Sask. Prov. Ct.).

Where a significant part of the scheme operated in the province it is no defence that part of the scheme, such as the actual payment of the money, also operated in the United States: *R. v. Stead, supra.*

Subsection 1(*f*) – Simply because there is an increased level of difficulty or because some elements of the game are out of the player's control does not necessarily render the game one of mixed chance and skill. In this case, however, a "crane machine" in which the player operates a joystick to move the crane to a location and uses the claw to obtain toys and novelties was a game of mixed chance and skill as virtually all of the elements of the game were out of the control of the player: *R. v. Balance Group International Trading Inc.* (2002), 162 C.C.C. (3d) 126, 155 O.A.C. 357 (C.A.).

Subsection (1)(*g*) – A wheel of fortune is a gambling device bearing some resemblance to a revolving wheel with sections indicating chances taken or bets placed: *R. v. Andrews and five others* (1975), 28 C.C.C. (2d) 450, 32 C.R.N.S. 358 (Sask. C.A.).

Subsection (3) – An accused who can bring himself within this subsection is entitled to its protection even on a charge of keeping a common gaming house under s. 201: *R. v. Andrews and five others, supra.*

However, this principle does not apply where the games involved are slot machines: *R. v. Cross* (1978), 40 C.C.C. (2d) 505, [1978] 4 W.W.R 644 (Alta. S.C. App. Div.).

Subsection (7) – This section is not unconstitutionally vague: *R. v. Stromberg, infra.*

Subsection (8) – The exemption in para. (*a*) does not apply to a bingo game where, although all participants must be members of the sponsoring association, the prize money is derived from the sale of the bingo cards: *R. v. Gladue and Kirby* (1986), 30 C.C.C. (3d) 308 (Alta. Prov. Ct.).

PERMITTED LOTTERIES / Terms and conditions of licence / Offence / Definition of "lottery scheme" / Exception re: pari-mutuel betting.

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;**

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

(*c*) **for the board of a fair or of an exhibition or an operator of a concession leased by that board, to conduct and manage a lottery scheme in a province where the Lieutenant Governor in Council of the province or such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof has**

(i) **designated that fair or exhibition as a fair or exhibition where a lottery scheme may be conducted and managed, and**

(ii) **issued a licence for the conduct and management of a lottery scheme to that board or operator;**

(*d*) **for any person, pursuant to a licence issued by the Lieutenant Governor in Council of a province or by such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof, to conduct and manage a lottery scheme at a public place of amusement in that province if**

(i) the amount or value of each prize awarded does not exceed five hundr dollars, and

(ii) the money or other valuable consideration paid to secure a chance to win prize does not exceed two dollars;

(*e*) for the government of a province to agree with the government of anoth province that lots, cards or tickets in relation to a lottery scheme that is by a of paragraphs (*a*) to (*d*) authorized to be conducted and managed in that oth province may be sold in the province;

(*f*) for any person, pursuant to a licence issued by the Lieutenant Governor Council of a province or such other person or authority in the province as m be designated by the Lieutenant Governor in Council thereof, to conduct a manage in the province a lottery scheme that is authorized to be conducted a managed in one or more other provinces where the authority by which t lottery scheme was first authorized to be conducted and managed conse thereto;

(*g*) for any person, for the purpose of a lottery scheme that is lawful in a provin under any of paragraphs (*a*) to (*f*), to do anything in the province, accordance with the applicable law or licence, that is required for the condu management or operation of the lottery scheme or for the person to particip in the scheme; and

(*h*) for any person to make or print anywhere in Canada or to cause to be made printed anywhere in Canada anything relating to gaming and betting that is be used in a place where it is or would, if certain conditions provided by law met, be lawful to use such a thing, or to send, transmit, mail, ship, deliver allow to be sent, transmitted, mailed, shipped or delivered or to accept carriage or transport or convey any such thing where the destination thereo such a place.

(2) Subject to this Act, a licence issued by or under the authority of the Lieuten Governor in Council of a province as described in paragraph (1)(*b*), (*c*), (*d*) or (*f*) m contain such terms and conditions relating to the conduct, management and operat of or participation in the lottery scheme to which the licence relates as the Lieuten Governor in Council of that province, the person or authority in the provi designated by the Lieutenant Governor in Council thereof or any law enacted by legislature of that province may prescribe.

(3) Every one who, for the purposes of a lottery scheme, does anything that is authorized by or pursuant to a provision of this section

(*a*) in the case of the conduct, management or operation of that lottery schem

(i) is guilty of an indictable offence and liable to imprisonment for a term exceeding two years, or

(ii) is guilty of an offence punishable on summary conviction; or

(*b*) in the case of participating in that lottery scheme, is guilty of an offe punishable on summary conviction.

(4) In this section, "lottery scheme" means a game or any proposal, scheme, pl means, device, contrivance or operation described in any of paragraphs 206(1)(*a*) to whether or not it involves betting, pool selling or a pool system of betting other th

(*a*) three-card monte, punch board or coin table;

(*b*) bookmaking, pool selling or the making or recording of bets, including h made through the agency of a pool or pari-mutuel system, on any race or fi or on a single sport event or athletic contest; or

(*c*) for the purposes of paragraphs (1)(*b*) to (*f*), a game or proposal, scheme, pl means, device, contrivance or operation described in any of paragra 206(1)(*a*) to (*g*) that is operated on or through a computer, video device or machine, within the meaning of subsection 198(3), or a dice game.

(5) For greater certainty, nothing in this section shall be construed as authorizing the making or recording of bets on horse-races through the agency of a pari-mutuel system other than in accordance with section 204. R.S., c. C-34, s. 190; 1974-75-76, c. 93, s. 12; R.S.C. 1985, c. 27 (1st Supp.), s. 31, c. 52 (1st Supp.), s. 3; 1999, c. 5, s. 6.

CROSS-REFERENCES

The terms "bet" and "game" are defined in s. 197. Pari-mutuel systems are dealt with in s. 204. The game of "three-card monte", referred to in subsec. (4), was described in *Re Rosen* (1920), 37 C.C.C. 381 (Que. C.A.), as a "a game played with three cards, say, two black ones and a red one, shuffled or manipulated by the dealer and placed face down and the opponent backs his ability to spot the position of a particular card. By sleight of hand or quickness of movement, the dealer endeavours to induce the person backing his opinion to put his hand on the wrong card".

Where the Crown elects to proceed by indictment on the offence described in subsec. (3)(*a*) then the accused has an election as to mode of trial under s. 536(2). Where the Crown elects to proceed by way of summary conviction for the offence under subsec. (3)(*a*) and for any case under subsec. (3)(*b*), the trial is conducted by a summary conviction court pursuant to Part XXVII. The punishment for these summary conviction offences is as set out in s. 787 and the limitation period is set out in s. 786(2). For all offences under this section, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under ss. 496, 497 or by the officer in charge under s. 498. As regards special search and seizure powers in relation to offences under this section, see s. 199.

As regards pyramid selling and similar schemes, reference should be made to ss. 55 and 56 of the *Competition Act*, R.S.C. 1985, c. C-34, and respecting the conduct of promotional contests involving a lottery or other game, see s. 59 of the same Act. Section 207.1 authorizes lotteries on international cruise ships.

Related offences are: s. 201, keeping common gaming or betting house; s. 203, placing bets on behalf of others; s. 209, cheating at play.

SYNOPSIS

Section 207 legalizes the *creation* and *operation* of *lotteries* run by any of the bodies specified in s. 207(1)(*a*) to (*d*). In addition it provides for the *regulation* of such schemes and creates an offence of operating or participating in a lottery not created or run in accordance with s. 207.

Section 207(1) permits lotteries to be created by a *province*, or *under licence* by charitable or religious organizations, by a board of a fair or exhibition or by any other person to whom a licence has been issued. The last-mentioned category only applies to lotteries in which the ticket cost no more than two dollars and the prize does not exceed $500.

Section 207(1)(*e*) to (*h*) permits persons to do specified activities required to carry out the operation of lawful lotteries under this section.

Section 207(4) *exhaustively defines* the term *lottery scheme* for the purposes of this section and also specifically excludes the activities noted in s. 207(4)(*a*) to (*c*) which are dealt with (either by way of prohibition or regulation) in ss. 202 to 206.

Section 207(5) clarifies the scope of the exclusion in s. 207(4)(*b*) in relation to pari-mutuel schemes.

Section 207(2) permits *terms and conditions* to be imposed in a *licence* under this section to regulate the conduct, management, and operation or participation in a lottery scheme.

Section 207(3) makes it an offence to do anything not authorized by this section if the act is done for the purpose of a lottery scheme. It is a summary conviction offence or an indictable offence punishable by up to two years imprisonment if the act is done in relation to the conduct, management or operation of such scheme. It is a summary conviction offence to participate in an unlawful scheme.

ANNOTATIONS

Since a "pull-ticket" vending machine falls within the definition of a slot machine in s. 198(3) the provincial gaming commission acts properly in refusing to issue licenses to charities or religious organizations seeking to use such machines: *Charity Vending Ltd. v. Alberta (Gaming Commission)* (1988), 45 C.C.C. (3d) 455 (Alta. C.A.).

The statutory scheme established by this section and s. 206 which, in effect, decriminalizes certain forms of gambling and creates a regulated industry does not constitute an unconstitutional delegation to the province, although the power to impose terms and conditions on licenses is delegated to the Lieutenant Governor: *R. v. Furtney*, [1991] 3 S.C.R. 89, 66 C.C.C. (3d) 498, 8 C.R. (4th) 121 (7:0).

EXEMPTION — LOTTERY SCHEME ON AN INTERNATIONAL CRUISE SHIP / Paragraph 207(1)(*h*) and subsection 207(5) apply / Offence / Definitions.

207.1 (1) Despite any of the provisions of this Part relating to gaming and betting, it is lawful for the owner or operator of an international cruise ship, or their agent, to conduct, manage or operate and for any person to participate in a lottery scheme during a voyage on an international cruise ship when all of the following conditions are satisfied:

- **(*a*) all the people participating in the lottery scheme are located on the ship;**
- **(*b*) the lottery scheme is not linked, by any means of communication, with any lottery scheme, betting, pool selling or pool system of betting located off the ship;**
- **(*c*) the lottery scheme is not operated within five nautical miles of a Canadian port at which the ship calls or is scheduled to call; and**
- **(*d*) the ship is registered**
  - **(i) in Canada and its entire voyage is scheduled to be outside Canada, or**
  - **(ii) anywhere, including Canada, and its voyage includes some scheduled voyaging within Canada and the voyage**
    - **(A) is of at least forty-eight hours duration and includes some voyaging in international waters and at least one non-Canadian port of call including the port at which the voyage begins or ends, and**
    - **(B) is not scheduled to disembark any passengers at a Canadian port who have embarked at another Canadian port, without calling on at least one non-Canadian port between the two Canadian ports.**

(2) For greater certainty, paragraph 207(1)(*h*) and subsection 207(5) apply for the purposes of this section.

(3) Every one who, for the purpose of a lottery scheme, does anything that is not authorized by this section

- **(*a*) in the case of the conduct, management or operation of the lottery scheme,**
  - **(i) is guilty of an indictable offence and liable to imprisonment for a term of not more than two years, or**
  - **(ii) is guilty of an offence punishable on summary conviction; and**
- **(*b*) in the case of participating in the lottery scheme, is guilty of an offence punishable on summary conviction.**

(4) The definitions in this subsection apply in this section.

"international cruise ship" means a passenger ship that is suitable for continuous ocean voyages of at least forty-eight hours duration, but does not include such a ship that is used or fitted for the primary purpose of transporting cargo or vehicles.

"lottery scheme" means a game or any proposal, scheme, plan, means, device, contrivance or operation described in any of paragraphs 206(1)(*a*) to (*g*), whether or not it involves betting, pool selling or a pool system of betting. It does not include

- **(*a*) three-card monte, punch board or coin table; or**

(*b*) bookmaking, pool selling or the making or recording of bets, including bets made through the agency of a pool or pari-mutuel system, on any race or fight, or on a single sporting event or athletic contest. 1999, c. 5, s. 7.

CROSS-REFERENCES

For other exemptions from liability for lottery schemes, see ss. 206(3), (7) and 207.

SYNOPSIS

This section creates an exemption from liability for the gaming and betting offences created by this Part for lottery schemes conducted on international cruise ships. To take advantage of the exemption the operator must comply with all of the conditions set out in subsec. (1). Subsection (4) defines "international cruise ship" and "lottery scheme". Subsection (2) makes it clear that it is lawful to make or print items for use in a scheme authorized by this section and that this section does not authorize the making or recording of bets on horse-races through the agency of a pari-mutuel system other than in accordance with s. 204. Subsection (3) creates two offences: para. (*a*) for a person conducting, managing or operating the lottery scheme not authorized by this section and para. (*b*) participating in an unauthorized lottery scheme. The former is a hybrid offence. The latter is a summary conviction offence.

ANNOTATIONS

Paragraph (*b*) prohibits either extra-provincial or international sales of lottery tickets and accordingly, charitable lottery tickets marketed via the Internet were not lawful: *Reference re: Earth Future Lottery and Criminal Code s. 207* (2002), 166 C.C.C. (3d) 373, 215 D.L.R. (4th) 656, 211 Nfld. & P.E.I.R. 311 (P.E.I.C.A.), affd [2003] 1 S.C.R. 123, 171 C.C.C. (3d) 225, 222 D.L.R. (4th) 383.

208. [*Repealed*, R.S.C. 1985, c. 27 (1st Supp.), s. 32.]

CHEATING AT PLAY.

209. Every one who, with intent to defraud any person, cheats while playing a game or in holding the stakes for a game or in betting is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 192.

CROSS-REFERENCES

The terms "game" and "bet" are defined in s. 197.

This offence is a pure indictable offence, but, by virtue of s. 553, it is an offence over which a provincial court judge has absolute jurisdiction and does not depend on the consent of the accused. That is, the accused does not have an election as to mode of trial, although the provincial court judge may, by virtue of s. 555(1), elect to continue the proceedings as a preliminary inquiry, in which case, the accused is deemed to have elected trial by judge and jury pursuant to s. 565(1)(*a*). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Related offences are: s. 201, keeping common gaming or betting house; s. 202, offences in relation to betting, pool-selling and book-making, etc.; s. 203, placing bets on behalf of others; s. 380, fraud.

SYNOPSIS

This section makes it an indictable offence to *cheat at play*. The *actus reus* of the offence is to cheat while doing any of the following: playing a game; holding the stakes; or betting. The requisite mental element is the *intention of defrauding* any person. The maximum sentence upon conviction is two years.

ANNOTATIONS

In *R. v. McGarey*, [1974] S.C.R. 278, 6 C.C.C. (2d) 525, 26 D.L.R. (3d) 231, the booth operator was convicted in the operation of a midway milk bottle toss game where the unsuspecting patron was unaware that the bottom bottles of each pyramid were heavily weighted. It was held (5:0) that in this game of mixed chance and skill the booth operator was a player and the surreptitious weighting of the bottom bottles constituted his intent to defraud the patron player by creating a false visual impression of the game, which false impression in itself was the ill-practice of cheating.

However, simple measures taken to increase the degree of skill required for success are not improper: *R. v. Reilly* (1979), 48 C.C.C. (2d) 286 (Ont. C.A.).

Bawdy-houses

KEEPING COMMON BAWDY-HOUSE / Landlord, inmate, etc. / Notice of conviction to be served on owner / Duty of landlord on notice.

210. (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who

- **(*a*) is an inmate of a common bawdy-house,**
- **(*b*) is found, without lawful excuse, in a common bawdy-house, or**
- **(*c*) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,**

is guilty of an offence punishable on summary conviction.

(3) Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served on the owner, landlord or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.

(4) Where a person on whom a notice is served under subsection (3) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the same premises, the person on whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence. R.S., c. C-34, s. 193.

CROSS-REFERENCES

The terms "keeper", "common bawdy-house" and "place" are defined in s. 197. Section 198(1)(*a*) and (*d*) set out certain presumptions which aid in proof that premises are a common bawdy-house.

As regards special search and seizure powers in relation to bawdy-houses, see s. 199.

The offence in subsec. (1) is a pure indictable offence, but, by virtue of s. 553, it is an offence over which a provincial court judge has absolute jurisdiction and does not depend on the consent of the accused. That is, the accused does not have an election as to mode of trial, although the provincial court judge may, by virtue of s. 555(1), elect to continue the proceedings as a preliminary inquiry, in which case, the accused is deemed to have elected trial by judge and jury pursuant to s. 565(1)(*a*). The trial of the offences in subsec. (2) are conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offences in subsec. (2) are as set out in s. 787 and the limitation period is set out in s. 786(2). For all offences under this section, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

This offence falls within the definition of "enterprise crime offence" in s. 462.3 for the purposes of Part XII.2.

Other offences related to prostitution may be found in ss. 211 to 213.

As to production of records containing personal information of the complainant or a witness, see ss. 278.1 to 278.9.

Section 486(2.1) provides that, where an accused is charged with this offence and the complainant is, at the time of the trial or preliminary inquiry, under the age of 18 years or may have difficulty communicating the evidence by reason of a mental or physical disability, the judge may order that the complainant testify outside the courtroom or behind a screen where such procedure is necessary to obtain a full and candid account of the acts complained of. Section 715.1 provides that, in proceedings under subsec. (2) or (3), a videotape, made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant adopts its contents. Similarly, s. 715.2 provides that, in proceedings under this section in which the complainant or another witness may have difficulty communicating the evidence by reason of a mental or physical disability, a videotape made within a reasonable time after the alleged offence, in which the complainant or witness describes the acts complained of, is admissible in evidence if the complainant or witness adopts its contents.

SYNOPSIS

This section creates a number of offences in relation to a common bawdy-house.

Section 210(1) makes it an indictable offence to *keep a common bawdy-house*. The maximum sentence upon conviction is two years.

Section 210(2) creates three summary conviction offences. Section 210(2)(*a*) makes it an offence to be an *inmate* in a common bawdy-house. "Inmate" is not defined in the *Criminal Code* but would include a resident or regular occupant of the premises. Section 210(2)(*b*) makes it an offence to be *found in* a common bawdy-house. It must be shown that there was no lawful excuse for the accused's presence. The term "found in" is not defined. Section 210(2)(*c*) makes it an offence for any of the named persons to *knowingly permit* any part of a premises to be used or let for the *purposes* of a common bawdy-house. The category of persons who are caught by this paragraph are those who have actual control or charge over the premises. To demonstrate that the conduct satisfies the necessary mental element of having *knowingly permitted* the use, it must be shown that the accused was aware of the use of the premises and either acquiesced or encouraged its continued use for the illicit purposes.

Subsections (3) and (4) must be read together and create a duty upon the owner, landlord or lessor of the premises which was the subject of a conviction under subsec. (1) (keeping a common bawdy-house). Subsection (3) provides for a notice to be served upon such person or his agent advising of the conviction, and upon receipt of the notice the landlord, owner or lessor must either *forthwith* attempt to terminate the tenancy or other arrangement permitting the keeper to be on the premises or face possible later prosecution. If there is a conviction under subsec. (1) in relation to the same premises after the notice has served upon the owner (or other person mentioned in the subsection) the person who had received the notice *shall be deemed* to also be a keeper pursuant to subsec. (1). To accord with fundamental fairness, at the least it must be shown that the later conviction involving the same premises related to activity which occurred after the notice has been served. The effect of the deeming provision may be ousted if the accused establishes that all reasonable steps were taken to prevent the reoccurrence of the offence under subsec. (1).

ANNOTATIONS

Common bawdy-house / ***Also see notes under s. 197*** – Any defined space is capable of being a common bawdy-house, even a parking lot, if there is localization of a number of acts of prostitution within its specified boundaries. However, mere presence by prostitutes in the parking lot on a number of occasions, where they did not exercise any control or management over the lot and had no right or interest in the lot as owners, tenants or licensees, is not sufficient to establish them as keeping a common bawdy-house: *R. v. Pierce* (1982), 66 C.C.C. (2d) 388, 37 O.R. (2d) 721 (C.A.).

That the premises are a common bawdy-house may be proved by evidence of the general reputation of the house in the community: *R. v. Theirlynck*, [1931] S.C.R. 478, 56 C.C.C. 156, [1931] 4 D.L.R. 591.

As well, where there is evidence that the place has the reputation as a common bawdy-house, evidence was admissible as to the accused's reputation as a prostitute. Such evidence is not admitted to show that the accused was the keeper but that the place is occupied by a person whose reputation is consistent with the reputation which it is said the place bears: *R. v. West* (1950), 96 C.C.C. 349, 9 C.R. 355, [1950] O.W.N. 302 (C.A.).

"Acts of indecency" and "prostitution" are not vague so as to violate s. 7 of the Charter: *R. v. DiGiuseppe* (2002), 161 C.C.C. (3d) 424, 155 O.A.C. 62, 91 C.R.R. (2d) 124 (C.A.), leave to appeal to S.C.C. refused 172 O.A.C. 397*n*, 96 C.R.R. (2d) 376*n*, 302 N.R. 199*n*.

A couples only bar allowed patrons to engage in sexual acts on the dance floor behind a translucent curtain. An act of indecency had to meet the objective standard which includes two components: the acts are degrading and dehumanizing and the acts predispose people to act in an anti-social manner. The patrons were not used as sexual objects for the benefit of others in a servile and humiliating exchange, nor were the participants degraded. There was no disorder, violence, solicitation or prostitution: *R. v. Kouri* (2004), 191 C.C.C. (3d) 42, [2004] R.J.Q. 2061 (C.A.).

In *R. v. Labaye* (2004), 191 C.C.C. (3d) 66 (Que. C.A.), however, a bar which operated as a meeting place for couples interested in partner swapping was held to be a common bawdy house for the purpose of the practice of indecent acts. In this case, the court considered the fact that the men substantially outnumbered the women and the protection against sexually transmitted diseases was limited or non-existent.

Keeps (subsec. (1)) – As not every "keeper" as defined in s. 197 "keeps" a common bawdy-house, an information charging that the accused "were the keepers of a common bawdy-house" does not charge an offence known to law: *R. v. Catalano* (1977), 37 C.C.C. (2d) 255 (Ont. C.A.).

Thus the offence requires proof of provision of accommodation by the accused. A prostitute who on several occasions over a two-week period resorted to the same hotel must be acquitted of this offence where there is no evidence she was given any particular room, or had rented a particular room or even that she had paid the rent on the room: *R. v. McLellan* (1980), 55 C.C.C. (2d) 543 (B.C.C.A.).

To establish the offence of keeping there must be proof that the accused had some degree of control over the care and management of the premises, and that the accused participated to some extent in the illicit activities of the common bawdy-house. This element of participation does not, however, require personal participation in the sexual acts which occur in the house. It is sufficient that the accused participated in the use of the house as a common bawdy-house. Thus, a person who satisfies the definition of "keeper" in s. 197(1) does not necessarily commit the offence under subsec. (1): *R. v. Corbeil*, [1991] 2 S.C.R. 830, 64 C.C.C. (3d) 272, 5 C.R. (4th) 62 (4:1).

It is unnecessary to show that the accused participated in the day-to-day running of the premises where he is shown to be the directing mind of the corporation which owned the premises, participated in the management, received the proceeds and was aware of the activities being carried on: *R. v. Woszczyna; R. v. Soucy* (1983), 6 C.C.C. (3d) 221 (Ont. C.A.).

Even where the accused uses her own residence by herself for the purposes of prostitution she may be convicted under this section: *R. v. Worthington* (1972), 10 C.C.C. (2d) 311, 22 C.R.N.S. 34 (Ont. C.A.).

The Crown must establish an element of control over the care and regular management of the place which harboured the acts of indecency. Willful blindness on the part of the owner or delegation of responsibility are insufficient: *R. v. Kouri, supra.*

Prostitution is not limited to conventional sexual activities and includes lewd acts for payment for the sexual gratification of customers. In this case, sado-masochistic acts were lewd activities in that although they involved pain and humiliation, this did not detract from

their sexuality nor the sexual gratification obtained by the clients: *R. v. Bedford* (2000), 143 C.C.C. (3d) 311, 184 D.L.R. (4th) 727 (Ont. C.A.), leave to appeal to S.C.C. refused 147 C.C.C. (3d) vi, 193 D.L.R. (4th) vii.

Indecency is not inherent in the offence of prostitution. In this case, even though there was no physical contact, the fact that dancers stimulated the customer by engaging in various sexual acts while the customers masturbated was sufficient to constitute prostitution: *R. v. St-Onge* (2001), 155 C.C.C. (3d) 517, 44 C.R. (5th) 395 (Que. C.A.), leave to appeal to S.C.C. refused 160 C.C.C. (3d) vi.

And, in *R. v. Ni* (2002), 158 O.A.C. 230 (C.A.), the court held that the charge under this section could be made out on the basis of acts of prostitution consisting of acts of masturbation by employees of a massage parlour upon customers. It was unnecessary for the Crown to prove that the conduct also amounted to acts of indecency.

Found in (subsec. (2)(*b*)) – The offence of being found in a common bawdy-house is not a lesser offence included in the charge of keeping a common bawdy-house: *R. v. Labelle*, [1957] Que. Q.B. 81 (C.A.).

The offence under subsec. (2)(*b*) requires that the accused was found in the common bawdy house and it was not sufficient that the accused "was present". Mere proof of presence on the premises in question at some earlier time is not sufficient, the accused must have been perceived there or seen by someone. On the other hand, evidence that the accused was seen entering and leaving was sufficient to prove the offence, his presence in the bawdy house not being the object of subsequent admission but being discovered by the contemporaneous observation or inspection by the police: *R. v. Lemieux* (1991), 70 C.C.C. (3d) 434, [1992] R.J.Q. 295, 44 Q.A.C. 1 (C.A.).

Permitting (subsec. (2)(*c*)) – Where the accused knowingly allowed the premises to be used as a place to which men and women resorted for the purpose of illicit sexual intercourse then a conviction will be sustained even though there was no evidence that the women were charging money for their services or that the couples resorting to the premises were unmarried: *R. v. Turkiewich* (1962), 133 C.C.C. 301, 38 C.R. 220 (Man. C.A.).

A charge of being an occupier unlawfully permitting premises to be used as a common bawdy-house was held to be a lesser offence included in the charge of keeping a common bawdy-house: *R. v. Lafreniere*, [1965] 1 C.C.C. 31, 44 C.R. 274 (Ont. H.C.J.).

The words "or otherwise having charge or control" qualify the earlier words in the subsection and make it clear that the section is not directed at an owner or landlord, *per se*, but rather at such persons as being the ones having charge or control of the premises. Even where the landlord has power to acquire the charge or control of the premises by immediate termination of the lease, still, once he leased the premises, it was the tenant who had charge or control. The section is directed at a landlord who has actual charge or control in the sense that he has the right to intervene forthwith and whose failure to do so can be considered the granting of permission: *R. v. Wong* (1977), 33 C.C.C. (2d) 6, 2 Alta. L.R. 90 (S.C. App. Div.).

Constitutional considerations – This section does not offend either s. 2 or s. 7 of the *Charter of Rights and Freedoms*: *Reference re Sections 193 and 195.1(1)(c) [now ss. 210 and 213] of the Criminal Code*, [1990] 1 S.C.R. 1235, 56 C.C.C. (3d) 65, 77 C.R. (3d) 1 (4:2).

TRANSPORTING PERSON TO BAWDY-HOUSE.

211. Every one who knowingly takes, transports, directs, or offers to take, transport or direct, any other person to a common bawdy-house is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 194.

CROSS-REFERENCES

The term "common bawdy-house" is defined in s. 197.

The trial of this offence is conducted by a summary conviction court pursuant to Part XXVII.

The punishment for the offence is as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. Other offences in relation to bawdy-houses are found in s. 210. Offences in relation to prostitution are found in ss. 212 and 213.

As to production of records containing personal information of the complainant or a witness, see ss. 278.1 to 278.9.

Section 486(2.1) provides that, where an accused is charged with this offence and the complainant is, at the time of the trial or preliminary inquiry, under the age of 18 years or may have difficulty communicating the evidence by reason of a mental or physical disability, the judge may order that the complainant testify outside the courtroom or behind a screen where such procedure is necessary to obtain a full and candid account of the acts complained of. Section 715.1 provides that, in proceedings under subsec. (2) or (3), a videotape, made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant adopts its contents. Similarly, s. 715.2 provides that, in proceedings under this section in which the complainant or another witness may have difficulty communicating the evidence by reason of a mental or physical disability, a videotape made within a reasonable time after the alleged offence, in which the complainant or witness describes the acts complained of, is admissible in evidence if the complainant or witness adopts its contents.

SYNOPSIS

This section makes it a summary conviction offence to *transport a person to a common bawdy-house*. The actions encompassed by the section are broadly defined as including taking, transporting, directing or offering to do any of these things. The *mens rea* for the offence is that the action be done *knowingly*, namely, that the accused knew that the place was a common bawdy-house.

Procuring

PROCURING / Idem / Aggravated offence in relation to living on the avails of prostitution of a person under the age of eighteen years / Presumption / Offence — prostitution of person under eighteen.

212. (1) Every one who

- **(*a*) procures, attempts to procure or solicits a person to have illicit sexual intercourse with another person, whether in or out of Canada,**
- **(*b*) inveigles or entices a person who is not a prostitute to a common bawdy-house for the purpose of illicit sexual intercourse or prostitution,**
- **(*c*) knowingly conceals a person in a common bawdy-house,**
- **(*d*) procures or attempts to procure a person to become, whether in or out of Canada, a prostitute,**
- **(*e*) procures or attempts to procure a person to leave the usual place of abode of that person in Canada, if that place is not a common bawdy-house, with intent that the person may become an inmate or frequenter of a common bawdy-house, whether in or out of Canada,**
- **(*f*) on the arrival of a person in Canada, directs or causes that person to be directed or takes or causes that person to be taken, to a common bawdy-house,**
- **(*g*) procures a person to enter or leave Canada, for the purpose of prostitution,**
- **(*h*) for the purposes of gain, exercises control, direction or influence over the movements of a person in such manner as to show that he is aiding, abetting or compelling that person to engage in or carry on prostitution with any person or generally,**
- **(*i*) applies or administers to a person or causes that person to take any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower that**

person in order thereby to enable any person to have illicit sexual intercourse with that person, or

(*j*) lives wholly or in part on the avails of prostitution of another person,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

(2) Notwithstanding paragraph (1)(*j*), every person who lives wholly or in part on the avails of prostitution of another person who is under the age of eighteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(2.1) Notwithstanding paragraph (1)(*j*) and subsection (2), every person who lives wholly or in part on the avails of prostitution of another person under the age of eighteen years, and who

(*a*) for the purposes of profit, aids, abets, counsels or compels the person under that age to engage in or carry on prostitution with any person or generally, and

(*b*) uses, threatens to use or attempts to use violence, intimidation or coercion in relation to the person under that age,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years but not less than five years.

(3) Evidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution, for the purposes of paragraph (1)(*j*) and subsections (2) and (2.1).

(4) Every person who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person who is under the age of eighteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(5) [*Repealed*, 1999, c. 5, s. 8.] R.S., c. C-34, s. 195; 1972, c. 13, s. 14; 1980-81-82-83, c. 125, s. 13; R.S.C. 1985, c. 19 (3rd Supp.), s. 9; 1997, c. 16, s. 2; 1999, c. 5, s. 8.

CROSS-REFERENCES

The terms "prostitute", "common bawdy-house" and "place" are defined in s. 197. Sexual intercourse is defined in s. 4(5).

Under s. 150.1, it is no defence to the offences in subsec. (2) and (4) that the accused believed that the complainant was 18 years of age, unless the accused took all reasonable steps to ascertain the complainant's age. Age is determined by s. 30 of the *Interpretation Act*, R.S.C. 1985, c. I-21. Section 658 provides means of proving the age of a child. The accused may elect his mode of trial on any of the offences in this section pursuant to s. 536(2). Release pending trial is determined by s. 515, although an accused charged with the offence under subsec. (4) is eligible for release by the officer in charge under s. 498.

Pursuant to s. 274, no corroboration is required for a conviction of the offence under this section and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

A person found guilty of an offence under subsec. (1) or (2) may, depending on the circumstances, be liable to the mandatory prohibition order in s. 109 for possession of firearms, ammunition and explosives. The offence under this section may be the basis for an application for an authorization to intercept private communications by reason of s. 183 or a warrant to conduct video surveillance by reason of s. 487.01(5). The offences in this section fall within the definition of "enterprise crime offence" in s. 462.3 for the purposes of Part XII.2.

Special evidentiary and procedural provisions – Section 274 specifically provides that no corroboration is required for a conviction for these offences and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. Also see s. 659 abrogating any rule requiring a warning about convicting on the evidence of a child. Under s. 4(2)

of the *Canada Evidence Act*, the spouse of an accused charged with this offence is a compellable witness at the instance of the prosecution. Section 16 of the *Canada Evidence Act* deals with the competency of witnesses under the age of 14 years. As to production of records containing personal information of the complainant or a witness, see ss. 278.1 to 278.9.

Section 486(2.1) provides that, where an accused is charged with this offence and the complainant is, at the time of the trial or preliminary inquiry, under the age of 18 years or may have difficulty communicating the evidence by reason of a mental or physical disability, the judge may order that the complainant testify outside the courtroom or behind a screen where such procedure is necessary to obtain a full and candid account of the acts complained of. Section 715.1 provides that, in proceedings under subsec. (2) or (3), a videotape, made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant adopts its contents. Similarly, s. 715.2 provides that, in proceedings under this section in which the complainant or another witness may have difficulty communicating the evidence by reason of a mental or physical disability, a videotape made within a reasonable time after the alleged offence, in which the complainant or witness describes the acts complained of, is admissible in evidence if the complainant or witness adopts its contents.

Related offences are: ss. 210 and 211, offences in relation to bawdy-houses; s. 213, offences in relation to prostitution; ss. 271 to 273, sexual assault; s. 245, administering noxious substance. Sexual offences in relation to children may be found in Part V, ss. 151 to 153 and ss. 170 to 172.

SYNOPSIS

This section makes it an indictable offence to engage in any of the listed actions in relation to *procuring a person for the purposes of prostitution* and related illicit activities. It also creates indictable offences relating to youthful prostitutes.

Section 212(1)(*a*) prohibits *procuring*, attempting to procure or soliciting a person to have *illicit sexual intercourse with another person*. The act of intercourse may occur (or be intended to occur) in or out of Canada. The term "illicit" is broader than prohibited by the criminal law and includes such acts as requiring an employee to have sex with prospective clients in order for the employer to obtain business.

Section 212(1)(*b*) makes it an offence to *inveigle or entice* another person to a common bawdy-house. It must be shown that the accused did the acts *for the purpose* of getting that person to engage in *illicit sexual intercourse or prostitution*. The paragraph specifically excludes liability if the person enticed or inveigled is a prostitute.

Section 212(1)(*c*) makes it an offence to *conceal another* in a common bawdy-house. It must be proven that the accused did so knowingly, namely, that the accused did the act while aware of the nature of the premises involved.

Section 212(1)(*d*) prohibits *procuring* or attempting to procure any one to *become a prostitute*. It applies whether the person is being procured to be a prostitute in or out of Canada. It is a defence if the accused reasonably believed that the person is already a prostitute.

Section 212(1)(*e*) makes it an offence to procure or attempt to procure any one to *move from their home* for the *purpose of becoming an inmate or a frequenter of a common bawdy-house*. The common bawdy-house may be located in or out of Canada. It must be shown that the person does not already live in a common bawdy-house.

Section 212(1)(*f*) makes it an offence to direct, take (or to cause either) a *person arriving in Canada to a common bawdy-house*. No intention beyond the doing of the physical acts need be shown.

It is an offence under s. 212(1)(*g*) to *procure another to enter or leave Canada* for the *purpose of prostitution*.

Section 212(1)(*h*) makes it an offence to *exercise control, direction or influence* over another person if the accused's acts aid abet or compel another to *carry on prostitution*. It must be proven, in addition to the foregoing, that the acts were done *for the purpose of gain*.

Pursuant to s. 212(1)(*i*) it is an offence to *administer* or cause another to take *anything* (including drugs or alcohol) if the acts are accompanied by the mental elements of intent to

either *stupefy or overpower* another person for the *purpose of enabling any one to have sexual intercourse* with that person.

The final offence created by this subsection is to *live* entirely, or in part, *on the avails of the prostitution of another person.* A prostitute cannot be prosecuted for supporting him or herself on the proceeds of the trade nor can such a person be convicted as a party or co-conspirator to living off the avails of their own earnings.

The maximum sentence upon conviction for any of the offences in s. 212(1) is 10 years' imprisonment.

Subsection (3) creates a presumption that one who lives with a prostitute or is in the habitual company of a prostitute or lives in a common bawdy-house, lives on the avails of prostitution. The accused may rebut the inference which would otherwise be relevant to a prosecution under subsecs. (1)(*j*) or (2).

Subsections (2) and (4) create offences relating to youthful prostitutes. Section 212(2) raises the maximum sentence upon conviction for living off the avails of a prostitutes to 14 years if the prostitute is under 18. (The maximum sentence would otherwise be 10 years – see s. 212(1)(*j*)). Subsection (2.1) creates an offence for which there is a minimum penalty of five years where the accused not only lives wholly or in part on the avails of prostitution of a person under the age of 18 years, but is a party to or compels that person to engage in prostitution and uses or threatens to use violence etc. in relation to that person. The maximum penalty for this offence is 14 years. Section 212(4) makes it an offence to obtain, or communicate for the purpose of obtaining, for consideration, the sexual services of a person who is under 18 years of age. It must be shown that consideration was offered for the services. The accused is liable to a sentence of five years upon conviction.

ANNOTATIONS

Subsection (1)(*a*) – Evidence of an attempt to obtain a female person for a man who desires sexual intercourse for money will support a conviction: *R. v. Babcock* (1974), 18 C.C.C. (2d) 175 (B.C.C.A.).

The word "illicit" in this paragraph refers to sexual intercourse not authorized or sanctioned by lawful marriage and is not limited to sexual intercourse prohibited by the criminal law or other enactment of positive law and would include requiring an employee to have intercourse with the company's clients in order to conclude contracts: *R. v. Deutsch*, [1986] 2 S.C.R. 2, 27 C.C.C. (3d) 385, 52 C.R. (3d) 305 (5:0).

Assuming that the offence of procuring a woman to have illicit sexual intercourse is not committed unless sexual intercourse takes place nevertheless the accused could be convicted of attempting to procure under this paragraph where the accused in the course of a job interview advised the prospective employee that she would have to have sexual intercourse with the company's clients where necessary to conclude a contract and that a successful employee could make a great deal of money, even if in the end no job offer was actually made. Provided the accused had the necessary intent to induce or persuade the woman to seek employment that would require her to have sexual intercourse with prospective clients, then the holding out of the large financial rewards in the course of the interviews, in which the necessity of having sexual intercourse with prospective clients was disclosed, could constitute the *actus reus* of an attempt to procure. This would clearly be a step, and an important step, in the commission of the offence: *R. v. Deutsch, supra.*

Subsection (1)(*d*) – It is no offence to recruit a woman who is already a prostitute and the accused's belief that the woman is already a prostitute is a defence to this charge: *R. v. Cline* (1982), 65 C.C.C. (2d) 214, [1982] 2 W.W.R. 286 (Alta. C.A.). However, in *R. v. Bennett* (2004), 184 C.C.C. (3d) 290, 184 O.A.C. 386, the Ontario Court of Appeal concluded that the fact that someone has acted as a prostitute on a previous occasion does not necessarily immunize them from being procured again.

Subsection (1)(*h*) – "Control" refers to invasive behaviour which leaves little choice to the person controlled. The exercise of "direction" exists when rules or behaviours are imposed.

This does not exclude the person being directed from having a certain latitude or margin for initiative. "Influence" includes any action exercised over a person with a view to aiding, abetting or compelling that person to engage in or carry on prostitution. In this case, the fact that the owner of an escort agency employed the complainants and employed rules regarding meetings with clients and distribution of funds did not constitute "control" within the meaning of this section. The screening of clients; placing of advertisements; imposition of rules regarding meetings with clients; the provision of a driver for the complainants, and the purchase of clothing, however, constitute evidence of "direction": *R. v. Perreault* (1996), 113 C.C.C. (3d) 573, [1997] R.J.Q. 4 (C.A.).

Subsection (1)(*j*) – This offence requires proof that the accused received in kind all or part of the female's proceeds from prostituting herself or had those proceeds applied in some way to support his living. It is her avails as such that he must live on and indirect benefits resulting to him from her practice are not avails of her prostitution. As well, the words "living on" connote living parasitically and those persons who offer the same services to prostitutes as to other persons do not commit this offence: *R. v. Celebrity Enterprises Ltd.* (1977), 41 C.C.C. (2d) 540, [1978] 2 W.W.R. 562 (B.C.C.A.).

Where the accused is living with a prostitute, the question to be determined is whether the accused and the prostitute had entered into a normal and legitimate living arrangement which included a sharing of expenses for their mutual benefit or whether, instead, the accused was living parasitically on the earnings of the prostitute for his own advantage. This is not to say that, to avoid liability under this paragraph, each of the parties must make an equal contribution to the living expenses. The parasitic aspect of the relationship involves an element of exploitation which is essential to the concept of living on the avails of prostitution: *R. v. Grilo* (1991), 64 C.C.C. (3d) 53, 5 C.R. (4th) 113 (Ont. C.A.). Similarly: *R. v. Bramwell* (1993), 86 C.C.C. (3d) 418, 60 W.A.C. 293 (B.C.C.A.).

The prostitute on whose avails another person lives may not be convicted of the offence of conspiring with that person to commit the offence contrary to this paragraph. The prostitute's immunity from prosecution does not, however, bar the conviction for conspiracy of the person who lived on the avails of her prostitution where there is proof of an agreement between him and the prostitute that he do so: *R. v. Murphy and Bieneck* (1981), 60 C.C.C. (2d) 1, 21 C.R. (2d) 39 (Alta. C.A.).

The accused, who ran an escort agency, was found to live on the avails of prostitution even though the escorts did not always provide sexual services to customers. Although no escort was forced to take a particular job nor perform any particular act, including sexual acts, the element of parasitism was found in the fact that the accused was in the business of rendering services to the escorts because they were prostitutes: *R. v. Barrow* (2001), 155 C.C.C. (3d) 362, 42 C.R. (5th) 203 (Ont. C.A.), leave to appeal to S.C.C. refused 160 C.C.C. (3d) vi.

Living off the avails of prostitution can amount to property obtained by crime pursuant to s. 354(1) of the *Criminal Code*: *R. v. Friesen* (2002), 164 C.C.C. (3d) 280, [2002] 6 W.W.R. 593, 271 Sask. R. 302 (C.A.).

Living off the avails of prostitution can support a conviction for money laundering with respect to the avails contrary to s. 462.31(1) of the *Criminal Code*: *R. v. Friesen*, *supra*.

Subsection (3) – This subsection creates a mandatory presumption whereby the accused will need to call evidence, unless there is already evidence to the contrary in the Crown's case. This presumption infringes the presumption of innocence as guaranteed by s. 11(*d*) of the Charter but constitutes a reasonable limit and is therefore valid. *R. v. Downey*, [1992] 2 S.C.R. 10, 72 C.C.C. (3d) 1, 13 C.R. (4th) 129.

Subsection (4) – Communicating for the purpose of prostitution pursuant to s. 213(1) is not a lesser or included offence of this provision: *R. v. Amabile* (2000), 143 C.C.C. (3d) 270, 223 W.A.C. 169 (B.C.C.A.).

Offence in Relation to Prostitution

OFFENCE IN RELATION TO PROSTITUTION / Definition of "public place".

213. (1) Every person who in a public place or in any place open to public view

(*a*) stops or attempts to stop any motor vehicle,

(*b*) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or

(*c*) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person

for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

(2) In this section, "public place" includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view. 1972, c. 13, s. 15; R.S.C. 1985, c. 50 (1st Supp.), s. 1.

CROSS-REFERENCES

The terms "place" and "prostitute" are defined in s. 197. "Motor vehicle" is defined in s. 2.

The trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. Other offences in relation to prostitution are found in ss. 211 and 212. Offences in relation to bawdy-houses are found in ss. 210 and 211.

As to production of records containing personal information of the complainant or a witness, see ss. 278.1 to 278.9.

Section 486(2.1) provides that, where an accused is charged with this offence and the complainant is, at the time of the trial or preliminary inquiry, under the age of 18 years or may have difficulty communicating the evidence by reason of a mental or physical disability, the judge may order that the complainant testify outside the courtroom or behind a screen where such procedure is necessary to obtain a full and candid account of the acts complained of. Section 715.1 provides that, in proceedings under subsec. (2) or (3), a videotape, made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant adopts its contents. Similarly, s. 715.2 provides that, in proceedings under this section in which the complainant or another witness may have difficulty communicating the evidence by reason of a mental or physical disability, a videotape made within a reasonable time after the alleged offence, in which the complainant or witness describes the acts complained of, is admissible in evidence if the complainant or witness adopts its contents.

SYNOPSIS

This section makes it an offence to do any of the prohibited acts (described in subsec. (1)(*a*) to (*c*)) if accompanied by the intention of *engaging in prostitution* or obtaining the *sexual services of a prostitute*. This summary conviction offence applies to the acts described below only if they are done in a *public place* (as defined by s. 213(2)) or a place open to public view.

Section 213(1)(*a*) applies to the act of either stopping a motor vehicle or attempting to do so for the prohibited purpose.

Section 213(1)(*b*) prohibits impeding either pedestrian or motor vehicle traffic, or impeding others from going in or out of any premises adjacent to a public place, or one open to the public for the purposes described above.

Section 213(1)(*c*) makes it an offence to stop any one or to *communicate in any manner* (or attempt to do either) for the prohibited purpose.

ANNOTATIONS

Subsection (1)(*c*) of this section, while infringing freedom of expression as guaranteed by s. 2(*b*) of the Charter, is a reasonable limit on that freedom and is therefore valid. Nor is the provision on its own or in combination with the bawdy-house prohibition in s. 210(1) a violation of s. 7 of the Charter: *Reference re ss. 193 and 195.1(1)(c) [now ss. 210 and 213] of the Criminal Code*, [1990] 1 S.C.R. 1123, 56 C.C.C. (3d) 65, 77 C.R. (3d) 1 (4:2). Nor does subsec. (1)(*c*) violate the guarantee to freedom of association: *R. v. Skinner*, [1990] 1 S.C.R. 1235, 56 C.C.C. (3d) 1, 77 C.R. (3d) 84 (4:2).

Subsection (1)(*c*) in effect creates two ways in which the offence may be carried out in that it makes it an offence either to stop or attempt to stop the person or to in any manner communicate or attempt to communicate for the prohibited purpose. There is no requirement that the accused be shown to have stopped and communicated with another person: *R. v. Head* (1987), 36 C.C.C. (3d) 562, 59 C.R. (3d) 80 (B.C.C.A.).

The offence of communicating for the purpose of obtaining sexual service requires proof of an intention to engage sexual services. More than mere communication is required. The intention of the accused, however, may be inferred from the circumstances. In this case, evidence that the accused spoke to the undercover officer merely out of curiosity negatived intent: *R. v. Pake* (1995), 103 C.C.C. (3d) 524 (Alta. C.A.).

The mere response by the accused, to an overture by a plainclothes police woman, that he wished to obtain the sexual services of a prostitute is sufficient to make out the offence under this section: *R. v. Edwards and Pine* (1986), 32 C.C.C. (3d) 412, 45 C.R. (4th) 117, 110 W.A.C. 53 (B.C. Co. Ct.).

The offence in para. (*c*) was intended to protect everyone from the nuisance of being propositioned on the street and at least prohibits communication for the purpose of engaging the sexual services of a person whom the accused thinks to be a prostitute: *R. v. Ruest* (1991), 67 C.C.C. (3d) 476, 7 C.R. (4th) 48 (Que. C.A.). Hitch-hiking does not constitute an attempt to stop a person for the purpose of prostitution: *R. v. Lane* (2000), 33 C.R. (5th) 107 (Ont. C.J.).

An undercover police officer did not commit an offence pursuant to subsec. (1)(*c*) where the police officer spoke to the accused and complied with the accused's request that he prove he was not a police officer by touching the accused's pubic area: *R. v. P. (N.M.)* (2000), 146 C.C.C. (3d) 167, 33 C.R. (5th) 113 (N.S.C.A.), motion for leave to intervene adjourned 149 C.C.C. (3d) 446 (S.C.C.), leave to appeal to S.C.C. refused 193 D.L.R. (4th) vi.

A conversation in a motor vehicle on a public street is within this section, although the vehicle is at all times in motion: *R. v. Smith* (1989), 49 C.C.C. (3d) 127 (B.C.C.A.).

Part VIII / OFFENCES AGAINST THE PERSON AND REPUTATION

Interpretation

DEFINITIONS / "abandon" or "expose" / "aircraft" / "child" / "form of marriage" / "guardian" / "operate" / "vessel".

214. In this Part

"abandon" or "expose" includes

(*a*) a wilful omission to take charge of a child by a person who is under a legal duty to do so, and

(*b*) dealing with a child in a manner that is likely to leave that child exposed to risk without protection;

"aircraft" does not include a machine designed to derive support in the atmosphere primarily from reactions against the earth's surface of air expelled from the machine;

BETWEEN:

B-FILER INC. Applicants	- and -	THE BANK OF NOVA SCOTIA Respondent	Court File No. CT 2005-006

COMPETITION TRIBUNAL

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