

GAMING LEGALNEWS

"NO MORE BETS": ONTARIO COURT OF APPEAL DISMISSES "FLOATING BALL" CASE

by Michael D. Lipton, Q.C., Kevin J. Weber, and Jack I. Tadman

"The process of removing a floating ball from the wheel, declaring a 'no-spin,' and rendering all bets void has no substantive impact on the fairness or integrity of the game of roulette vis-à-vis the players. This is because of the nature of the game as a true game of chance and, to some extent, because of the house advantage. The existence of a floating ball renders the spin a nullity, but it does not disadvantage the players. In these circumstances, I see no basis for distinguishing floating balls from other irregularities that necessitate stopping the game."

– Simmons, J.A. at para. 86 of *Moreira*

Background

On February 26, 2013, the Ontario Court of Appeal dismissed *Moreira*, likely putting an end to a claim by four high-stakes gamblers for damages for negligence, breach of contract, unjust enrichment, and misrepresentation arising from monies lost while playing roulette at an Ontario casino.

Between 2004 and 2008, four high-stakes gamblers lost approximately \$2.1 million while playing roulette at the Fallsview Casino (Fallsview). Fallsview is a Niagara Falls, Ontario, casino conducted and managed by the Ontario Lottery and Gaming Corporation (OLG).

All four gamblers either borrowed money from Fallsview or issued signed markers to Fallsview. After OLG made formal demands for the repayment of the gambling loans, the gamblers commenced two actions against OLG, claiming \$14 million in damages for negligence, breach of contract, unjust enrichment, and misrepresentation.

The basis of the action was a rule (Rule) put in place by casino operators at Fallsview that permitted roulette dealers to remove a "floating ball" from a roulette wheel, call a "no-spin," and void all wagers.

Summary of the Appellants' Argument

The appellants argued that the Rule, which was not approved by OLG's regulator, the Alcohol and Gaming Commission of Ontario (AGCO), was a "rule of play." Every "rule of play" has to be approved by the AGCO, pursuant to the (now repealed) *Games of Chance Conducted and Managed by the Ontario Lottery and Gaming Corporation* regulation (Regulation).

The appellants also argued that if OLG does not obtain AGCO approval for a "rule of play," OLG provides such games in contravention of the



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Gaming Control Act (Act). If the games are provided in contravention of the Act, the games are not provided “in accordance with [the] law[s] enacted” by the province as required by s. 207(1)(a) of the *Criminal Code* (Code). If the games are not provided “in accordance with [the] law[s] enacted” by the province as required by s. 207(1)(a) of the Code, the games are illegal. If the games are illegal, (i) the appellants should be entitled to the return of their gambling losses, and (ii) OLG should not be permitted to collect on the appellants’ loans and markers because the Act prohibits using civil proceedings to recover illegal gambling loans.

Decision of the Ontario Court of Appeal

The court was not persuaded that the “floating ball rule” was a “rule of play” that required AGCO approval. The court distinguished between the requirement under the Regulation to “describe the rules by which the game is played and which ensure the integrity and fairness of the game assuming it proceeds in ordinary course,”² and “an obligation to consider and provide a rule to respond to every irregularity that may occur during a ... game.”³

The court held that the legislative purpose of the rules of play is to ensure that lottery schemes and games, where permitted, be conducted responsibly and in the public interest. Accordingly, stated the court, the AGCO is required to review rules relating to the integrity and fairness of the games, such as (i) the objectives of the game, (ii) the wagers that may be made, (iii) the chances of winning, and (iv) the advantages of the operator in relation to each wager. Removing a “floating ball” does not impact any of these variables.

Comment

From a public policy perspective, the onus should not be on OLG to consider every irregularity that may occur during a game. The “floating ball” is one such irregularity, and it is an irregularity that has no bearing on players’ likelihood to win at roulette (which is a game of chance – even though your cousin tells you she has a “system” to beat the wheel).

The court, unfortunately for gaming lawyers, did not address the merits of the appellants’ arguments with respect to situations when actual “rules of play” do not receive AGCO approval. Does this make a game illegal? If so, what would the implications be to OLG and gamblers if OLG was to provide an illegal game?

It is part of a lawyer’s job to develop and advocate creative arguments for his or her clients. While the appellants’ lawyers were not able to convince the Ontario Court of Appeal that OLG’s policies and procedures relating to floating balls were “rules of play,” they came up with an interesting argument in a case that adds to Canada’s long, strange history of gambling-related jurisprudence.

¹ As described in *Moreira v. Ontario Lottery and Gaming Corporation*, 2013 ONCA 121 (*Moreira*), a “floating ball” is a roulette ball that either becomes stationary on the numbers ring of the roulette wheel as the wheel continues to spin (a “ghost ball”) or a ball that continues to roll around the roulette wheel without falling

into the numbered slots (a “runner”), sometimes for a considerable period of time.

² *Moreira*, para 67.

³ *Moreira*, para 68.

DETROIT CASINOS’ FEBRUARY REVENUES DECREASE FROM SAME MONTH LAST YEAR: MICHIGAN GAMING CONTROL BOARD RELEASES FEBRUARY 2013 REVENUE DATA

by Ryan M. Shannon

The Michigan Gaming Control Board (“MGCB”) released the revenue and wagering tax data for February 2013 for the three Detroit, Michigan, commercial casinos. The three Detroit commercial casinos posted a collective 13.67% decrease in gaming revenues compared to the same month in 2012. Aggregate gross gaming revenue for the Detroit commercial casinos increased, however, by approximately 4.8% compared to January 2013 revenue figures, continuing the increase in revenues between January and February in 2012.

MGM Grand Detroit posted lower gaming revenue results for February 2013 as compared to the same month in 2012, with gaming revenue decreasing by nearly 13.1%. MGM Grand Detroit continued to maintain the largest market share among the three Detroit commercial casinos and had total gaming revenue in February 2013 of approximately \$46.5 million. MotorCity Casino had monthly gaming revenue approaching \$38.3 million, with revenues decreasing by more than 10.8% in February 2013 compared to February 2012. Greektown Casino posted an 18.4% decrease in revenues for February 2013 compared to the same month in 2012. Greektown had gaming revenue of more than \$26.5 million for February 2013.

The revenue data released by the MGCB also includes the total wagering tax payments made by the casinos to the State of Michigan. The gaming revenue and wagering tax payments for MGM Grand Detroit, MotorCity Casino, and Greektown Casino for February 2013 were:

Casino	Gaming Revenue	State Wagering Tax Payments
MGM Grand Detroit	\$46,465,030.58	\$3,763,667.48
MotorCity Casino	\$38,280,263.88	\$3,100,701.37
Greektown Casino	\$26,554,877.16	\$2,150,945.05
Totals	\$111,300,171.62	\$9,015,313.90

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