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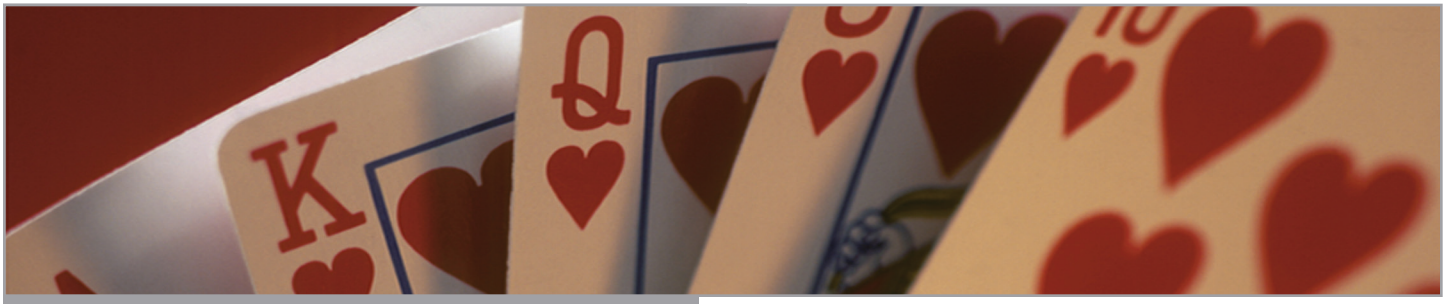

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CHANGES TO HEARINGS AND APPEALS IN GAMING REGISTRATION MATTERS IN ONTARIO

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

Effective July 1, 2011, all responsibility for new hearings and appeals commenced under the *Gaming Control Act, 1992* involving the registrations granted to persons involved in the Ontario gaming industry will no longer be conducted by the Board of the gaming regulator, the Alcohol and Gaming Commission of Ontario (the "AGCO"). Henceforth, all such hearings and appeals will be made before a general purpose adjudicative agency, the Licence Appeal Tribunal ("LAT"). Hearings and appeals that were once heard by the Board of the AGCO, a body dedicated to gaming and alcohol licensing issues, will now be heard by the LAT, which is responsible for hearings under approximately 23 different provincial statutes.

This change will affect hearings involving gaming registrants in Ontario who are subject to (i) a proposed order of the Registrar of Alcohol and Gaming to refuse to issue, to suspend, or to revoke a gaming registration; (ii) an appeal of the Registrar's order of a monetary penalty against a gaming registrant; and (iii) a hearing of a Registrar's proposed compliance or similar order under the *Gaming Control Act, 1992*.

The conduct of hearings and appeals before the LAT will be similar in manner to the procedure previously carried out before the Board of the AGCO. All hearings and appeals will be accorded the status of a quasi-judicial process. Gaming registrants can be represented by counsel, call witnesses, present evidence, and cross-examine the Registrar's witnesses. The Registrar will also be represented by counsel, can present witnesses and evidence, and can cross-examine the registrant's witnesses. Witnesses will be required to swear or affirm to tell the truth. After each party presents their evidence, they will each make closing submissions to the LAT panel.

This change, which is intended to allow the AGCO to focus on its governance and policy functions, will not affect hearings or appeals already commenced before the Board of the AGCO. Where the Board of the AGCO has commenced a hearing, it will remain seized of the matter even if the hearing goes past the transfer date of July 1, 2011. Any decisions rendered by the Board of the AGCO that are under appeal as of July 1, 2011, will remain within the jurisdiction of the Board of the AGCO.

SUPREME COURT DISMISSES LARGE CLASS ACTION AGAINST WAL-MART FOR LACK OF COMMONALITY AMONGST PLAINTIFFS

by Kathleen Lang and Farayha Arrine

In its much-anticipated ruling in *Wal-Mart, Inc. v. Dukes*, 180 L.Ed. 2d 374 (2011), last month, the Supreme Court rejected an attempt by 1.5 million former and current female Wal-Mart employees to join together and sue the retail giant for gender discrimination as a class. The Court dismissed the case on the grounds that the Plaintiffs' alleged experiences of gender discrimination were simply too varied and individualized to be considered as a class.

The ruling strengthens the requirement for commonality of issues before a class can be certified and will surely be cause for lower courts requiring plaintiffs to make a far more stringent showing of "commonality" when seeking class certification.

The commonality requirement in FRCP 23(a)(2) states that a class be certified only where "there is a question of law or fact that is common to the class." Justice Scalia focused his majority opinion on the fact that the analysis as to whether a large number of plaintiffs have legitimately alleged common questions is far more nuanced than just a precursory look at the allegations in the complaint. Rather than just concluding there were some common issues, before certifying a class, a court must find that all the members of the class have suffered the same type of injury. *Wal-Mart, supra* at 389.

The majority opinion then examined the commonality between the Plaintiffs' injuries and concluded that the allegedly discriminatory employment decisions regarding promotions and pay, of which Plaintiffs complained, were made by individual managers at hundreds of different Wal-Mart stores throughout the country. These managers were given broad discretion by Wal-Mart to make and implement their own pay and promotion policies for the employees in their store.

The Court observed that because Wal-Mart gave so much discretion to its managers, there was no uniform or common practice of discrimination. The Court reasoned that because the managers had such broad discretion in pay and promotion policies for their own store, and because they were not following a discriminatory mandate from Wal-Mart, each Plaintiff could have been passed up for a promotion or paid less than her male colleagues for a number of different – and potentially discriminatory – reasons. Further, the expert hired by the Plaintiffs could not testify as to how many employment decisions were based on discrimination or stereotyping, therefore further supporting that the alleged discrimination was not uniform or common within Wal-Mart. Hence, while each Plaintiff's claim could be brought separately to determine whether the allegedly discriminatory employment decision was in fact discriminatory, the claims did not belong together in a class action.

The *Dukes* decision should have impact beyond employment discrimination class actions. Often, class action complaints are filed even when the alleged injuries of the class members vary widely and require individualized proof. The Supreme Court held that in order to proceed as a class action, plaintiffs must show that the class suffered a common injury that can be tried as one action. In other words, if individual trials are necessary to determine if there has been a common type of injury, then the class action mechanism should not be used. Likewise, the Supreme Court confirmed that it is the plaintiffs' burden to prove to the court that all of the requirements for a class action have been established and that more than just saying so in a pleading is required. Under these standards, lower courts should be more closely scrutinizing whether a case is appropriate to be a class action.

KEY U.S. SENATORS PRESSURE ATTORNEY GENERAL ON INTERNET GAMING

by Robert W. Stocker II

In a jointly signed letter to United States Attorney General Eric Holder dated July 14, Arizona's notoriously anti-gaming Senator Jon Kyl and Nevada's pro-gaming senior Senator/Senate Majority Leader Harry Reid declared that "it is important that the Department of Justice pursue aggressively and consistently those offering illegal Internet gambling in the United States." While that declaration is no great surprise, the following joint declaration is a showstopper:

> In addition, we have two further concerns: the spread of efforts to legalize intra-state Internet gambling and the spread of efforts to offer such intra-state Internet gambling through state-sponsored lotteries.

Their joint letter goes on to declare that: "We respectfully request that you reiterate the Department's longstanding position that federal law prohibits gambling over the Internet, including intra-state gambling (e.g., lotteries)."

The Senators do not address the intrastate internet exception Congress included in the Unlawful Internet Gambling Enforcement Act or the impact of the Tenth Amendment to the United States Constitution, which gives the states in the Union the right to govern their internal affairs.

Such pronouncements are most likely a dagger in the heart of federal efforts to legalize any form of internet gaming before the November 2012 national elections. It remains to be seen what the reaction will be by the state legislatures that are considering legislation legalizing intrastate internet gaming.