

# Reflections on the Voluntary Self-Exclusion of Gamblers and the Law-Suits against Ontario Lottery and Gaming Corporation

Neda Faregh · Craig Leth-Steensen

Published online: 11 February 2009  
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**Abstract** Legalized gambling in Canada is governed by Provincial legislation. In Ontario, the Ontario Lottery and Gaming Corporation is responsible for all aspects of gambling in the Province. There have been a number of recent lawsuits against this Crown agency of the Government of Ontario by gamblers, most of which have been settled or otherwise resolved. A recent class-action lawsuit on behalf of thousands of Ontario gamblers against this agency raises a number of interesting questions regarding the issue of responsibility and liability. The questions surround the issue of self-exclusionary practices of gamblers who deem themselves in need of external intervention in order interesting questions regarding the issue of responsibility and liability. The questions surround the issue to abstain from further gambling. A contract is voluntarily signed by the self-excluding gamblers whereby their further attendance at gaming venues is prevented and could be punishable by law. Where the gaming venues have failed to enforce the terms of this contract, gamblers have continued to gamble at these establishments. The class-action lawsuit stems from the grievances of these self-excluded gamblers who were not turned away. Relevant psychological theories and recent findings pertaining to gambling are reviewed and questions relevant to these grievances are discussed in favor of government responsibility and liability toward gamblers.

**Keywords** Problem gambling · Self-exclusion · Psychological theories

Legalized gambling in Canada has led to a proliferation of regulated gambling establishments in most regions of the country. Canadians have wagered an estimated \$11.3 billion in 2002, and \$13.6 billion in 2006, compared to \$2.7 billion in 1992 (Statistics Canada 2003; Statistics Canada 2007). Canadians continue to wager increasing amounts with 25% of

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N. Faregh (✉) · C. Leth-Steensen  
Department of Psychology, Carleton University, 1125 Colonel By Drive, Ottawa K1S 5B6, Canada  
e-mail: nfaregh@connect.carleton.ca; nfaregh@rogers.com

C. Leth-Steensen  
e-mail: craig\_leth\_steensen@carleton.ca

gamblers being among those who wager the highest proportion of their income (MacDonald et al. 2004). In 2001 the Canadian Centre on Substance Abuse and the Responsible Gambling Council of Ontario undertook a study that determined 86% of Ontario residents engage in some form of gambling and most do so at the frequency of once per month with over 92% stating gregarious motives as their intent (Wiebe et al. 2001). The study found that over 13% of gamblers report some form of gambling problem resulting in a moderate or severe gambling pathology prevalence of 3.8% among Ontario residents 18 years or older. The adverse effects of excessive gambling are profound and the social and psychological impact are not directed solely at problem-gamblers, but their families and communities (Ferland et al. 2008), and potentially other unrelated sectors of the population as well (Grinols 2004). Hence, the nature and the impact of gambling as well as the unintended consequences of the gambling policies are no longer insignificant and have become a major concern with public health implications.

As a matter of social responsibility and in an effort to prevent the potential development of harm associated with gambling and to reduce excessive gambling, responsible gambling measures have been established including self-exclusionary programs. In Ontario, self-exclusion programs consist of a voluntary gambler-initiated agreement between an individual and the Ontario Lottery and Gaming Corporation (OLGC), a government agency responsible for gaming in Ontario, whereby the individual agrees not to return to the OLGC premises (such as casinos and race tracks) and to be prevented from re-entering those premises. The role of the OLGC predominantly is enforcement-based, mainly to monitor, detect, and prevent self-excluders' re-entry (Responsible Gambling Council 2008).

In Ontario, there have been reports of recent law suits by gamblers against the OLGC. Reportedly, the OLGC has been involved in several lawsuits but does not divulge pertaining information (Alberta Gaming Research Institute 2008). Many have involved prior self-excluders who have nevertheless re-entered the OLGC venues and continued to gamble. Reportedly, there have been 11 individual lawsuits over the recent years which, according to media reports, have been settled by the OLGC under confidential terms. In most cases, the OLGC has reportedly compensated the plaintiffs. Although the details remain confidential, this act of compensation, in essence, constitutes recognition of or acquiescence to responsibility toward gamblers, as well as an admission to blame and liability. As recently as June 2008, a new class-action lawsuit has been filed against the OLGC involving thousands of individuals, asking for damages for negligence, occupier's liability, and breach of contract from failure to deny entry to gambling venues operated by the OLGC (Morse and Fancy 2008). The plaintiffs' position is that after they had self-excluded from further gambling at the OLGC venues, the OLGC failed to prevent them from returning to the OLGC premises consisting of six casinos, four resort casinos, and 21 slots (including raceways) facilities. Furthermore, the plaintiffs claim that because OLGC revenues and profits depend on increased gambling of its patrons, and contrary to the pertinent statutes which stipulate the OLGC must operate for the public good and in the best interest of the public, the OLGC has purposefully designed and operates its premises to maximize revenues through various malevolent conducts within its premises and through vigorous promotional advertising which are especially detrimental to compulsive gamblers. The specific conducts mentioned in the claim filed by the plaintiffs' barristers include the physical layout and interior design of the venues which are appointed in such a way as to induce and protract patrons' gambling episodes through absence of clocks and windows, maze-like floor-plans which make exiting difficult, the maintenance of high ambient noise levels, the use of mirrors and flashing lights, the crowding of customers, design elements

that provoke illusion of control over the outcome of the games and anticipation of imminent wins, the use of high-limit bets, the use of mystifying variable “pay-back” schemes, and the availability of alcoholic beverages along with ready availability of funds (including on credit), all of which, the plaintiffs claim, are designed so that the patrons, including self-excluders, persevere in their gambling (Morse and Fancy 2008).

The class-action suit on behalf of thousands of self-excluding gamblers in Ontario against the OLGc poses a number of interesting questions dealing with the issues of responsibility for the great financial, familial, and social losses incurred by the gamblers who have deemed their gambling behaviors problematic and in need of external intervention. Where adults are deemed responsible to do with their money as they wish, within legal bounds, the question of responsibility for the behavior of those with gambling problems would be at the centre stage of a class-action suit against the OLGc.

The OLGc is responsible for all facets of Ontario gambling. It also acts as a business which promotes gambling through media advertising on Television, billboards, its websites, and a number of other venues including sponsored events such as popular music concerts in several municipalities. At the time of this writing, the OLGc website ([www.olg.ca](http://www.olg.ca)) promotes eight separate contests on their website brandishing the logo “Everyday Possibilities”. It also makes available various forms of sports betting and online gambling. The promoted contests include “Lotto Advance VIP Rewards” through online subscription to LOTTO 6/49 with further special offers available exclusively to subscribers. Another promoted game is the “Instant Games Radio Program” where adult listeners are invited to telephone a radio station in order to win an INSTANT Games Radio Prize by uttering “their best INSTANT WHOO-HOO” sound. Other prizes require the caller to correctly identify the Jackpot level and to describe what they would do with their prize money should they win. In essence, the advertising is expanded from the website to the selected local radio stations. The act of gambling is thus extended from the gaming venue to the ubiquitousness of air-waves. The inherently passive act of listening to the radio is potentially transformed into an active involvement in gambling. The active involvement is encouraged by invitations to claim one’s rewards simply by phoning in, needing nothing more than some luck, continuous attentiveness to the rising amounts of the jackpot, and public reverie of how one might relish the promised fortune.

Such gratuitous promotion and advertising along with promises of untold treasure stand together with declarations of responsible gaming and consumer protection. Moreover, the change in vocabulary from gambling to gaming in OLGc’s discourse is noteworthy. The OLGc’s approach to consumer protection involves a number of restrictions including “strict corporate guidelines on advertisements”, and “self-exclusion programs”. The self-exclusion programs, as previously mentioned, are a type of harm reduction intervention used to limit gamblers’ losses (Nower and Blaszczynski 2006). In Ontario, this strategy allows players to voluntarily self-exclude from all OLGc gaming venues for an indefinite period of time with the possibility of re-instatement after a minimum elapse of 6 months. The process involves self-identification to the security offices of any OLGc venue, signing of required forms, and having a photograph taken. It should be noted that the OLGc website does not provide any detail on this process. The self-excluding players must present themselves to one of the OLGc gaming premises in order to prevent themselves from future admissions. Also, information obtained by the authors from the general phone line of the OLGc emphasized that every effort would be made to block future marketing and advertising contact but that complete prevention is not always possible. Recent findings of different jurisdictions on self-exclusion systems have concluded that this practice is effective at reducing gambling among self-excluders (Ladouceur et al. 2007; Townshend

2007; Ladouceur et al. 2000). However, more recent works in jurisdictions outside of Ontario advocate for improvement in the self-exclusion service and a shift from an enforcement-based model to an assistance-based model (Tremblay et al. 2008; Responsible Gambling Council 2008). Nowatzki and Williams' (2002) review of self-exclusion programs discuss the changes needed to improve these contracts and suggest a number of changes including legal liability and penalties for both parties.

Other services provided to problem gamblers include a one page explanation of Responsible Gaming, a downloadable document about Responsible Gaming Code of Conduct, two Responsible Gaming Radio Ads downloadable from the website, a downloadable Problem Gambling Treatment Brochure, and the downloadable Lottery Responsible Gaming brochure. Moreover, the OLG revenues help support the Ontario Problem Gambling Helpline, and the Ontario Problem Gambling Research Centre.

On the surface, it appears that the signed self-exclusion form would constitute a binding contract between the self-identifying player and the OLG. Should this contract be broken by the self-excluded gambler as a result of attending any of the OLG premises, the OLG agrees to have the individual "escorted" off the property and reported to the police. The individual then could be charged and fined for trespassing by the Police. It can therefore be assumed that the agreement and the obligation are mutual and enforceable by law. One party agrees to refrain from attending the premises, the other agrees to forbid the presence of the first party by monitoring, removing, and reporting the infraction to the law enforcements. There is an agreement to mutuality of responsibility. This sort of agreement requires that both parties be competent when they sign a specific contract (Napolitano 2003). It is therefore assumed that the voluntarily self-excluding gambler and the OLG are both competent parties to the signed agreement. There remains a question as to whether the signed agreement represents a legal contract between the parties, or if the contract simply is a service provided by the OLG as a courtesy to accommodate the needs of its patrons. In other words, what needs to be established is how enforceable this mutual contract is and whether it can transfer the liability for gamblers' behavior to the gambling establishment (Napolitano 2003).

The gamblers involved in the lawsuit may be considered the "guilty" party in this case, because they have admitted by virtue of their lawsuit to have broken the agreement. They voluntarily self-excluded and signed an agreement. They then voluntarily returned to OLG premises fully aware of the probable consequences, conceivably took measures to remain undetected, and proceeded to gamble. They broke the contract. Therefore, they would legally be responsible for not holding up their end of the contract. This conclusion is drawn under the assumption that both parties are competent. However, it is not apparent whether gamblers who have developed a serious addict-like problem with their gaming behavior could be considered competent party to the signed contract.

In general, those with gambling problems tend to have problems with casino games especially and have disproportionately higher rates of casino use (Nowatzki and Williams 2002). European studies report that the majority of self-excluders are middle-aged male pathological gamblers with significant gambling debts (Nowatzki and Williams 2002). A Quebec study undertaken by Ladouceur et al. (2000) found that up to 95% of the self-excluding participants in their study were in the Severe Pathological Gambler category of the South Oakes Gambling Screen. A follow-up study by Ladouceur et al. (2007) found that 73.1% of the participants were pathological gamblers, according to the DSM-IV criteria. A recent study reports that the self-exclusion contracts are solicited and signed by gamblers during severe emotional turmoil (Tremblay et al. 2008). A study of characteristics of self-excluding gamblers over the age of 56 reported that gamblers cite fear of suicide as their

primary reason for self-excluding (Nower and Blaszczynski 2008). In her editorial commentary, Reith (2008) remarks that the issue of responsibility implies the existence of power which, she argues, necessarily is lacking among those who have lost control of their gambling behaviour (Reith 2008). These findings do not point to a group of healthy individuals, but to one that likely suffers from some form of acute psychological impediment. These findings also cast a shadow of doubt as to whether self-excluding gamblers are competent parties to the self-exclusion agreements they sign.

Much is known about the psychology of gambling and therefore the psychological community is well placed to offer insights, albeit limited, into this matter. However, the field is also divided as to whether there exists a continuum of gambling problems or a disease state of gambling pathology. However, many support the idea that gambling constitutes an addictive behaviour (Dickerson and O'Connor 2006) and that pathological gamblers fit Jacob's General Theory of addiction (Gupta and Derevensky 1998).

About half a century ago, Frederic Skinner proposed his operant conditioning model suggesting that habituated voluntary behaviours are responses to stimuli and are "learned". The reward structure inherent in gambling is, in essence, a schedule of reinforcement, the periodical allocation of a prize interspersed with losses, and considered the foundation of success in maintaining gamblers' initial inclination to gamble (Haruvy et al. 2001). Skinner proposed that a single reinforcement is sufficient for operant conditioning. Once the expected reward is no longer forthcoming the behaviour extinguishes. Presumably, this is what happens within normal parameters of gambling behaviour. In pathological gambling, the frequent loss should, but fails to, extinguish the desire to gamble further. A number of rationales for this phenomenon have been proposed, including a variable-ratio schedules of reinforcement, i.e., random rather than regular rewards. The extension of this theory to gambling is that those who gamble successfully or skilfully are reinforced by the rewards of winning whereas unskilful or unsuccessful gamblers are eventually repelled by the experience (Petry 2005). In essence, those reinforced by wins maintain and persist at gambling but those punished by losses cease the behaviour.

Skinner notes that by using a variable reinforcement schedule he was able to decrease the rewards given to his laboratory animals until the rewards occurred rarely. In doing so, he was able to induce the animal to spend more energy operating the reinforcement device than that received from the reward. In this way he was able to protract the reinforcement schedule at variable-magnitude to the point of total exhaustion for the animal where the pigeon would persist in its behaviour until total exhaustion in anticipation of the reward, usually a single pellet of birdseed (Skinner 1953). This bears great resemblance to the behaviour of the gambler, at play on a casino machine, programmed with a variable-ratio or variable-magnitude ratio of reward schedule, which loses steadily and yet persists in the behaviour, as would the rat or the pigeon.

Other aspects of gambling also increase the likelihood that a gambler who is losing money would continue to gamble. The uncertainty factor is one of the main features of all gambling, but particularly of the slot machine, often programmed initially to dispense large prizes and then to decrease the reinforcement ratio in order to intensify gamblers' persistence at play. Some argue this constitutes a violation of the laws of consumer-safety protection because the machines are certain to "hook" the player. More recent slot machines, unlike their counterparts of the 1950s, are thought to be so effective that all players develop some form of pathology in response to their games (Dickerson and O'Connor 2006). Admittedly, the majority of gamblers engage in gambling without encountering significant behavioural problems, however, those that do develop problems are likely succumbing to powerful and biologically driven operant conditioning which

leads to a disordered motivational system which would make the exercise of restraint difficult, if not impossible. Once again, the ability of the compulsive gamblers to control their behaviour in the presence of compelling biologically driven operant conditioning would be questionable. Presumably, such conditioning would thwart ordinary judgment and prevent a compulsive gambler from relinquishing their gambling behaviour.

In addition, a number of psychological theories concerned with cognitive distortions of gamblers suggest such distortions are likely exaggerated among pathological gamblers and involve irrational decision making about the degree of control they, or other fictitious causes (resulting from superstitious beliefs and magical thinking), have over their games (Goodie 2005). Illusion of control is the result of irrational thinking, misattribution of cause-and-effect, and general cognitive error that result in exaggerated conviction in one's capacity to determine the outcome of a random or uncertain event resulting in higher risk taking behaviour (Goodie 2005; Delfabbro 2004). Generally, only a few successes are required to inflate the illusion of control in gamblers (Ladouceur et al. 1988). Because these beliefs are internalized, gamblers often fail to question their accuracy and worth. When they win, they attribute their success to their own abilities, special insights, and sets of beliefs, or alternatively to luck, fate, or the existence or proximity of a credulous artefact or deed. In contrast, when they lose they blame outside factors, flukes, or the absence of fortune, for their failure (Toneatto 2002). Chasing the loss and persisting to gamble after considerable loss are closely linked behaviours of problem gamblers which essentially stem from loss of control and an inability to cope emotionally with the incurred loss (Dickerson et al. 1987). The loss of control, inefficient information-processing, and an inability to cope with the emotional outcomes of inevitable defeat suggest a lack of "power" which according to Reith (2008) is contrary to the idea of responsibility and informed decision making.

Although all gamblers are susceptible to operant conditioning and cognitive errors, the pathological gamblers are ostensibly either more susceptible or more vulnerable due to pre-existing risk factors (Hardoon et al. 2004; Rush et al. 2008; el-Guebaly et al. 2006; Adida et al. 2008). The theories discussed here contribute to the understanding of compulsive gamblers' experiences and motives of compulsive and eventual pathological gambling and suggest that gambling problems are created by the act of gambling, and that problems may be perpetuated by the deliberate action of the gambling establishment. If one were to accept the premise that gambling problems represent a form of addiction or mental illness, then the problem gambler who voluntarily self-excluded from further attendance at gambling venues might not be considered a competent party to the agreement. If the self-excluding gamblers are deemed not competent and not responsible for their behaviour, it follows that they were not able to make informed decisions regarding their voluntary self-exclusion. Are they then legally responsible for the self-imposed contract with the OLG? Or are they guilty of breaking their side of the contract by returning to OLG gambling venues and by gambling further at those venues? Another interesting issue brought forth by these questions is what might occur if gambling problems came to be known or considered a mental disorder. Such designation would certainly have more than legal implications. Gamblers who perceive themselves as having problems will no doubt have to reconcile with the designation of having a mental disorder. The voluntary self-exclusionary practice originally motivated by an intention to be or become healthy is now overshadowed by fears of being branded with a mental disorder.

Should the OLG be found liable or choose to settle the case or otherwise reimburse the plaintiffs, it would be refunding a portion of the money they had gambled in the first place. In other words, it would simply be reimbursing and giving back the money it had received

from the gamblers. Although the lost fortunes of the problem gamblers now belong to the government of Ontario, the funds were acquired by the government as what has come to be known as a form of voluntary taxation from all the gamblers. The settlement of the lawsuits, aside from legal implications and precedents, is giving a refund to the other party. This scenario is little different than government clemency. In this case potentially a clemency towards those who erred due to a disorder they were not responsible for. That would be akin to cancelling gambling debts, or a one-time forgiving of financial obligations, incurred while one inadvertently got carried away by what the OLGCA advertises as excitement in a “mini holiday” at perhaps one of the “most action-packed attractions in Canada”. After all, why should mere games be allowed to ruin lives? Why let innocuous reverie of “Everyday Possibilities” be held accountable for violation of contracts, divorces and family break-ups, financial ruins, unemployment, occasional fraud or embezzlement, and countless other psychological and social consequences for the gamblers, their close associates, and their communities?

It will be interesting to watch the unfolding of the class action lawsuit against the OLGCA, and to observe how the Ontario law judges this issue of responsibility. Certainly, the scientific community can offer limited guidance in view of the fact that the community itself has yet to achieve consensus starting from the appropriate nomenclature for gambling problems, to diagnostic criteria and even classification of gambling problems as disease, disability, mental disorder, or addiction.

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