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HER MAJESTY THE QUEEN APPELLANT;

AND

JOHN TOPECHKA RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA,
 APPELLATE DIVISION

Criminal law—Common gaming houses—Slot machines—Whether bowling machine giving amusement and chance of free game depending on skill a “slot machine” contrary to the Criminal Code, 1953-54 (Can.), c. 51, s. 170.

The accused's premises contained an automatic machine whereby a person, on the insertion of a coin, could play a bowling game by aiming a device which propelled balls toward the pins at the other end of the machine. The skill used in playing the game was in aiming the mechanical bowler. If the scoring of points had a sufficient margin the operator became entitled to a free game. On a charge of keeping a common gaming house for the purpose of gambling contrary to the Criminal Code, the respondent was acquitted by the magistrate and this judgment was confirmed by the Appellate Division of the Supreme Court on an equal division. The Crown appealed to this Court.

Held (Fauteux and Judson JJ. *dissenting*): The appeal should be dismissed.

Per Taschereau, Martland and Ritchie JJ.: This machine is not a slot machine within the meaning of the Act. It is used for vending “services”, and “services” include “amusements”. *Laphkas v. The King*, [1942] S.C.R. 84, applied.

What the law forbids is a machine that by electronic devices or other means, defeats the ability of the player to obtain favourable results. To be within the law, the player must control the game, and not be at the mercy of a machine where skill is not the only element.

When the Act speaks of a *matter of chance or uncertainty* to the operator, it refers obviously to the machine itself which may produce different results independently of the skill of the player. *Laphkas v. R., supra*; *R. v. Isseman*, [1956] S.C.R. 798; *Regent Vending Machines v. Alberta Vending Machines*, [1954] S.C.R. 98, referred to.

The privilege of a free game is the result of skill in operating rather than an element of chance or uncertainty due to the machine and therefore does not make the machine unlawful.

Per Fauteux and Judson JJ., *dissenting*: It is an offence if the result of one of any number of operations of the machine is a matter of chance or uncertainty to the operator. Chance or uncertainty to the operator must be present unless he can, without possibility of failure, achieve any result that he wishes or unless the result is automatic.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division¹, affirming, on an equal division, the acquittal of the accused. Appeal dismissed, Fauteux and Judson JJ. *dissenting*.

*PRESENT: Taschereau, Fauteux, Martland, Judson and Ritchie JJ.

¹ (1959-60), 30 W.W.R. 359, 32 C.R. 144.

S. A. Friedman, for the appellant.

T. A. Miller, for the respondent.

The judgment of Taschereau, Martland and Ritchie JJ. was delivered by

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TASCHEREAU J.:—The charge against the respondent is that on the 26th day of February, 1959, at the City of Edmonton, he did unlawfully keep a disorderly house, to wit: a common gaming house for the purpose of gambling contrary to the *Criminal Code*. His Honour Magistrate Barclay acquitted the respondent, and this judgment was confirmed by the Appellate Division of the Supreme Court of Alberta¹, on an equal division, Mr. Justice McBride having died before the rendering of the judgment.

The provisions of the *Criminal Code* which have to be examined for the purpose of determining this case, are the subsections of section 170. This section reads as follows:

170. (1) 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.

(2) In this section "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.

It was admitted at the trial that when the machine was seized, it was in good operating condition, and was on the premises of the accused. The only question that arises and which has to be decided is whether or not this "William Ten Strike" bowling machine is a "slot machine" contrary to the above section of the *Criminal Code*.

This alleged slot machine, as found by the learned trial judge, is operated as follows, and this is not contested by the appellant. "There is a mechanical man at one end, and when ten cents is inserted in the slot, a ball comes out and comes before the man's hand. The man can be turned through an angle and is aimed at the pins which are placed in the form of a triangle at the other or far end. The base

¹ (1959-60), 30 W.W.R. 359, 32 C.R. 144.

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of the triangle is at the far end of the rectangle, with the apex facing the "man" and the player. After the man is aimed a plunger is pushed forward and the arm of the man moves and propels the ball forward. The direction of the ball is determined by the position of the man as determined by the player." The trial judge came to the conclusion that the skill used in playing the game is in aiming the man or bowler.

If the aim is accurate, the operator will get a "strike", and if he gets twelve strikes in a row, his score will be 300, which is the maximum that can be obtained. If the aim is inaccurate, the score will be lower. A better player will of course be the winner.

I do not think that this machine is a "slot machine" within the meaning of the Act. It is used for vending "services" and, "services" include "amusements". (*Laphkas v. The King*¹).

This machine, I believe, procures an innocent amusement to the operator, and this is not within the ban of the Act. It is an automatic machine used for vending services, and it does not emit a *slug* or *token*. Of course, under s. 170, a machine used for vending services or amusements will be illegal, if the result produced by the machine is a matter of chance or uncertainty to the operator, or if different results as a consequence of the adjustment of the mechanism are obtained. But this has nothing to do with the skill of the operator and is quite independent of the ability of the player to hit the target if he aims properly.

What the law forbids is a machine that by electronic devices or other means, defeats the ability of the player to obtain favourable results. To be within the law, the player must control the game, and not be at the mercy of a machine where skill is not the only element, as it is in the present case.

When the Act speaks of *a matter of chance or uncertainty to the operator*, it refers obviously to the machine itself which may produce different results independently of the skill of the player. I think this is the letter and spirit of the law. (Vide: *Laphkas v. R.*, *supra*; *R. v. Isseman*²; *Regent Vending Machines v. Alberta Vending Machines*³).

¹[1942] S.C.R. 84, 2 D.L.R. 47.

²[1956] S.C.R. 798, 24 C.R. 346. ³[1954] S.C.R. 98, 2 D.L.R. 679.

Skill might be successful or not, it may produce uncertain results, as in baseball, football, trap or skeet shooting, golf or hockey, but the uncertainty then comes from the player, and not from the mechanism of a machine which nullifies the ability of the player.

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I would hate to think that the law intends to brand as a criminal a Canadian citizen who, for a dime, procures an innocent amusement to the public where there is no element of gambling or hazard.

Of course, I have in mind a machine that functions properly and not a machine which does not operate normally, and where the skill of the player might be defeated. I finally believe, as did the learned Chief Justice of Alberta, that if the scoring of points shows that the operator has a sufficient margin, he is entitled to play another game without further payment of money for the operation. This feature can be eliminated by an adjustment of the scoring mechanism. As found by the courts below, the privilege so given is the result of skill in operating rather than an element of chance or uncertainty due to the machine, and does not make the machine unlawful.

I would dismiss the appeal.

The judgment of Fauteux and Judson JJ. was delivered by

JUDSON J. (*dissenting*):—For the reasons given by Porter J.A. in the Appellate Division, I would allow this appeal. While there is some element of skill involved in the operation of the machine, in that one player may obtain a better result than another, it is still an offence if the result of one of any number of operations of the machine is a matter of chance or uncertainty to the operator. Chance or uncertainty to the operator must be present unless he can, without any possibility of failure, achieve any result that he wishes or unless the result is automatic. I do not think that uncertainty to the operator can be given the restricted meaning set out in the reasons of my brother Taschereau.

Appeal dismissed, FAUTEUX and JUDSON JJ. dissenting.

Solicitor for the appellant: The Attorney General for Alberta.

Solicitors for the respondent: Miller, Miller & Witten, Edmonton.