

# **INTERNET GAMING** **THE CANADIAN LEGAL LANDSCAPE**

## **WHERE WE ARE – WHERE WE ARE GOING**

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# Criminal Prohibitions Against Gaming in Canada

- Part VII of the *Canadian Criminal Code* (“Code”) makes all activities related to operating or acting in support of a commercial gaming enterprise an offence, unless it is an enterprise licensed by a provincial government
- Section 201 makes it an offence to keep a common gaming house or common betting house, or to be found in such places

# Criminal Prohibitions Against Gaming in Canada

- Section 202(1) creates offences re betting (waging stakes on external events); Section 206 creates offences re lotteries or gaming (waging stakes on one's own competitive activity)
- Although these sections of the Code were enacted to deal with bricks and mortar types of gambling operations, they may be applied to interactive online gaming

# Exceptions to Prohibition

## Government-Operated Computer Gaming

- Internet gaming (a “lottery scheme...operated on or through a computer”) may only be conducted by a provincial government– ss. 207(1)(a) & (b), and 207(4) of the Code
- Subsection 207(4) specifically provides that provincial governments may conduct & manage lottery schemes on or through a computer, but are not empowered to license others to do so

# Exceptions to Prohibition

## Government-Operated Computer Gaming

- Provincial governments are hampered in offering sports betting. Cannot offer betting on single sport events – only multiple-bet parlays are allowed. Considerable disadvantage vis-à-vis existing offshore online sportsbooks
- Presently, only the Atlantic Lottery Corporation and British Columbia Lottery Corporation offer online gaming

# Exceptions to Prohibition

## Internet Horse Race Betting

- Pari-mutuel horse racing is the only form of betting regulated by the federal government – specific exemptions for pari-mutuel horse-racing are created by section 204 of the Criminal Code, and regulation is by the Canadian Pari-Mutuel Agency, under the federal Ministry of Agriculture

# Exceptions to Prohibition

## Internet Horse Race Betting

- Telephone betting on horse races is permitted by regulation, and in 2003, this was extended to online betting: the regulation's definition of "telephone" was expanded to include "any telecommunication device"
- Effectively puts the federal government in the business of regulating Internet betting, but no debate on the issue in the House of Commons because it was done by amending a regulation

# Exceptions to Prohibition

## Internet Horse Race Betting

- January 2004: Woodbine Entertainment Group launched racetrack betting website
- August 2004: The Ontario Racing Commission challenged validity of change, arguing that Minister of Agriculture could not make far-reaching changes to definition of “telephone” by regulation
- Challenge later withdrawn

# Exceptions to Prohibition

## Internet Horse Race Betting

- By comparison, right of provincial governments to conduct & manage gaming that is operated through computers explicit in *Criminal Code*
- Woodbine & Canadian Pari-Mutuel Agency campaign to keep offshore betting sites out of Canada – letters to operators, threatening prosecution under *Criminal Code* – Effort to keep out the competition continues to date

# Exceptions to Prohibition

## Support Services for Legal Extraterritorial Activity

- Exception in section 207(1)(h) of the Code permits the printing or making of things for use in gaming, which are to be used in jurisdictions where their use is legal – i.e., software used by interactive gaming enterprises licensed outside of Canada.
- ISSUE: Does allowing Canadian bettors access to offshore gaming enterprise disallow the use of this exception? i.e., Canadian developer licenses gaming software for use by a site on which Canadians may bet – Uncharted Territory<sub>11</sub>

# Exceptions to Prohibition

## Support Services for Legal Extraterritorial Activity

- Where is software being used?
- At the location of the offshore server or at the location of the bettor in Canada?

# Internet & Criminal Jurisdiction

## “Connecting Factors” Test

- Could Canadian courts exert jurisdiction over gaming conducted over the Internet, where only some of the relevant activities occurred in Canada? Law in this area is uncertain
- A criminal offence is subject to prosecution in Canada if “a significant portion of the activities constituting the offence” took place in Canada, establishing a “real and substantial” link between the offence and this country (***R. v. Libman***)

# Internet & Criminal Jurisdiction

## “Connecting Factors” Test

- ***Libman***: Telephone fraud scheme operated from Canada victimized U.S. residents – money sent to offices in Central America – accused went outside Canada to meet with associates and receive his share of proceeds, some of which went back in Canada – accused convicted
- ***Libman*** precedent would allow conviction for acts undertaken in Canada in pursuit of a commercial gaming enterprise, even where Canadians could not place bets on the site

# Internet & Criminal Jurisdiction

## “Connecting Factors” Test

- ***R. v. Chapman***: Ontario Court of Appeal held that a fraudulent scheme initiated and realized in Canada was an offence committed in Canada, even though inducements made under the fraud were only extended to persons outside Canada
- ***R. v. Ede***: Trial judge convicts accused for providing information relating to pool-selling to Canadians, although both the pool-selling and the sporting events upon which it was based occurred in the U.K. (ss. 202(1)(i) of the Code)

# Internet & Criminal Jurisdiction

## *SOCAN v. Canadian Association of Internet Providers*

- “Real and substantial connection” test has not yet been applied to online gaming
- One case that gives insight into the courts’ developing ideas re online activity generally: ***SOCAN v. Canadian Association of Internet Providers***

# Internet & Criminal Jurisdiction

## *SOCAN v. Canadian Association of Internet Providers*

- In *SOCAN*, the issue was: who should compensate composers and artists of music downloaded in Canada from a foreign country?
- SOCAN is a collective society which administers copyright & collection of royalties for members
- Sought to collect from Internet Service Providers located in Canada – the ISPs argued that they neither “communicated” the works in question, nor “authorized” such communication

# Internet & Criminal Jurisdiction

## *SOCAN v. Canadian Association of Internet Providers*

- In the course of its reasons, the Federal Court of Appeal made comments regarding the extra-territorial application of the *Copyright Act*, with specific mention of the “real and substantial connection” test set forth in ***R. v. Libman***
- Location of host server not determinative of jurisdiction. Many relevant “connecting factors” to consider, including “location of the content provider, the end user and the intermediaries, in particular the host server.”

# Internet & Criminal Jurisdiction

## *SOCAN v. Canadian Association of Internet Providers*

- Federal Court of Appeal also considered the purpose of the *Copyright Act*: protecting copyright “in the Canadian market” – the location of the end users in Canada of the Internet activity therefore the most important single factor
- On appeal, the Supreme Court of Canada addressed these issues: reiterated that the courts presume, in the absence of clear words to the contrary, that Parliament does not intend its legislation to have extraterritorial application

# Internet & Criminal Jurisdiction

## *SOCAN v. Canadian Association of Internet Providers*

- *Copyright Act* applies where there is sufficient connection between Canada and a communication, such that Canada may apply its law consistent with “principles of order and fairness...that ensure security of [cross-border] transactions with justice”
- “In terms of the Internet, relevant connecting factors would include the *situs* of the content provider, the host server, the intermediaries and the end user. The weight to be given to any particular factor will vary with the circumstances<sup>20</sup> and the nature of the dispute ”

# Internet & Criminal Jurisdiction

## *SOCAN v. Canadian Association of Internet Providers*

- No special emphasis placed on location of host server as a factor, differentiating S.C.C. opinion from that of Federal court
- The following passage of decision could have application in an online gaming prosecution under the *Criminal Code* with extraterritorial implications:

# Internet & Criminal Jurisdiction

## SOCAN v. Canadian Association of Internet Providers

- *“Canada clearly has a significant interest in the flow of information in and out of the country. Canada regulates the reception of broadcasting signals in Canada wherever originate...[o]ur courts and tribunals regularly take jurisdiction in matters of civil liability arising out of foreign transmissions which are received and have their impact here...generally speaking, this Court has recognized as a sufficient "connection" for taking jurisdiction, situations where Canada is the country of transmission (Libman, supra) **or the country of reception...**” [emphasis added]*

# Internet & Criminal Jurisdiction

## *SOCAN v. Canadian Association of Internet Providers*

- This passage can be read as having laid the groundwork for exerting jurisdiction over the classic online gaming scenario, where transmission of online gaming originates offshore and is only received in Canada
- If a court accepts that purpose of the relevant provisions of the Code is to protect Canadian residents from unlicensed gaming and betting, it may assign considerable importance to Canada being “**the country of reception**”

# Internet & Criminal Jurisdiction

## Advertising Internet Gaming

- Some Canadian media advertise offshore-based Internet gaming to Canadian residents – ads in print, radio, signs at sporting events
- Advertising or otherwise giving notice of “any offer, invitation or inducement” to bet on the results of contests is forbidden by ss. 202(1)(h) of the *Code* – applicable to ads for interactive sportsbooks. Advertising games of “pure chance” (i.e. many games offered by casino websites) violates ss. 206(1)(a) of the *Code*

# Internet & Criminal Jurisdiction

## Advertising Internet Gaming

- No advertising prohibition re games of “mixed chance and skill,” such as poker – prosecution for advertising poker sites would require creative application of generally worded provisions of *Code* – less certainty of successful prosecution
- Much of the advertising of Internet gaming that goes on in Canada is subject to prosecution – however, no one has been prosecuted for this activity, and we see no evidence that the authorities consider this matter to be a priority

# Internet & Criminal Jurisdiction

## Advertising Internet Gaming

- October 12, 2004: Bowman International Sports Ltd., an Internet betting and gaming site which has been advertising on Canadian radio for years, announced an advertising deal with the Canadian Football League – comprehensive in-stadium advertising program throughout CFL post-season & a cross-promotional free game offered on CFL and Bowman’s websites.
- Bowmans ads appear on signage, and printed on playing fields of four of the league’s nine teams

# Internet & Criminal Jurisdiction

## Advertising Internet Gaming

- In Nov. 2005, the B.C. Lottery Corp. tried to get the CFL to ban Bowmans from having any presence at league-sponsored events during the Grey Cup (B.C. has begun offering online sports betting through its lottery system)
- Effort failed, and in the end over 2 million Canadians watching the Grey Cup game saw “Bowmans.com” emblazoned all over the field during the game
- Relationship between CFL and Bowmans remains a sore spot between the CFL and the provincial lottery commissions

# Internet & Criminal Jurisdiction

## Advertising Internet Gaming

- According to newspaper report, the RCMP denied that B.C. Lottery Corp. filed an official criminal complaint in connection with the matter
- RCMP source does indicate Bowmans, and advertising online gaming generally, are under investigation
- Same source indicated that they were working through CRTC to get at media outlets, a further indication that Criminal Code provisions inadequate to the task

# Internet & Criminal Jurisdiction

## *Advertising Internet Gaming*

- Bowmans.com is in direct competition with those provincial lottery commissions that have begun offering their sports-betting service online
- Code puts lottery commissions at disadvantage against offshore books
- CFL deal represents mainstream acceptance of such advertising – makes it harder to someday use the *Code* to put the genie back in the bottle

# Internet & Criminal Jurisdiction

## Starnet Prosecution

- Authorities have demonstrated a willingness to prosecute online sites that keep servers in Canada and take bets from Canadian residents. In 2001, Starnet Communications International Inc. (“**Starnet**”) pled guilty to one count under ss. 202(1)(b) of the *Code*, was fined \$100,000 & paid approx. US\$4-million as proceeds of crime
- Guilty plea in **Starnet** gives insight into what the Crown in that instance considered permissible activity in support on online gaming enterprise

# Internet & Criminal Jurisdiction

## *Starnet Prosecution*

- Starnet kept its gaming-related server in Vancouver – users downloaded casino side software and modifications from Vancouver
- Crown focused on whether components of the systems that enabled persons to engage in gambling or betting were present in Vancouver
- On guilty plea, counsel for Starnet stated that its operations were now “legal” – Crown took no issue with this characterization – following factors stated as making operation “legal”:

# Internet & Criminal Jurisdiction

## *Starnet Prosecution*

- All aspects of gaming operations now offshore
- New company operated gaming operations from Antigua, using 70-80 full-time employees
- Antiguan company did all licensee support and relations, cheque processing, credit card processing, customer service, all day-to-day gaming activities and all financial activities
- Management committee present in Antigua: to ensure directing minds didn't reside in Canada

# The Mohawks of Kahnawake

## *The Legality of the Activities of the Mohawks*

- Kahnawake Reserve: 20 square-mile community of 8,000 Mohawk Indians located on south shore of St. Lawrence River, 20 minutes from Montreal
- Mohawks claim jurisdiction as a sovereign nation to issue gaming licenses for lottery schemes, notwithstanding provisions of the *Code* – have set up their own Gaming Commission complete with probity checks, etc.

# The Mohawks of Kahnawake

## *The Legality of the Activities of the Mohawks*

- Case law to date has repeatedly ruled against the existence of an inherent aboriginal right to operate a commercial gaming enterprise – however, this issue must be re-examined in light of particular facts re each individual First Nation
- Quebec & federal governments, and provincial police, have investigated these activities – Quebec Minister of Public Security stated publicly that Internet gaming operating from Quebec on the Kahnawake Reserve is illegal: ***L. Moore, Montreal Gazette.com, June 10, 2001***

# The Mohawks of Kahnawake

## *The Legality of the Activities of the Mohawks*

- However, no police action has been taken, possibly due to residual tensions dating from summer of 1990, when a police raid at a Kahnawake Mohawk barricade led to a stand-off between the Mohawks and the Canadian military
- Sources tell us that Quebec considers the Kahnawake situation embarrassing – the corporation that manages gaming in Quebec may not like it, but Quebec clearly does not intend to interfere with the operations on the Kahnawake Reserve at this time

# The Mohawks of Kahnawake

## *The Legality of the Activities of the Mohawks*

- The Kahnawake Mohawks want federal gov't to pass legislation designating Kahnawake as Internet gaming jurisdiction
- Kahnawake recently joined by Six Nations reserve near Brantford as only North American “jurisdictions” to license Internet gaming
- Currently, Mohawks host about 30 cybercasinos, and they remain open to discussions with jurisdictions, including Quebec and Canada, for the purpose of harmonizing their respective legislative provisions concerning gaming

# The Mohawks of Kahnawake

## Recent Developments

- Difficulty of obtaining a legal opinion that gives a “clean bill of health” to gaming licences granted by Kahnawake Mohawks becoming a problem
- PartyGaming PLC wants to move its gaming servers off the Kahnawake Territory
- July 2005: Law Commission of Canada report stated that activities taking place in Kahnawake Territory were in violation of the *Code*

# Gaming Services & The WTO

## Antigua – U.S. Dispute

- Relevance of World Trade Organization (“WTO”) dispute between U.S. and Antigua to Canada
- WTO recently determined that certain U.S. laws, regulations and measures are inconsistent with U.S. commitments & obligations under General Agreement on Trade in Services (“GATS”)
- Some U.S. government authorities take the view that U.S. state and federal laws have the effect of prohibiting online supply of gaming and betting services from outside the U.S. to consumers in the U.S.

# Gaming Services & The WTO

## Antigua – U.S. Dispute

- U.S. position became subject to a WTO dispute to the extent that the laws in question could prevent operators from Antigua from lawfully offering gambling and betting services in the U.S. under competitive conditions that are compatible with U.S. obligations under GATS
- U.S. made commitments under sub-sector 10.D of GATS, because it included in its Schedule of Specific Commitments “recreational services (except sporting)”

# Gaming Services & The WTO

## Antigua – U.S. Dispute

- March 26, 2004: WTO panel decided in favour of Antigua – U.S. held to be in breach of its obligations under GATS
- April 7, 2005: On appeal, recognized that the laws in question were enacted to protect public morals, but held that the prohibitions were not equally applied to foreign & domestic operators, due to provisions that allow U.S. horse-racing operators to offer online betting on races
- WTO gave the U.S. until April 3, 2006 to bring its laws into compliance with the ruling.

# Gaming Services & The WTO

## Antigua – U.S. Dispute

- U.S. response: when April 2006 came and went, the U.S. declared itself in compliance, without amending a single statute
- U.S. took position that it is in compliance if it can show that relevant laws do not discriminate against foreign suppliers of remote horse-race betting
- In effect, U.S. is “complying” with ruling by taking the same position it took before the appellate panel – inviting further proceedings by Antigua <sup>41</sup>

# Gaming Services & The WTO

## Antigua – U.S. Dispute

- Antigua’s recourse is to invoke a “compliance panel” under Article 21.5 of the GATT
- A three-member WTO panel would then evaluate U.S. legislation to determine whether compliance with the decision exists

# Gaming Services & The WTO

## Antigua – U.S. Dispute – Canadian Ramifications

- In Canada, GATS not applicable to gaming services – Sector 10 of GATS is specifically excluded from Canada's commitments under GATS in its entirety, let alone sub-sector 10.D
- However, were Canada to use the *Code* to keep foreign online gaming operators from accessing Canadian customers while allowing Kahnawake Mohawks to benefit from the gaming activities of non-Canadians, it would certainly be inequitable

# Gaming Services & The WTO

## Antigua – U.S. Dispute – Canadian Ramifications

- Inequitable treatment, even in absence of a trade agreement, can give rise to “self-help” methods by affected countries – i.e. unilateral trade sanctions
- Countries that license online gaming include many with whom Canada has important trade ties, including Australia & the U.K.

# Looking Ahead at Canada and the Online Gaming Industry

- Future of Internet gaming in Canada will likely depend more on consumer tastes, government policy and international developments than domestic court decisions. By standing pat, Canadian governments will lose gaming revenue to foreign websites. Substantial challenges in determining appropriate government course of action re Internet gaming

# Looking Ahead at Canada and the Online Gaming Industry

- Regulation, or prohibition?
- Prohibition inherently ineffective. Comparatively authoritarian governments (e.g. Singapore) have acknowledged that Internet is too difficult to police
- In Canada, regulating online gaming would require joint federal-provincial effort to create a national regulatory structure – considerable public impetus will be necessary to motivate

# Looking Ahead at Canada and the Online Gaming Industry

- Low-level studies are being undertaken by some provincial governments to determine whether there is a public need to regulate the industry and if so, the manner of regulation including the regulatory and control framework
- Regulating an activity that is international in its reach, crossing national boundaries effortlessly, is difficult even at a national level. At the provincial level, it's inherently ridiculous

# Looking Ahead at Canada and the Online Gaming Industry

- Industry growth and huge revenues generated means there is likely a need for regulation – industry cries out for legitimacy in N. America, and its members strive for integrity & credibility
- Decision to regulate will not depend solely upon government's perceived loss of revenue – focus will also be on whether there is public demand for such regulation – considerable public demand, to overcome federal-provincial inertia

# Looking Ahead at Canada and the Online Gaming Industry

- UK was convinced of this need, and a law regulating UK-based online gaming sites should be in place by 2007
- UK understands that even this is insufficient – as the only major industrialized nation that is trying to regulate online gaming, it is operating in isolation
- Recognizing that an international approach is necessary to effectively regulate online activity, the UK is convening an online gaming summit in fall of 2006

# **Looking Ahead at Canada and the Online Gaming Industry**

- UK hopes to persuade other countries to start process of regulation, so industry is made up of visible and accountable actors
- Australia, South Africa and New Zealand are reported to have welcomed the idea of a summit – online jurisdictions such as Malta, Costa Rica and Antigua also invited