

Internet Gambling Report – 12th Ed. – Canada

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Introduction

Online gaming and betting (“iGaming”) is prevalent in Canada, though in many of its manifestations it is illegal pursuant to the *Criminal Code of Canada* (the “Code”).² The primary exception is that iGaming may be conducted and managed by the government of a province of Canada. In recent years, a number of provincial governments have begun to exercise their prerogatives in the iGaming field. At the time of writing, British Columbia (New Brunswick, Nova Scotia, Newfoundland and Prince Edward Island) has expanded its iGaming operations to include poker and casino games, where previously it had limited itself to selling lottery tickets online. The Atlantic Lottery Corporation, a consortium of the gaming operations of the four Atlantic provinces, has announced plans to expand its iGaming into poker, casino games and sports betting, and the government of Quebec has entered the iGaming field, with plans to offer a full panoply of poker and casino games before the end of 2010.

Canadian authorities have to date taken a nonconfrontational attitude toward iGaming based in foreign countries. Such iGaming enterprises often accept customers physically present in Canada, Canada has seen nothing in the way of an active campaign to prosecute entities involved in such activity, of the kind that has been seen in the U.S.

When the federal government abandoned an active role in the conduct and management of gaming and betting in 1985, ceding that sphere to the provincial governments, Canada lost the ability to articulate a consistent national policy on issues relating to gaming and betting. This deficiency attained prominence when the Internet made borderless gambling a reality a decade later. In the absence of a consistent policy on iGaming, the landscape has become littered with vague provisions of the Code, jurisdictional uncertainties and arguments over Aboriginal Sovereignty and unpredictable attempts at enforcement.

In 2009, the provincial governments began to take belated steps to act in conjunction with each other in offering iGaming to Canadians, in a manner explicitly legal under the Code, in a format competitive with iGaming operators from outside Canada. In 2010, these expanded provincial government iGaming operations began to go live, with the expected

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² R.S.C. 1985, c. C-46

interest group and media protestations, and some unexpected technical glitches. It remains to be seen what effect these operations will have upon the market for iGaming services in Canada, and in official efforts to exclude non-Canadian operators from that market.

Even before the onset of expanded provincial government-operated iGaming in 2009, rumblings were heard that indicated that some in government were considering taking a more “hard-line” approach on iGaming, perhaps mirroring the approach taken by the U.S. with the *Unlawful Internet Gambling Enforcement Act of 2006* (“UIGEA”). Recent prosecutions and pressures have been reported, and anti-iGaming forces have secured a number of initial legislative victories. It remains to be seen whether those with a better understanding of the state of the international iGaming industry will have the opportunity to provide a more complete picture to the Canadian public and decision-makers before such drastic steps are taken.

Criminal Code of Canada

Gambling is a term which includes both gaming and betting.³ The layman often treats gaming and betting as one and the same, but the terms have historically been accorded different treatment under the *Criminal Code of Canada* (the “Code”). “Betting” is generally understood to involve staking money on the outcome of events in which those risking the stakes are not personally taking part; activities connected with bookmaking and horse-race betting are the most common examples.⁴ Gaming, by contrast, refers to staking money on one’s own performance in an activity; common examples include casino games such as poker, blackjack, roulette and craps.⁵ Lotteries are traditionally considered gaming as well,⁶ in the sense that people participated in the “game” by picking their numbers and seeing whether chance favored their choices, in a manner similar to a roulette wheel.

Gambling is an area of shared jurisdiction in Canada. Both the federal and provincial levels of governments have legislative authority over matters pertaining to gaming and betting. Pursuant to its authority over criminal law under subsection 91(27) of the *Constitution Act, 1867*, the federal Parliament has jurisdiction over the prohibition of gaming and betting. Any gaming or betting which is not criminally prohibited, or which Parliament has explicitly exempted from prohibitions, may be conducted, managed and regulated by the provincial legislatures, pursuant to subsections 92(7), (9) and (13) of *Constitution Act, 1867*.⁷

³ *R. v. Kent*, [1994] 3 S.C.R. 133, 117 D.L.R. (4th) 345 (S.C.C.)

⁴ *R. v. Lebansky*, [1940] 3 W.W.R. 374; affirmed [1941] 2 D.L.R. 380 (Man. C.A.)

⁵ *R. v. Gardiner* (1971), 2 C.C.C. (2d) 463 (Alta. C.A.)

⁶ *R. v. Hoy* (1922), 40 C.C.C. 102 (B.C.S.C.); *R. v. Woodward and Willcocks* (1922), 69 D.L.R. 552 (Man. C.A.); *R. v. World Media Brokers Inc.* (1998), 132 C.C.C. (3d) 180; aff’d (2003), 174 C.C.C. (3d) 385 (Ont. C.A.)

⁷ *R. v. Furtney*, [1991] 3 S.C.R. 89 at paragraph 28 (S.C.C.)

The primary gaming and betting criminal offenses are found in sections 201, 202 and 206 of the Code. Section 201 creates offenses relating to the keeping of “common betting house” or a “common gaming house.” Section 202 was intended by Parliament to create offenses relating to betting, emerging as it did from a contentious public debate over the prohibition of horse-race betting. However, some provisions of section 202 use terminology that renders those offenses applicable to gaming as well. Of particular note to iGaming is s-s. 202(1)(b) of the Code, which prohibits a wide range of activities relating to the use of “any machine or device for gambling or betting”; this captures computer equipment used for iGaming activities. In both of the known instances in which prosecutions were commenced in Canada for iGaming-related activities, s-s. 202(1)(b) of the Code was the focus of the prosecution.

In addition, gaming and betting offenses under these provisions are classified as “enterprise crimes” under the Code, which classification allows persons accused of and/or convicted of those offenses to be subjected to “proceeds of crimes” orders. Merely being accused of these offenses allows the prosecution to seek an order “freezing” the assets of the accused pursuant to a restraint order under section 462.33 of the Code. Upon conviction, the accused may be ordered to pay a substantial fine and forfeit the proceeds of the gaming and betting activities that were the subject of the conviction, pursuant to section 462.37 of the Code.⁸

On August 4, 2010, the federal Minister of Justice announced changes to the status of the gaming and betting offenses under Part VII of the Canadian Criminal Code (the “Code”). In many quarters, these changes were wrongly described as amendments to the Code, which is not the case.

What in fact occurred was that the federal Cabinet used its regulation-making powers to deem gaming offenses to be “serious offenses” for the purposes of s. 467.1 of the Code. The effect of this designation is that persons operating gaming or betting that is unlawful under sections 201, 202 or 206 of the Code may be treated as “criminal organizations” for the purpose of the offenses set out in ss. 467.11–467.13 of the Code, and the prosecutorial powers set out in s. 467.2 of the Code. These provisions create very broad offenses that carry harsh penalties, directed at those who (i) participate in or contribute to any activity of a criminal organization (up to five years’ imprisonment); (ii) commit an indictable offense for the benefit of, at the direction of, or in association with, a criminal organization (up to fourteen years’ imprisonment); and (iii) instruct others to commit an indictable offense for the benefit of, at the direction of, or in association with, a criminal organization (up to life imprisonment).

In announcing these new regulations, the Minister of Justice stated that the government’s intention was “to strengthen the ability of law enforcement to fight organized crime” by

⁸ In both the *Starnet* case of 2001 and the *Cyber World Group* case of 2007, reviewed at length later in this chapter, the defendants pleaded guilty to charges under section 202(1)(b), and both were ordered to forfeit proceeds of crime under section 462.37.

including within the definition of serious offenses a number of criminal enterprises⁹ in which organized crime is involved, but which do not meet the minimum threshold required to qualify as a serious crime (an indictable offense creating liability to imprisonment for a term not exceeding five years).

While the government has indicated its intention to use the powers granted by these new regulations to prosecute unlawful gaming and betting that are operated by “organized crime,” there is nothing preventing their use against a foreign iGaming operator. In considering whether these new regulations might be used to charge a foreign iGaming operator with being a “criminal organization,” one must consider the more basic issue of whether the gaming and betting prohibitions in the Code apply to such an iGaming operator, and the attitude of law enforcement authorities toward extraterritorial application of the Code in those circumstances. The remainder of this chapter will elaborate upon these issues in some detail.

Section 207 of the Code creates express exemptions for a number of activities relating to the conduct and management of gaming and betting (referred to collectively as “lottery schemes”), most importantly for gaming and betting conducted and managed by provincial governments (s-s. 207(1)(a)) and by charitable and religious organizations operating under provincial licenses (s-s. 207(1)(b)). Section 204 creates a number of other express exemptions, most notably for private bets between individuals not engaged in the business of betting (s-s. 204(1)(b)) and for horse-race betting regulated by private governing bodies which are themselves regulated by the federal Minister of Agriculture and Agri-Food (s-s. 204(1)(c)).

Of importance to the issue of iGaming is that s-s. 207(4) of the Code explicitly reserves the right to conduct and manage gaming and betting “through a computer or video device” to the provincial governments. While this provision was enacted in 1985, before the popularization of the Internet, it could be applied to create a government monopoly over iGaming in Canada.

Skill Gaming

The Code generally exempts from its prohibitions games of pure skill. The sole exception to this rule is the provision of the Code that prohibits pyramid schemes. An activity that is otherwise a pyramid scheme cannot be rendered lawful by appending a game of pure skill (or mixed skill and chance) to that scheme.¹⁰ This pyramid scheme provision cannot, however, be used to criminalize games of pure skill generally, as this

⁹ As stated in the Ministry backgrounder to the new Regulations: “Organized crime is involved in numerous criminal enterprises including all aspects of the drug trade (production, importation, exportation and selling), prostitution and illegal gambling activity, auto theft, identity theft, financial crime such as securities and mass marketing fraud, environmental crime and the illicit movement of firearms, tobacco, and people.”

¹⁰ Subsection 206(1)(e) of the Code; *Roe v. The King*, [1949] 2 D.L.R. 785 (S.C.C.); *R. v. Dream Home Contests (Edmonton) Ltd.*, [1960] S.C.R. 414 (S.C.C.)

would run contrary to the plain wording¹¹ and legislative history¹² of the gaming and betting provisions of the Code as a whole.

To qualify as a game of pure skill, a game cannot in any way, shape or form involve the systemic resort to chance. Even where skill is the predominant factor in deciding a game, if an aspect of the game requires a systemic resort to chance, that game will be classified as a game of mixed chance and skill.¹³ Poker, for instance, can never be a game of “pure skill,” since the random deal of cards necessarily involves a systemic resort to chance which aids in determining the winner.¹⁴

Games of mixed chance and skill may serve as the basis for a “common gaming house” offense under section 201, the “machine or device for gambling or betting” provision found at s-s. 202(1)(b), as well as section 206(1)(f) of the Code.

The Supreme Court of Canada has held that certain provisions of the Code apply only to games of chance alone.¹⁵ To avoid the application of these provisions, many Canadian contests and sweepstakes require potential winners to answer correctly a mathematical skill-testing question,¹⁶ a peculiarity unique to Canadian gaming law.

Jurisdiction

Activities that have an insufficient connection to Canada do not offend against the Code. As stated by s-s. 6(2) of the Code: “Subject to this Act or any other Act of Parliament, no person shall be convicted...of an offense committed outside Canada.”

¹¹ Section 197 of the Code explicitly excludes games of skill alone from the definition of “game,” thereby rendering activities relating to such skill games lawful. It is evident that it would be internally inconsistent for Parliament to craft an exclusion permitting such activities in sections 197, 201 and 202, and then to re-criminalize those same activities by way of section 206(1)(e). The canons of statutory interpretation dictate that all of the provisions of Part VII of the Code must be read together, and each individual provision interpreted in a manner that avoids internal inconsistency.

¹² The legislative history of section 206(1)(e) of the Code is sparse, and gives inconsistent indications of Parliament’s intent. However, the record gives no indication that Parliament intended to re-criminalize games of pure skill in Canada: Canada. Parliament. Senate. Debates. 17th Parl., 6th sess, 04 Jul 1935: 4297-4298 and Canada. Parliament. House of Commons. Debates. 17th Parl., 6th sess, 05 July 1935: 466. Such an intent would need to be expressed clearly by Parliament, given that the exclusion of games of pure skill pre-dates the Code itself, dating from *An Act to amend the Law concerning Games and Wagers*, 8-9 Vict., c. 109 (Imp.) which in 1845 repealed those portions of the laws made by Henry VIII in the 16th century which applied to games of pure skill, stating that whatever “mischiefs” might arise from unlawful gaming “cannot arise” from games of “mere skill.”

¹³ *Ross v. R.*, [1968] S.C.R. 786, 70 D.L.R. (2d) 606 (S.C.C.)

¹⁴ *Ross v. R.*, *supra* note 12 at 617 – 20; *R. v. Grossman*, [1991] O.J. No. 869 (Ont. Prov. Ct.); *R. v. J.B.L. Amusements Ltd.*, [1998] N.J. No. 59 (Nfld. C.A.)

¹⁵ Subsections 206(1)(a), (b), (c) and (d) of the Code; *Roe v. The King*, [1949] 2 D.L.R. 785 (S.C.C.)

¹⁶ The four-part mathematical skill-testing question commonly used in sweepstakes in Canada derives from the lower court decision in *R. v. Canada Trust Company*, July 5, 1984, Alta. Prov. Ct., Plomp Prov. J.

The question of whether an offense is committed “outside Canada” is answered by applying the “substantial and bona fide connection” test for criminal jurisdiction,¹⁷ adopted by the Supreme Court of Canada in the case of *Libman v. R.*,¹⁸ in which it was phrased as “real and substantial connection.”

In *Libman*, a fraudulent telephone sales solicitation scheme was operated from Canada. The victims were residents of the United States, who were induced to purchase worthless shares in Central American mining companies. The victims sent money to Libman’s associates in Central America. Libman would attend at locations outside Canada where he would meet with his associates, and receive his share of the proceeds, some of which Libman would bring back to Canada.

The Supreme Court of Canada held that the Canadian courts had jurisdiction to prosecute the accused for fraud. Both the making of the telephone calls from Canada and the repatriation of funds into Canada were held to represent a sufficiently “real and substantial connection” to Canada for the Canadian courts to have jurisdiction over Libman’s actions.

In so doing, the Court formulated the test for Canadian courts to exercise jurisdiction over a criminal matter:

“As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting the offence took place in Canada. As it is put by modern academics, it is sufficient that there be a ‘real and substantial link’ between an offence and this country...”

“Just what may constitute a real and substantial link in a particular case, I need not explore. There were ample links here.”¹⁹

The *Libman* test was considered by the Supreme Court of Canada in a 2004 case involving Internet communications. Rather than criminal law, however, this case involved the question of whether the jurisdiction of the federal *Copyright Act* extended over online communications transmitted from outside of Canada, and received in Canada. In *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers* (“SOCAN”),²⁰ the Court stated that the factors which should be taken into account in determining whether an online activity has a real and substantial link to Canada “...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 and the nature of the dispute.”²¹

¹⁷ Currie, Robert J. and Stephen Coughlan, Extraterritorial Criminal Jurisdiction: Bigger Picture or Smaller Frame? (2007), 11 Can. Crim. L. Rev. 141 at 151.

¹⁸ (1985), 21 D.L.R. (4th) 174 (S.C.C.).

¹⁹ *Supra* note 17 at 200.

²⁰ (2004), 240 D.L.R. (4th) 193 (S.C.C.)

²¹ *Supra* note 17 at 218.

The question of the location of the “end user” of online content has considerable application to the question of jurisdiction over iGaming. Canadian iGaming customers may be precisely the type of “end user” of online content the Court had in mind in *SOCAN*. Clearly, the Supreme Court in *SOCAN* was expressly leaving open the possibility that Canadian courts could assume jurisdiction in cases involving online activity where “foreign transmissions which are received and have their impact here,” though no element of the transmission occurs in Canada. The Supreme Court did this first by making it clear that the physical location of the server permitting the transmission of online communications was not a decisive factor, but merely one of many factors. This was in marked contrast to the decision from which *SOCAN* was appealed, in which the Federal Court of Appeal accorded particular importance to the location of the host server.

While they were not speaking of iGaming per se, the Supreme Court was also explicit in stating that Canadian courts could claim jurisdiction in circumstances where the transmission of an offending online communication originates outside Canada, and is only *received* in Canada.

“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...or the country of reception...”²²

A prosecutor could cite *SOCAN* in support of an argument that Canada, as the country of reception of gaming and betting transactions, may exercise jurisdiction over a foreign iGaming company for alleged breaches of the provisions of the Code. The sole obstacle would be the practical matter of gathering sufficient evidence against a foreign company, given the limited cooperation that may be expected of foreign authorities, particularly in circumstances where the “offending” company is acting pursuant to an iGaming license granted by the foreign jurisdiction.

In 2006, the Ontario Superior Court of Justice considered the *SOCAN* decision in determining whether to grant enforcement to a judgment that had been obtained in New York State against a resident of Ontario, on the basis of online communications of a commercial nature between that Ontario resident and his international customers.²³ Click Enterprises Inc. (“Click”), the respondent Ontario company, operated Web sites that allowed Click’s customers to download copyrighted films. Disney Enterprises Inc. (“Disney”), the copyright owner, brought a civil action in New York and obtained default judgment when

²² *Supra* note 19 at 218-219.

²³ *Disney Enterprises Inc. v. Click Enterprises Inc.* (2006), 267 D.L.R. (4th) 291 (Ont. Sup. Ct.) (hereinafter “*Click Enterprises*”)

Click chose not to defend in New York. When Disney sought to enforce its judgment in Ontario, Click asked the Ontario court to deny recognition to the judgment, arguing that the New York court lacked reasonable grounds for assuming jurisdiction over the matter.

The court held that while the defendants were resident in Ontario, the U.S. District Court for the Southern District of New York nonetheless had reasonable grounds to assume jurisdiction. Click's Web sites sold subscriptions to download the copyrighted films to U.S. residents, and the Ontario Superior Court, citing *SOCAN*, held that Canada recognizes a sufficient connection where the country assuming jurisdiction is *either* the country of transmission *or* the country of reception of online communications. Some of the downloading occurred in the U.S., Click received payment for the subscriptions through two U.S.-based Internet payment providers, and the majority of the customers' testimonials displayed on Click's Web sites came from U.S. subscribers. In addition to citing *SOCAN*, the Ontario Superior Court also applied the following reasoning from a products liability case:

*"By tendering his products in the marketplace directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods..."*²⁴

The *SOCAN* and *Click Enterprises* decisions appear to indicate that Canadian courts are moving toward a "targeting" analysis in determining jurisdiction over online activity, particularly where the online activity is of a commercial nature. Where an online operation that is based outside Canada directs its attention to people present in Canada, such that it is clearly anticipating and even encouraging the participation of Canadian residents in the online activity, it is reasonable for that operation to expect that it will be liable to the exercise of Canadian laws over those commercial activities.

This trend has been recognized by leading academic commentators on Internet law in Canada,²⁵ and it indicates that if Crown prosecutors could gather sufficient evidence, a licensed iGaming entity based outside Canada could be successfully prosecuted under the Code for offering its services to Canadian residents. Where such evidence was gathered, an offshore iGaming operator who came to Canada could well be arrested and charged with violating the relevant gaming and betting provisions of the Code.

Law enforcement authorities have not taken the approach of arresting iGaming executives who come to Canada. In only two known Code prosecutions have the gaming and betting provisions of the Code been applied to iGaming, neither of which involved true "offshore" iGaming: Starnet Communications International Inc. in 2001, and Cyber World Group in 2007. These prosecutions will be reviewed later in this chapter.

²⁴ *Supra* note 22 at paragraph 28.

²⁵ Michael Geist, *Internet Law in Canada*, 2nd ed. (North York: Captus Press, 2001), pp. 69 – 72.

Advertising and Marketing Online Gaming and the *Canadian Criminal Code*

Foreign iGaming businesses that maintain no physical connections to Canada frequently advertise their services to Canadian residents, using Canada-based advertising and marketing firms and Canadian media outlets. This raises the question of under what circumstances it is lawful to market iGaming Web sites to Canadian residents.

Offenses Under the Code

The following Code offenses relate to the advertising of gaming and/or betting:

- (i) Advertising of sports betting services: s-s. 202(1)(h)
- (ii) Advertising of lotteries and games of chance: s-s. 206(1)(a)
- (iii) Other provisions: s-ss. 202(1)(f), 202(1)(g), 202(1)(i)

Subsection 202(1)(h) of the Code makes it an offense to advertise, print, publish, exhibit, post up or otherwise give notice of any offer, invitation or inducement to bet on, to guess or to foretell the result of a contest, or a result of or contingency relating to any contest. The case law differentiates between “gaming,” the action of playing a game for stakes, and “betting,” placing stakes on the outcomes of events external to the bettors. Subsection 202(1)(h) is clearly aimed at advertising relating to a form of betting activity

Subsection 206(1)(a) of the Code makes it an offense to, among other things, advertise or cause to be advertised any proposal, scheme or plan for disposing of property by any mode of pure chance.²⁶ Advertisements and marketing campaigns that promote Web sites offering casino games of pure chance (i.e., roulette, lottery-style games) that involve the staking of real money or money’s worth are subject to s-s. 206(1)(a) of the Code. Where the games advertised involve some element of skill, an offense under s-s. 206(1)(a) is not made out. This provision accordingly does not prohibit the advertising of iGaming sites that offer only poker and/or blackjack

Subsections 202(1)(h) and 206(1)(a) are the only provisions of Part VII of the Code that refer *specifically* to advertising. The following three provisions could be *interpreted* as applying to advertising and marketing:

s-s. 202(1)(g): Makes it an offence to import or bring into Canada any information or writing that is intended or is likely to promote or be of use in gambling, book-making, pool-selling or betting on a horse race, fight, game or sport. The provision makes specific reference to importing material that is “intended...or likely to *promote*...gambling or betting.” It could only be applied where advertising and marketing materials or information are produced outside of Canada and then brought into Canada, in which case could be used to prosecute advertising relating to either gaming or betting. However, this provision also makes it clear that there is no offence of

²⁶ *Supra* note 14.

exporting “gambling” material to Canada; only the Canadian-based recipient could be convicted under s-s. 202(1)(g).

s-s. 202(1)(f): Prohibits printing, providing or offering to print or provide information intended for use in connection with book-making, pool-selling or betting on any horse race, fight, game or sport. Unlike s-s. 202(1)(g), this provision does *not* refer to information used to “promote” betting and/or gaming, making it difficult to apply s-s. 202(1)(f) to advertising or marketing. Penal statutes are strictly interpreted by the court, with any uncertainty being decided in favour of the accused. By comparing s-s. 202(1)(f) with s-s. 202(1)(g), a court would likely be compelled to assign some meaning to the absence of language forbidding promotional activities in the former provision. For that reason, it is difficult to envision s-s. 202(1)(f) applying to advertising activities.

s-s. 202(1)(i): Makes it an offence to send, transmit, deliver or receive messages that convey information relating to book-making, pool-selling or betting or wagering, or intended to assist in those activities. This provision applies to betting only, not gaming.²⁷ Like s-s. 202(1)(f), s-s. 202(1)(i) lacks explicit reference to information used to “promote” betting, referring instead to information “relating to” or “intended to assist in” betting activities. Again, when one compares the language of s-s. 202(1)(i) with that of s-s. 202(1)(g), some meaning should be assigned to the absence of language forbidding “promotional” activities. This may be sufficient to remove advertising and marketing from the purview of s-s. 202(1)(i).

Advertising of Instructional, “Freeroll” Web sites

Under the common law, gambling, whether characterized as gaming, betting or lottery, requires three elements: risk, reward and consideration. The common law definition has been imported into the Code, such that an activity which lacks any one of these three elements cannot form the basis for a conviction under the Code.

This has given rise to the widespread advertising of “freeroll” sites to Canadians, particularly with respect to poker sites. Often marketed as “instructional” sites, they allow players to play poker and other games without risk of losing money or money’s worth. The element of consideration being removed, there is no gambling, and accordingly none of the provisions of the Code relating to advertising or marketing are violated by promoting such sites. Telecaster Services of the Television Bureau of Canada (“Telecaster”) is a private body that acts as the gatekeeper of propriety in television ads.

²⁷ See Canada. Parliament. Senate. Standing Committee on Legal and Constitutional Affairs. Proceedings, 39th Parl., 2nd sess., issue 2, 28 Nov 2007: 2:12. A senior official of the Department of Justice indicated that the federal government recognizes the distinction between “gaming” and “betting.” In discussing recent amendments to ss. 202(1)(i), she stated: “I should point out that the provision does not refer to ‘gambling’ but rather to betting and bookmaking.”

Telecaster accepts that the advertising of freeroll sites is lawful, subject to certain conditions: most notably, the freeroll sites cannot provide links or pop-up ads directing people to “real-money” sites.

Telecaster previously took the position that a freeroll site that awards prizes to players could not be advertised on television. The authors explained to Telecaster in June 2006 that this position arose from an erroneous interpretation of the law. Telecaster has since modified its position. The sponsor of a freeroll site that provides Telecaster with a legal opinion from its Canadian solicitors, stating without material qualification that the site does not contravene the provisions of the Code, may advertise that site on Canadian television.

The benefit of operating a freeroll site is that it provides the opportunity for the operator to compile a list of persons who are already interested in gaming. Using this list, a directed marketing campaign can be used to interest these persons in playing for real money on a Web site owned by the same persons operating the freeroll site.

It would be difficult for a Crown prosecutor to gather the evidence necessary to attribute criminal intentions to the Canadian marketer/advertiser on the basis of these motives. That said, to ensure against their activities giving rise to a prosecution for aiding and abetting, Canadian-based marketers and advertisers should ensure that they are not knowingly helping their clients market real-money sites to people who were “targeted” through their use of freeroll sites.

Advertising of Poker and Other Games of Mixed Skill and Chance

With prosecutions relating to the advertising of gaming and betting having to be based on either s-s. 202(1)(h) (for sports books) or s-s. 206(1)(a) (for games of chance alone), it is arguable that the advertising of games of mixed skill and chance, notably poker, falls into a “loophole” in the Code. A prosecution would have to attempt to rely upon s-ss. 202(1)(f), (g) or (i), none of which would provide the Crown prosecutors with a comfortable “fit.”

While “cards” are specifically cited in s-s. 206(1)(a) as a prohibited method of disposing of property, a recent Ontario case indicated that even where “cards” are used in disposing of property, they must be used in course of a game of pure chance in order to create an offense against a provision of s. 206.²⁸

However, most media outlets are not comfortable relying on this loophole, largely due to their lack of knowledge and understanding of the Code and its interpretation. Accordingly, even poker-only Web sites are only advertised in Canada by way of freeroll sites, regardless of whether they are being advertised on television, radio or in print.

²⁸ *R. v. Shabaquay*, 2004 CarswellOnt 2309 (Ont. Ct. of J.)

Advertising Online Sports Books

Pursuant to s-s. 202(1)(h), it is clearly illegal to advertise or market offshore online sports books in Canada. Accordingly, any sports book Web sites advertised in Canada must be freeroll sites to avoid prosecution.

Bowmans.com was an offshore online sports book which for many years took an aggressive approach to marketing its services. Bowmans advertised its real-money site on radio stations in Canada, and beginning in 2004, it had a co-promotional deal with the Canadian Football League (“CFL”), under which Bowmans received comprehensive in-stadium advertising throughout the CFL season. Further, a number of individual CFL teams provided Bowmans with advertising signage in their stadiums during the regular season.

The minimalist signage advertising used at CFL events merely read “Bowmans.com,” giving rise to a further question: by simply posting a URL, has one given readers of the sign notice of any offer to bet? There is insufficient case law under s-s. 202(1)(h) of the Code to give a definitive answer to that question, which could certainly form part of a defense to a charge.

In November 2005, the British Columbia Lottery Corporation (the “BCLC”) tried to have the CFL ban Bowmans from having any presence at league-sponsored events during the CFL championship game, the Grey Cup. The BCLC had by that date begun offering its own online sports betting lottery, sanctioned under the Code. The BCLC’s efforts did not stop over 2 million Canadians from seeing “Bowmans.com” emblazoned on the field throughout the game.

Thereafter, Bowmans restricted its advertising to a freeroll Web site, although neither it nor its advertising partners was ever the subject of a prosecution during the time when it was overtly advertising its real-money site. The CFL itself ended its sponsorship relationship with Bowmans, but many individual CFL teams continued to have their own separate marketing agreements with Bowmans. In late 2006, Bowmans.com was sold to Bet365, and many individual CFL teams continue to advertise prominently their association with Bet365.net, the freeroll Web site associated with that brand.

The relationship between CFL teams and Bet365 is a point of contention for provincial lottery commissions. Online sports books directly compete with the services of provincial lottery commissions that offer sports betting online. Bet365’s deals with CFL teams represent mainstream acceptance of online gaming and betting offered by non-Canadian operators, an attitude that may make it more difficult for the provincial and federal governments someday to put the genie back into the bottle.

Affiliate Marketing

One highly efficient and inexpensive way to market online gaming and betting sites is through the use of affiliate marketers. Affiliates use their computer servers to direct traffic to Web sites, and are paid commissions for the customers they acquire.

Where a Canadian resident uses a computer located in Canada to direct traffic to online sports books, s-s. 202(1)(h) may be violated: giving people notice of offers, invitations and inducements to bet on outcomes or contingencies relating to “contests.” In directing traffic to online casinos that offer games of pure chance, s-s. 206(1)(a) may be violated. Where traffic is directed to online poker sites, the previously mentioned “loophole” for games of mixed skill and chance may apply.

The authors are aware of no arrests or warnings pursuant to the Code relating to affiliate marketers. However, whether more active participation in directing traffic to such sites (i.e., meeting physically with potential customers) would cross a line whereby some law enforcement authorities would take notice remains an open question.

Practical Considerations on Marketing iGaming to Canadian Residents

While some of the advertising for iGaming that goes on in Canada could be subject to prosecution, the fact is that no one has been prosecuted for such activity. There is little evidence that law enforcement authorities consider the matter a priority.

Law enforcement is a provincial responsibility, and some provinces may take more interest than others. The authors are aware that in Alberta, some media outlets have received police warnings to cease and desist. Even in Alberta, such enforcement efforts are spotty, to say the least.

If law enforcement does adopt a policy of attempting to obtain convictions under the Code, it is likely that the first charges would be laid against the media outlets carrying the advertisements and the marketing firms directing the advertising campaigns.

Freedom of Expression as a Defense to Charges of Advertising Gaming and Betting

The *Canadian Charter of Rights and Freedoms* (the “Charter”) guarantees “freedom of...expression, including freedom of the press and other media of communication” (s-s. 2(b)), subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” (section 1).

The courts have struck down laws that restrict advertising as unconstitutional in circumstances where the goods or services being advertised were themselves legal. However, criminal restrictions on communications for the purpose of engaging in prostitution have been held to be justifiable under s. 1, as have the Code restrictions on “obscene publications.”

The gaming and betting advertising prohibitions in the Code clearly infringe on s-s. 2(b) of the Charter. If challenged, the main question would be whether they represent an infringement that is justifiable under s. 1:

- (i) Are they designed to achieve an objective that is of sufficient importance to warrant overriding freedom of expression?
- (ii) If so, is there a rational connection between the criminal sanction and that objective?
- (iii) Is the impairment on expression minimal in light of the standard imposed?
- (iv) Is the criminal prohibition proportionate, when one weighs the importance of the objective sought against the degree of the infringement?

Criminal restrictions on communications have generally been upheld where the Court found that the objective of the provisions was to avoid harm to society. Here, the intent of Part VII of the Code is not to ban the advertising of gaming and betting, but rather to restrict it to circumstances where the gaming and betting in question are licensed by the province. A decision of the Ontario Court of Appeal has held this Code-imposed monopoly to be directed at avoiding harm to society.²⁹ However, it could also be argued that the provisions in question are now being used not to ban harmful activity, but to protect a government monopoly over that activity. If the court were receptive to this argument, the infringement might not be found justifiable.

Ontario – Section 13.1 of the *Consumer Protection Act, 2002*

Recent amendments to the *Consumer Protection Act, 2002* were enacted in 2006 by Bill 152, *An Act to modernize various Acts administered by or affecting the Ministry of Government Services*. Part 8 of Bill 152 enacted a new provision, section 13.1, which came into force on January 1, 2008, purported to amend consumer protection law in Ontario so as to render advertisement and marketing in support of iGaming illegal. This amendment received a great deal of media attention, none of which took note of the fact that much of the advertising which Bill 152 sought to ban was already prohibited by the Code. An anti-offshore iGaming private entity, Woodbine Entertainment Group, was the primary motivating force behind this amendment. Bill 152 in Ontario represented their first legislative victory prior to obtaining the amendments to the Code at the federal level, a development that will be reviewed later in this chapter.

The initial draft of Bill 152 put forth at First Reading appeared to be an attempt to supplement the laws contained in the Code, including provisions that might have been used to prohibit advertising of freeroll Web sites. After amendments were obtained at the Second Reading stage, in part due to legal opinions provided by the authors, the result is an offense that does little if anything to alter the state of the law from where it stood prior to the passage of Bill 152.

²⁹ *R. v. Andriopoulos*, [1993] O.J. No. 3427 (Gen. Div.); aff'd 1994 CarswellOnt 3947 (C.A.).

Section 13.1 of the *Consumer Protection Act, 2002* as enacted by Bill 152 makes it clear that it is the *functionality* of a Web site that determines whether advertising that site is an offense, as opposed to the overall business activities of the entity operating that Web site. The First Reading version of Bill 152 would have prohibited advertising for freeroll Web sites if those sites were owned by entities that also owned real-money sites. It relies upon the existing provisions of the Code for its effect, and contains explicit geographical limitations, stating that “a person advertises an internet gaming site only if the advertising originates in Ontario or is primarily intended for Ontario residents.” Finally, the law exempts search engines from its effect.

The Code already contains a number of provisions making it a criminal offense to advertise illegal gaming and betting. Section 13.1 of the *Consumer Protection Act, 2002* merely opens another parallel avenue through which activities presently prohibited by the Code might be prosecuted. Section 13.1 of the *Consumer Protection Act, 2002* may eliminate the “loophole” for advertising regarding games of mixed chance and skill such as poker, although in practice most media outlets in Ontario already only accepted advertisements for freeroll poker sites.

Legislative efforts such as Bill 152 demonstrate that anti-offshore iGaming partisans such as Woodbine believe that the Code provides insufficient tools to impede the advertising of such iGaming. The point was made explicitly by the sponsor of Bill 60, the private members’ bill that later became Part 8 of Bill 152:

“Let’s be clear. Internet gaming is already illegal in Canada under the Criminal Code. I’ve attempted to draft related legislation that doesn’t mirror federal law that exists within that code. It would seem that the problem lies in the area of the enforcement of existing law that already contains provisions relating to the advertising of gaming activities. These provisions appear insufficient to deal with the situation effectively, and of course it’s hard to see what meaningful legislative steps might be taken.”

“I’ve therefore proposed to the Legislature a bill that would complement the Criminal Code and require marketers and advertisers not to enter into contracts for the provision of marketing advertising services to Internet gaming businesses that do not operate pursuant to applicable Canadian law.”³⁰

The Mohawks of Kahnawá:ke

Since 1996, the Mohawk Council of Kahnawá:ke (the “Mohawk Council”) has claimed the right to conduct, manage and regulate online gaming and betting (“iGaming”) conducted within the Mohawk Territory of Kahnawá:ke (“Kahnawá:ke”). Kahnawá:ke is a twenty-square-mile community located on the south shore of the St. Lawrence River,

³⁰ Ontario, Legislative Assembly, *Debates*, 38th Parl., 2nd sess, no. 47, March 2, 2006: 2326

twenty minutes from Montreal, Quebec. It is the largest First Nation community in Quebec. The Mohawk Council has created the Kahnawá:ke Gaming Commission (the “KGC”) to award licenses and permits that allow private online gaming and betting enterprises to house their servers in Kahnawá:ke. As well, land-based poker rooms operate openly in Kahnawá:ke, also licensed by the KGC.

The Kahnawá:ke claim jurisdiction to issue gaming licenses for lottery schemes, notwithstanding the gaming and betting offenses found in the Code, as an incident of their self-proclaimed status a “sovereign nation.” In addition, the Mohawk Council alleges that the Kahnawá:ke have an “inherent aboriginal right” to conduct and regulate commercial gaming, protected by section 35 of the *Constitution Act, 1982* (the “Section 35 claim”). They take the position that their Section 35 claim renders the plain wording of the Code, which states that only a provincial government can lawfully conduct and manage gaming and betting that is “operated on or through a computer or video device,” inapplicable to the Kahnawá:ke.

To defend against any criminal charges that might be brought in relation to iGaming conducted at Kahnawá:ke, the Mohawk Council would have to present very specific evidence to support their Section 35 claim. A successful Section 35 claim would set a precedent affecting the provinces’ monopoly on the regulation of gaming and betting. The federal and provincial governments do not know the nature and extent of the evidence possessed by the Mohawk Council, and therefore commencing prosecutions would expose those governments to an unquantifiable legal risk.

The Quebec and federal governments and the provincial police have investigated the activities at Kahnawá:ke. In 2001, the Quebec Minister of Public Security stated publicly that online gaming activity operating from Kahnawá:ke is unlawful.³¹ However, no police action has ever been taken, possibly due to residual tensions dating from the summer of 1990, when a police raid at Kahnawá:ke led to a stand-off with the Canadian military.

Within the last couple of years, signs of an impending crackdown against iGaming at Kahnawá:ke have emerged. Should this come to fruition, it will likely occur in a manner that does not directly engage either the Section 35 claim or other sovereignty-based claims. We anticipate that instead, there would be an increased effort at bringing pressures to bear on non-Kahnawá:ke actors who do business that supports the iGaming activities at Kahnawá:ke. This aspect of the operations at Kahnawá:ke will be reviewed later in this chapter, in discussing recent prosecutions under the Code related to iGaming, and recent legislative developments at the federal level.

Absolute Poker and UltimateBet Scandals

Recent events have called into question the reliability of the regulatory scheme established by the KGC. Fraudulent activities have occurred with regard to two iGaming

³¹ *Montreal Gazette*, June 10, 2001

operations located at Kahnawá:ke and regulated by the KGC, Absolute Poker and UltimateBet.

In both cases, the fraudulent activity came from former employees of the iGaming enterprises. Particularly damaging to the reputation of the Kahnawá:ke is the fact that both UltimateBet and Absolute Poker are owned by the same company, Tokwiwo Enterprises, which is itself controlled by Joe Norton, a former Grand Chief of the Mohawk Council who was instrumental in the formation of the KGC.

In October 2007, a part-owner and former executive of Absolute Poker was accused of cheating by online gamers, who saw patterns indicating that he was able to see the digital cards of other players. The alleged cheater was traced to accounts owned by former executives of Absolute Poker; however, press reports indicated that Absolute Poker took the position that a “rogue employee” had hacked the system and deliberately used information pointing to these former executives.

This scandal earned a great deal of publicity, moving from a blog on the New York Times’s Web site in October 2007 to ABC News, MSNBC and other major media outlets. A simulation replaying the gameplay to highlight the cheating was posted on YouTube, where it was viewed by hundreds of thousands. Particularly damaging to the reputation of Kahnawá:ke was the fact that Absolute Poker is a company closely associated with Mr. Norton.

On January 11, 2008, the KGC issued a disciplinary decision in the Absolute Poker matter, arising from an independent audit carried out by the British firm Gaming Associates Pty Ltd. (“Gaming Associates”), at the behest of the KGC beginning on October 17, 2007. The decision did not identify the persons who had committed the cheating, but tacitly acknowledged that these persons had some internal position with Absolute Poker: “The Commission has identified the person(s) responsible for the impugned activities and has directed that AP take action to have these person(s) removed from playing any role in AP ‘mind and management’ and/or operations and to provide proof...that this has been done.” At the same time, the KGC held that there was no evidence Absolute Poker had sanctioned these actions or that they were intended to benefit Absolute Poker. In the final decision, the KGC ordered that certain conditions be added to the permit authorizing Absolute Poker to operate from the Mohawk Territory of Kahnawá:ke, requiring that Absolute Poker pay a fine of US\$500,000 along with the costs of the audit and investigation, and requiring Absolute Poker to post a security deposit for two years to be set off against any future breaches.

The UltimateBet scandal began to emerge almost immediately after the release of the decision concerning Absolute Poker. According to its own timeline of events, in January 2008, UltimateBet was alerted to suspicions of unfair play on the part of an account named “NioNio” in January 2008. UltimateBet contacted the KGC to provide formal notice that it had initiated an investigation of the incident, and subsequently forwarded a copy of all related data to the KGC. The “NioNio” account and related accounts were suspended pending the investigation.

In February 2008, preliminary findings indicated abnormally high winning statistics for the suspect accounts. After discussions with the KGC, UltimateBet once again engaged Gaming Associates to assist with its analysis. Gaming Associates confirmed that the suspect accounts were associated with individuals who had worked for UltimateBet under its previous ownership. It was also discovered that the unauthorized code that allowed the perpetrators to obtain “hole card” information during live play was part of a legacy auditing system that was manipulated by the perpetrators of the fraud. UltimateBet removed the unauthorized code and worked with the KGC and Gaming Associates to verify that the security breach had been eliminated.

In March 2008, it was confirmed that six player accounts participated in this scheme. No accounts were deleted at any point, although some account names were changed multiple times. In May 2008, the investigation confirmed that the fraudulent activity took place from March 7, 2006 to December 3, 2007. Gaming Associates certified that the software code that had enabled unfair play was removed from the UltimateBet servers in February 2008. Customers affected by the fraud were identified, and plans for corrective action were reviewed with the KGC.

Some in the iGaming community allege that the Kahnawá:ke have been less than transparent in their response to these scandals. They have not publicly addressed how they plan to prevent such frauds from recurring, nor have they demanded that the people responsible for these frauds come forward, or sought criminal prosecutions.³²

White List Rejection

The United Kingdom’s Department of Culture, Media and Sport (“DCMS”) maintains a list of jurisdictions that license iGaming operators (the “White List”). Inclusion on the White List allows licensees based in those jurisdictions to advertise freely in the U.K. The Kahnawá:ke made application to the DCMS for inclusion on the White List.

The DCMS confirmed that the application of the Kahnawá:ke to be added to the White List had been rejected. This announcement coincidentally came on January 11, 2008, the same day the KGC issued its decision concerning the Absolute Poker scandal.

The DCMS did not publicly release detailed reasons for rejecting the application, stating only that Kahnawá:ke “did not meet its criteria” under the relevant U.K. legislation, with a spokesperson saying that the decision was based on “legal considerations.” The Absolute Poker scandal was identified by some as a sticking point counting against the Kahnawá:ke application.³³ The Kahnawá:ke took the position that their application was not afforded fair and objective consideration, later indicating that the decision of the

³² “Kahnawake Licensed Online Poker Room Cheating Again,” Devon Chappell, OnlineCasinoSuite.com, June 3, 2008: <http://onlinecasinosuite.com/casino-news/june08/kahnawake-onlinepokerrooms-3114.html>

³³ “Kahnawake poker barons come up short,” Macleans.ca, Jan. 23, 2008: http://www.macleans.ca/world/global/article.jsp?content=20080123_61171_61171

DCMS made reference to a letter received from the Quebec Justice Department. The Kahnawá:ke clearly believe that the provincial government stymied their application.

Enforcement of the Code Against iGaming: *Starnet and Cyber World Group*

Starnet Communications

Until very recently, the only known prosecution of an online gaming service provider was the Starnet case. On August 17, 2001, Vancouver-based Starnet Communications International Inc. (“Starnet”) pleaded guilty to one count of keeping a device for gambling or betting contrary to s-s. 202(1)(b) of the Code, was fined C\$100,000 and forfeited approximately US\$3,925,000 as proceeds of crime pursuant to s. 462.37 of the Code.

Because the Starnet conviction was obtained by way of a guilty plea, there is little in the way of judicial reasoning to be gleaned from the case, but the facts are instructive. Starnet was a publicly traded company, incorporated in the State of Delaware. Through a number of wholly owned subsidiary companies, Starnet conducted an online gaming and betting operation from the premises of a Vancouver address. Police authorities in B.C. were suspicious that Starnet was accepting online bets from Canadians and as a result set up a police sting operation. As part of the sting, police gambled nearly US\$3,000 on the company’s site.

It was initially anticipated that all online gaming activities would be done in Antigua, where one of Starnet’s wholly owned subsidiaries (World Gaming Services Inc.) was incorporated and licensed to provide online gaming services. A group of Caribbean companies were formed to facilitate the withdrawal and deposit of monies by customers, using credit cards. While Starnet kept many of its servers in Antigua, some were being operated from their Vancouver office. The Vancouver servers were the ones that online customers would access in order to reach Starnet’s Web pages. The gaming Web sites were physically located in Vancouver. The customers accessed and downloaded the “side casino software” via these Vancouver Web sites. This casino side software, and the modifications to that software necessary to allow it to function on customers’ computers, were both located in Vancouver. The Crown prosecutors focused their attention on whether “the components of the systems that enable persons to engage in gambling or betting...were...present in Vancouver.”

In their submissions, counsel for Starnet stated that as of the time of the guilty plea, the operations of Starnet were “legal,” a contention with which the Crown took no issue. The basis for this conclusion was that all aspects of the gaming operations were now offshore; a new company called Starnet Systems was virtually operating the gambling operations from Antigua, where it had 70 to 80 full-time employees; Starnet Systems in Antigua did all of the licensee support, the check processing, the credit-card processing, the customer service, the licensee relations, all of the day-to-day gaming activities and all

of the financial activities. A management committee was present in Antigua, which did not exist in 1999.

Cyber World Group

On January 25, 2007, in a prosecution kept very quiet by Quebec authorities, 3370861 Canada Inc., also known as Cyber World Group, was charged with two counts under Part VII of the Code in connection with activities relating to the conduct of the business of an iGaming Web site, GoldenPalace.com, through a server located on the Mohawk Territory of Kahnawá:ke. On September 26, 2007, Cyber World Group pleaded guilty to these charges and paid a fine of C\$2 million. The prosecution did not become public knowledge until two months after the conviction, through a story broadcast by the Canadian Broadcasting Corporation on November 29, 2007. Neither the prosecution nor the conviction was publicized by the Quebec police, the Quebec government, the Kahnawá:ke, the KGC, Cyber World Group or GoldenPalace.com

The charges in the information sworn commencing the prosecution referred to “virtual casinos and computers” kept and operated in Kahnawá:ke, but the police did *not* collect the evidence to support those charges by conducting a raid on the Kahnawá:ke reserve. Rather, the evidence in question was obtained from a raid at the offices of Cyber World Group, in the Ville St. Laurent District of Montreal and nowhere in the vicinity of the Mohawk Territory of Kahnawá:ke. No charges were laid against any person or entity residing on the Kahnawá:ke reserve. Chuck Barnett, a member of the Board of Supervisors for MIT, states that no Mohawk person or entity “was even remotely contacted” in relation to the police action during the months following the raid in Ville St. Laurent, adding:

“As somebody who lives, breathes, eats and sleeps every day of my life in Kahnawá:ke Mohawk Territory, I can easily say there have been no policing actions from external police forces here relative to this or any other I-gaming related issue.”³⁴

The prosecution and conviction of Cyber World Group were carefully framed in such a way as to refrain from openly challenging the constitutional position taken by the Mohawk Council of Kahnawá:ke and the KGC. Cyber World Group operated from Canadian offices outside the Kahnawá:ke Mohawk reserve. Moreover, the KGC had granted a permit to Golden Palace Ltd., not Cyber World Group, and accordingly the jurisdiction of the KGC to grant such a permit was not directly challenged. Had the authorities wished to challenge the jurisdiction of the KGC or the Mohawk Council of Kahnawá:ke to regulate the activities of GoldenPalace.com, it would have been a simple matter to charge the KGC and/or the Mohawk Council of Kahnawá:ke with aiding and abetting Cyber World Group (contrary to s-s. 202(1)(j) of the Code), or with doing things not authorized by s. 207 of the Code in the conduct, management or operation of a lottery scheme (contrary to s-s. 207(3)(a)).

³⁴ Post from Chuck Barnett dated Dec. 1, 2007: <http://www.majorwager.com/forums/mess-hall/159085-kahnawakes-resident-cybercasino-giant-fined-illegal-gaming.html>, retrieved Dec. 7, 2007 at 3:53 p.m.

In any event, since Cyber World Group entered a guilty plea, there was no judicial reasoning in the case relating to the claimed Aboriginal right.

In some important respects, the Cyber World Group prosecution was not appreciably different from the Starnet prosecution. In both cases, the prosecution did not involve a challenge to the validity of the license. Rather, the prosecution focused on acts carried out outside the territory of the jurisdiction which granted that license, in support of gaming activities which accepted money from Canadian residents.

The Quebec authorities have accordingly demonstrated a willingness to prosecute activities in support of iGaming regulated by the KGC, where those activities take place *in* Quebec and *outside* Kahnawá:ke. In addition to charges under the Code, Quebec has demonstrated a willingness to confront such activities by way of charging those providing support services under the provincial tax regime, where circumstances permit. At the same time, it appears that the authorities continue to follow a “hands-off” policy with regard to directly enforcing the Code against iGaming taking place in Kahnawá:ke in a manner that might put a halt to that iGaming.

Recent Legislative Developments: Bill C-13

On May 29, 2008, the gaming and betting provisions of the Code were amended by Parliament. One of the two amendments involved the first amendment of an offense-creating provision of the Code since the 1970s. The amendments were introduced as clauses 5 and 6 of Bill C-13, *Act to amend the Criminal Code* (criminal procedure, language of the accused, sentencing and other amendments) (hereinafter the “Bill”). The voyage of the Bill from its introduction into Parliament in an earlier form on June 22, 2006 illustrates a great deal of the ferment currently at play on the iGaming legal front in Canada.

There was a conscious effort on the part of elected officials to portray the Bill as entirely noncontroversial, describing it as involving only “technical amendments,” “housekeeping,” “a non-contentious cleanup bill,” “fine-tuning” and matters that do “not lend [themselves] to partisanship.” They drew the picture of a Bill that was “not about fundamental law reform.”³⁵

The Legislative Summary of the Bill prepared by the Law and Government Division of the Library of Parliament stated that clause 5 of the Bill would amend s-s. 202(1)(i) of the Code to be “technologically neutral.”³⁶ Prior to the enactment of clause 5 of the Bill, s-s. 202(1)(i) of the Code stated that everyone commits an offense who:

³⁵ Canada. Parliament. House of Commons. *Debates*. 39th Parl., 1st sess., issue 2, no. 170, 13 Jun 2007

³⁶ Canada. Library of Parliament. Law and Government Division. *Legislative Summary of Bill C-13, Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments)* (Ottawa: Library of Parliament, 2006)

“willfully and knowingly sends, transmits, delivers or receives any message by radio, telegraph, telephone, mail or express that conveys any information relating to book-making, pool-selling, betting or wagering, or that is intended to assist in book-making, pool-selling, betting or wagering...”

Clause 5 of the Bill amended s-s. 202(1)(i) of the Code to read as follows:

“willfully and knowingly sends, transmits, delivers or receives any message that conveys any information relating to book-making, pool-selling, betting or wagering, or that is intended to assist in book-making, pool-selling, betting or wagering...”

It was only in response to direct questions from Members of Parliament (“MPs”) and Senators that senior officials of the Ministry of Justice admitted this was directed at ensuring that s-s. 202(1)(i) of the Code applied to iGaming. Even then, they were at pains to make soothing statements purporting to limit the effect of clause 5.³⁷

Clause 5 of the Bill was discussed briefly before the House of Commons Justice Committee on May 2, 2007. Anouk Desaulniers, senior counsel for the Criminal Law Policy Section of the Department of Justice, and the Honorable Rob Nicholson, the Minister of Justice, responded to a question from Carole Freeman, the MP for the area that includes Kahnawá:ke. Madame Freeman asked whether the Bill “addresses the issue of virtual casinos.” Ms. Desaulniers replied that the Bill proposes only “technical and minor corrections,” while acknowledging that the proposed amendment to s-s. 202(1)(i) “would apply to situations involving Internet betting.” She went on to state that “[t]he other controversy you raised is a significant one, and we are working on it at the department. However, it has not been included in this bill, which is more technical in nature, and non-controversial.” It was not clear whether Ms. Desaulniers meant the specific situation in Kahnawá:ke, or more general issues involving “virtual casinos,” when she spoke of that “other controversy.”³⁸

Speaking later on that day before that same committee, the Minister of Justice replied specifically to Madame Freeman’s question by stating:

“...it’s not meant to introduce either controversial or large substantial changes to the Criminal Code, because that would be more appropriate, in my opinion, for a stand-alone bill. This bill strictly deals with technical amendments.”³⁹

The Minister’s statement was revealing in two important respects. First, to state that clause 5 of the Bill was “not meant to introduce either controversial or large substantial changes to the Criminal Code” is only meaningful where there is broad agreement as to the effect of s-s. 202(1)(i) on iGaming prior to the enactment of the Bill. When clause 5

³⁷ *Supra* note 26

³⁸ Canada. Parliament. House of Commons. Standing Committee on Justice and Human Rights. *Proceedings*, 39th Parl., 1st sess., no. 65, 02 May 2007

³⁹ *Ibid.*

was discussed before the Senate committee reviewing the Bill, it became apparent that there was a considerable range of interpretations on that issue.

Second, the Minister revealed that he had clearly already considered how more wide-ranging changes to prohibit iGaming might be made, and determined that it would be appropriate to make such changes by way of “a stand-alone bill.”

Proceedings Before the Senate Committee – November 21 and 27, 2007

The Bill as it then read was passed by the House of Commons on October 29, 2007, and sent to the Senate for consideration. Thereafter, clause 5 of the Bill received considerable attention before the Standing Senate Committee on Legal and Constitutional Affairs (the “Senate Committee”) on November 28 and 29, 2007.

On November 28, 2007, Senator Raynall Andreychuk asked the Minister of Justice: “Is there any intention of...using this section in any way on the issue of offshore betting?” The Minister of Justice stated that clause 5 would make it so that s-s. 202(1)(i) of the Code would “apply equally to onshore and offshore betting.”⁴⁰

The Minister of Justice also took the position that ISPs “who unknowingly transmit messages containing this information would not be caught under this bill” because s-s. 202(1)(i) would still require that the accused willfully and knowingly sent, transmitted, delivered, etc. betting information, and clause 5 “would not create an onus on Internet service providers to monitor the information transferred.”

Senator Andreychuk sought clarification on this point later that same day from Mr. Hal Pruden, a senior official of the Department of Justice with noted expertise in the gaming and betting provisions of the Code. He further asked Mr. Pruden whether clause 5 of the Bill would enhance the extraterritorial effect of s-s. 202(1)(i):

“You talked about offshore betting and said that it falls under the bill. I want to be clear that no new offence is being created in terms of offshore. The bill is saying that if bookmaking takes place elsewhere but a part of the offence, i.e., the transmission, took place in Canada, then should that person ever come to Canada, we could charge them. If we had existing ways to go offshore in a criminal matter, we could gather evidence, but this bill is not creating a new offence that goes extraterritorially. Am I correct?”

To which Mr. Pruden replied:

“You are correct in saying that there is not a new offence. It is the same offence that currently exists in section 202(1)(i); there is no change, other than

⁴⁰ *Supra* note 26, at 2:11

to say that the technology used will go beyond the archaic terms that we find in the existing provisions. There is no change to the offence.”

“As well, you are correct in saying that if someone today, under those archaic technologies, were committing the offence in Canada while still offshore, should they some day be found in Canada, the police and prosecution might be able to proceed against them, even based on the existing provision.”

Senator Baker asked Ms. Desaulniers: “[t]he intent of this change is to focus on the Internet, is it not?” To which she replied:

“The objective of the amendment is to modernize the section, to bring it up to date with current communication methods. The intention of the government is not to target Internet service providers, but rather to continue to represent in an adequate and up to date way the communication methods that can be used to convey information for the purpose of betting.”⁴¹

Senator Baker indicated that he saw the potential for willful blindness or recklessness being sufficient to satisfy the mental element of the offense set out in ss. 202(1)(i), namely “willfully and knowingly,” with resulting liability to ISPs. He further suggested that private individuals using the Internet as bettors and gamers could be prosecuted under s-s. 202(1)(i) as amended by clause 5 of the Bill.

In response to Senator Baker’s questions in this vein, the Minister of Justice turned once again to Mr. Pruden, who cited the “private bet” exemption found at s-s. 204(1)(b) of the Code as preventing s-s. 202(1)(i) from being used against people who bet privately over the Internet. Mr. Pruden also reiterated that in his opinion, the use of the words “willfully and knowingly” in s-s. 202(1)(i) protects ISPs from being convicted under this provision. To Senator Baker’s follow-up question of who the amended s-s. 202(1)(i) would capture, Mr. Pruden replied “bookies in Canada today.”⁴²

PartyGaming Plc Appears Before the Senate Committee – November 29 and December 6, 2007

On November 29, 2007 and December 6, 2007, the Senate Committee heard the submissions of representatives of PartyGaming Plc, including its then-CEO, Mitchell Garber, and two Canadian members of its International Advisory Committee, Brahm Gelfand and Norman Inkster (“PartyGaming”). PartyGaming sought clarification of the Parliamentary intent animating clause 5 of the Bill. Specifically, PartyGaming asked whether it was intended that s-s. 202(1)(i) of the Code, as amended by clause 5 of the Bill, would apply to licensed, regulated offshore online gaming companies with Canadian customers.

⁴¹ *Supra* note 26 at 2:12

⁴² *Supra* note 26 at 2:15

PartyGaming took the position that s-s. 202(1)(i) had historically been interpreted to apply only to iGaming “conducted inside Canada,” and that an offshore entity sending e-mail to customers inside Canada would not be captured by s-s. 202(1)(i) should it be amended by clause 5 of the Bill.

Mr. Pruden, however, took a different view. He stated that, under the current law, unamended by the Bill, when a bookmaker situated in Florida “uses the telephone or Internet to call people in Ontario, and engages in bookmaking, the offence takes place in whole or in part in Canada...it is in part in Canada because one person is in Canada on the phone or Internet and the other is in Florida.”⁴³ He further cited the Supreme Court of Canada decision in the case of *Libman v. The Queen*⁴⁴ as authority for the proposition that where a criminal offense takes place in whole or in part in Canada, a Canadian court may be the appropriate forum for prosecution of the offense.⁴⁵

The upshot is that in Mr. Pruden’s opinion, an offshore bookmaker that contacts its Canadian customers by telephone “may be” subject to prosecution in a Canadian court, pursuant to s-s. 202(1)(i) of the Code as presently drafted. Mr. Garber, himself a Canadian lawyer with expertise in the law relating to gaming and betting, took a different view of the current state of the law.

In that light, we see that the meaning of the statement of the Minister of Justice, that clause 5 of the Bill is “not meant to introduce either controversial or large substantial changes to the Criminal Code,” would mean different things to Mr. Pruden than it would to PartyGaming.

As there have been no prosecutions in Canada relating to truly “offshore” iGaming, the question of how the principles set forth by the Supreme Court of Canada in *Libman v. The Queen* would apply to an offense in Part VII of the Code, cannot be answered with certainty. This explains why Mr. Pruden did not definitively state that the activities he described would be unlawful under s-s. 202(1)(i) of the Code.

The intervention of PartyGaming bore some fruit. The Senate Committee tabled its report on the Bill (the “Report”) on December 11, 2007, and appended its “Observations” to the Report, the final paragraph of which addressed clause 5 of the Bill:

“One final observation concerns the fear expressed by a witness of the potential extra-territorial application of clause 5 of the bill, which deals with the transmission and reception of information relating to book-making, betting and wagering, among other things. For the sake of clarity, the Committee

⁴³ Canada. Parliament. Senate. Standing Committee on Legal and Constitutional Affairs. Proceedings, 39th Parl., 1st sess., issue 2, 29 Nov 2007

⁴⁴ Canada. Parliament. Senate. Standing Committee on Legal and Constitutional Affairs. Proceedings, 39th Parl., 1st sess., issue 3, 06 Dec 2007

⁴⁵ *Ibid.*

wishes to note that it is satisfied that clause 5 of the bill will not have extra-territorial application.”⁴⁶

On December 12, 2007, in moving adoption of the Report, Senator Joan Fraser explained this passage as follows:

“Finally, we tried to allay concerns that were raised by one group of witnesses regarding the possible extraterritorial application of clause 5 of this bill, which concerns the gaming industry in particular. We are satisfied, upon assurance by, among others, Senator Oliver and the minister, that this concern is not the effect of this bill. Therefore, we made that view plain in our observations.”⁴⁷

Reviewing the debates, it is clear that while the lawyers speaking for PartyGaming, including Mr. Garber, used the term “extraterritorial,” they meant whether clause 5 would amend s-s. 202(1)(i) of the Code to have any effect on matters occurring outside Canada. Mr. Pruden, on the other hand, considered the word “extraterritorial” to refer to provisions that would criminalize activities occurring *entirely* outside Canada, with no Canadian links whatsoever. Now that clause 5 of the Bill has been enacted into law, the effect which the Senate’s “Observations” may have upon the interpretation of the amended s-s. 202(1)(i) may depend on which definition of “extraterritorial” is accepted by a court.

Press coverage of the Senate debate over clause 5 of the Bill demonstrated the widespread confusion over the legal status of iGaming in Canada. Some coverage appeared to represent that iGaming was legal in Canada, while other articles indicated a need for clarification. Mr. Pruden’s comments about extraterritoriality, and the effect of the *Libman* decision upon the treatment of iGaming under the Code, were generally ignored by the press.⁴⁸

Interests Motivating Clause 5 of the Bill

The passage of the Bill through Parliament also laid bare the identity of the interests that are motivating the prospect of expanded iGaming prohibitions in Canada, as embodied by clause 5 of the Bill. These private interests emerged from behind the scenes in February and March 2008, following the Senate’s passage of the Bill on Third Reading. They clearly indicated that clauses 5 and 6 of the Bill were just the beginning of a long-range plan, and raised the specter of a Canadian version of UIGEA.

⁴⁶ Canada. Parliament. Senate. Standing Committee on Legal and Constitutional Affairs. Proceedings, 39th Parl., 1st sess., issue 4, 11 Dec 2007, at 4:9

⁴⁷ Canada. Parliament. Senate. Debates. 39th Parl., 2nd sess., vol. 144, issue 23, 12 Dec 2007

⁴⁸ “Senate saves the day for online gambling,” *Law Times*, Dec. 10 2007; “Canada narrowly avoids approving online poker ban,” *PokerPages.com*, Dec. 14 , 2007; “Online Gambling still legal in Canada,” *VIPLounge Online Casino News*, <http://www.casinosviplounge.com/canada/news/5858484.html>

The Bill contained a second clause dealing with gaming and betting, clause 6. An analysis of clause 6 reveals the identity of the domestic interests which are influencing the government to explicitly direct the offenses in the Code to iGaming.

Clause 6 seeks to amend s-s. 204(2) of the Code, a provision which exempts lawful betting on horse-races from the offenses in the Code. Subsection 204(2) expressly states that this exemption includes betting by telephone calls to approved race-courses or betting theatres, with such betting being regulated by the federal Department of Agriculture. In 2003, the Minister of Agriculture amended the *Pari-Mutuel Betting Supervision Regulations*⁴⁹ to enact a new definition of “telephone” that purports to include online horse-race betting.

The 2003 amendment to the regulations is of dubious validity, however. It conflicts with the actual wording of the Code, which states that the exemption only applies to “telephone *calls* to the race-course of an association.” A regulation cannot go beyond the bounds of what is allowed by the statute empowering the regulations, and the term “telephone calls” used in the Code cannot be reconciled with the concept of online communication permitted by the regulation.

Clause 6 of the Bill amended s-s. 204(2) to remove the words “telephone calls,” replacing them with the words “any means of telecommunication.” This brings the Code into accord with the practice already being followed by the domestic Canadian horse-racing industry in reliance on what had formerly been regulations with a dubious legal basis.

Logical deduction would lead an observer to the conclusion that the interests that seek to bring the forces of prohibition to bear against iGaming are one and the same as the interests who would benefit from formalizing an exemption in favor of allowing domestic horse-racing interests to conduct online betting.

The Specter of a Canadian UIGEA

On February 6, 2008, Roy Cullen, MP for Etobicoke North, spoke to the issues relating to iGaming generally. Mr. Cullen indicated that he was considering introducing a private member’s bill which had already been drafted, calling for the enactment of prohibitions similar to UIGEA. He quite explicitly stated that he was advocating on behalf of Woodbine Entertainment Group, a private entity which has operated online horse-race betting in Canada since the 2003 amendments to the *Pari-Mutuel Betting Supervision Regulations* (“Woodbine”).

Mr. Cullen’s speech clearly revealed that it was Woodbine which acted behind the scenes to lobby for the amendments found in clauses 5 and 6 of the Bill, now enacted into law as s-ss. 202(1)(i) and 204(2) of the Code. Woodbine has actively sought the erection of legal barriers that would give it the maximum ability under the law to conduct iGaming in Canada, while at the same time denying Canadian consumers access to competing

⁴⁹ S.O.R. 91-365, section 2

iGaming services. They have expanded this protectionist stance to include iGaming services that do not directly compete with Woodbine's core business, horse-race betting.

While Mr. Cullen also referred to the U.K. model for regulating iGaming, he did not indicate that he had at his disposal a draft bill to regulate iGaming. This emphasis on a prohibitionist approach to the exclusion of regulation lends further insight into Woodbine's mindset.⁵⁰

On February 14, 2008, Mr. Cullen returned to the issue of online gaming in the House during Question Period. He asked a question of the Minister of Justice, in which he made a number of entirely uncorroborated statements about Canadians being "victimized by illegal Internet gambling operations," and stating that offshore iGaming is costing private interests like Woodbine "millions of dollars in lost revenues and putting Canadians out of work." He received a friendly answer from the government, indicating that Woodbine's lobbying efforts have borne fruit amongst the government, as already evidenced by their influence over the content of the Bill.⁵¹

On March 3, 2008, the Minister of Justice released a statement clearly indicating that the government is considering measures to prevent Canadians from accessing offshore iGaming services. The Minister indicated that the government was concerned about the presence of iGaming servers on the Kahnawá:ke Territory, and that the enactment of a "Canadian UIGEA" was being strongly considered as one possible response:

"Following recent concerns surrounding Internet gambling in Canada, the Minister of Justice [Rob Nicholson] has asked his officials to examine whether the enforcement of the Criminal Code provisions could be assisted with other measures," said Genevieve Breton, Mr. Nicholson's director of communications."

"The 'other measures' are understood to be moves to restrict banks and credit card companies from conducting financial transactions with illegal Internet operators. Similar legislation was enacted in the United States two years ago."⁵²

The Bill and these recent discussions demonstrate that the climate for a free market in iGaming appears to be chilling.

The Federal-Provincial Working Group Deliberations on Gaming

In November 2006, the Deputy Ministers Responsible for Justice Coordinating Committee of Senior Officials Working Group (the "Working Group") was formed to consider and report on a number of issues relating to the Code and iGaming. Formed at

⁵⁰ Canada. Parliament. House of Commons. *Debates*. 39th Parl., 2nd sess., vol. 142, no. 45, 06 Feb 2008

⁵¹ Canada. Parliament. House of Commons. *Debates*. 39th Parl., 2nd sess., vol. 142, no. 51, 14 Feb 2008

⁵² "Ottawa renews bid to stamp out native gambling sites," *National Post*, March 4, 2008

the initiative of the Province of Alberta, the Working Group was initially motivated by concerns about iGaming “unregulated” by Canadian gaming regulators. At the outset, the Working Group was particularly concerned with iGaming emanating from Kahnawá:ke.

Chaired by the same Hal Pruden who took such an active role in public deliberations over clause 5 of Bill C-13, the Working Group has met once or twice each year since its formation. It is composed of senior officials in the Attorney Generals’ offices and Departments of Justice of the ten provinces and the federal government, with some participation from selected provincial gaming regulatory officials. It is generally acknowledged that the pace of the Working Group’s deliberations is lagging behind developments in iGaming, both within Canada and internationally, and the anticipated report of the Working Group may well be obsolete by the time it is released.

The Working Group is considering a number of discrete topics concerning gaming law, some of which address iGaming, some of which are primarily concerned with land-based gaming, and some of which have potential application to both.

(1) Approaches to Unlicensed iGaming:

- (i) Banning Advertisements (U.K. “white list” model);
- (ii) Requiring ISPs to Block Access to Web sites; and
- (iii) Requiring Financial Transactions to Block iGaming Transactions (“UIGEA” model)

The deliberations of the Working Group have demonstrated that at present, very little support exists among the provincial governments for taking law enforcement action against unlicensed iGaming. There is no support for adopting a “white list” model which would ban ads relating to offshore iGaming except in the cases of approved jurisdictions. Nor do the members of the Working Group support an approach similar to that adopted by the U.S. with UIGEA, whereby financial institutions would be required to block transactions relating to iGaming, or requiring Internet Service Providers to block the reception of offshore iGaming transmissions within Canada. The members of the Working Group appear concerned solely with enforcing the Code against iGaming Web sites operating from within Canada that are not conducted and managed by any of the provincial governments.

This is consistent with law enforcement activity over the last decade. The responsible authorities appear to have no intention of expending the resources and effort required to prosecute individuals or corporations for unlicensed iGaming activities that emanate from outside Canada, or for activities that take place in the Kahnawá:ke Territory. The deliberations of the Working Group confirm that this remains the case, regardless of whether Canadian jurisprudence on jurisdiction over online activities would theoretically allow for such prosecutions.

Officials in the Working Group have reportedly indicated a willingness on the part of the authorities to prosecute for iGaming-related activities that physically take place in

Canada. Again, this is consistent with the handful of prosecutions that have occurred in Canada relating to iGaming. Each such prosecution has addressed circumstances where computer servers used for iGaming were located in Canada, or where support activities relating to iGaming originating from the Kahnawá:ke Territory took place within Canada and outside the Kahnawá:ke Territory.

(2) Criminalizing the Activity of Betting or Gambling through Unlawful Means

The Code at present does not make it an offense to place a bet or to gamble. The nearest it comes to such an offense is at s-s. 206(4) of the Code, which makes it an offense to buy, take or receive a lot, ticket or other device for disposing of property by a mode of pure chance. As well, s-s. 207(3)(b) of the Code states that it is an offense to do anything for the purposes of a lottery scheme that is not authorized by or pursuant to a provision of section 207 of the Code, including “participating in that lottery scheme.”

One of the questions considered by the Working Group in connection with iGaming has been whether an offense should be introduced into the Code which would explicitly penalize the actions of Canadians who access iGaming not regulated by the provincial governments. The Working Group has shown no interest in criminalizing the activities of individuals who bet or gamble on offshore iGaming Web sites, fully aware of the authoritarian tactics that would be required to enforce such a prohibition.

The Working Group’s consideration of this issue tends to confirm that s-s. 207(3)(b) of the Code does not provide the basis for a prosecution against individuals for the act of placing a bet or gambling. The legislative history of this offense indicates that it is directed at persons who permit “authorized” gaming and betting conducted and managed by a provincial government or charity to operate beyond the authority granted to those entities by the Code. Accordingly, it is not applicable to participation in iGaming that is not conducted and managed by a provincial government. The Working Group is operating from this same premise; namely, that an amendment to the Code is required before individual bettors and gamblers could be prosecuted for participation in iGaming that is not conducted and managed by a provincial government.

(3) Single-Event Sports Betting

This is an issue equally applicable to iGaming and to land-based sports betting. At present, the Code does not permit provincial governments to conduct and manage betting that involves bets “on any race or fight, or on a single sport event or athletic contest.” Before provincial lottery corporations could offer competitive services in sports betting, either through online or land-based sports books, this restriction would have to be removed.

The Working Group generally supports removing this restriction; however, it is mindful that the concerns which motivated Parliament to include this restriction in the Code in

1985 involved prevention of match-fixing. Accordingly, it appears likely that any amendments to the Code that remove this restriction will have to be accompanied by measures aimed at alleviating the threat of match-fixing.

As well, the Working Group has considered whether the sports books that would arise from such amendments to the Code should be conducted and managed directly by the provincial governments, or whether the Code should explicitly take cognizance of the fact that considerable private sector operation would be required.

This concern with match-fixing may open the door to active participation in Canada by online betting exchanges. In a number of highly publicized instances, online betting exchanges have been instrumental in detecting and acting to prevent match-fixing through careful monitoring of betting trends. These private enterprises are well situated to assist the Working Group and other concerned officials and decision-makers in determining how their concerns can be addressed in an environment where existing restrictions of sports betting have been removed.

iGaming Conducted and Managed by the Provincial Governments: British Columbia, Quebec and the Atlantic Provinces

In the fall of 2009, the government of British Columbia commenced the legal and technical process required to enable it to enhance the online gaming services offered by the BCLC. On September 15, 2009, the B.C. Gaming Policy and Enforcement Branch enacted standards to be used for the approval of Internet Gaming Systems in the province, with the goal of blackjack, roulette and pai gow poker being offered online by the BCLC.

This iGaming project was initially fraught with considerable obstacles, both technical and from a customer liquidity standpoint, due to the limitations placed upon the potential customer base. The BCLC proceeded from the standpoint that, acting on its own, it could only offer iGaming to customers within the territorial boundaries of British Columbia.

However, in the aftermath of the British Columbia announcement, the Atlantic Lottery Corporation (the “ALC”) announced its plans to join with the BCLC in this project. Besides the BCLC, the ALC was at that time the only other provincial governmental entity offering limited iGaming in Canada. The ALC is the entity responsible for conducting and managing gaming for the four Atlantic provinces (New Brunswick, Nova Scotia, Newfoundland & Labrador and Prince Edward Island).

In late 2009, Loto-Quebec, the governmental entity responsible for conducting and managing gaming in Quebec, publicly announced its plans to enter the iGaming field. Since that announcement, Loto-Quebec has begun offering iGaming through its “Lotoclie” Web site, although it has not yet begun offering poker, casino games or sports betting through that Web site. Loto-Quebec has submitted a proposal to the Quebec government for an iGaming operation that will include sports betting and poker, expected

to launch in the fall of 2010. Certain amendments will need to be made to Quebec provincial gaming laws to allow this to occur, and these are expected to be enacted by that time.

The Code explicitly contemplates that provincial governments may enter into reciprocal agreements pursuant to which the residents of each of these provinces could play on the iGaming services offered by all participating provinces. This would assist all of the provinces in alleviating the liquidity obstacles referred to earlier, while putting pressure upon the remaining provinces (Ontario, Manitoba, Saskatchewan and Alberta) to join in offering iGaming to their residents, in conjunction with Quebec, British Columbia, Nova Scotia, New Brunswick, Newfoundland & Labrador and Prince Edward Island.

As the provincial governments become increasingly involved in iGaming, it may develop that they will seek to preserve their local markets as monopolies by increasing law enforcement efforts against iGaming that is currently being offered to Canadian residents by iGaming entities based outside Canada. This could take the form of prosecutions under the *Criminal Code*, as well as enforcement of any federal or provincial laws that may be brought to bear against offshore iGaming.

Alternatively, if all ten Canadian provinces enter into reciprocal agreements that result in their jointly conducting and managing a pan-Canadian iGaming operation, they could determine to turn their sights on international markets. They would likely seek express authority from the federal government before embarking upon this course of action. This more ambitious course of action could result in the provincial governments forgoing law enforcement actions against persons involved in offshore iGaming.

On July 15, 2010, the BCLC launched its expanded iGaming operation, PlayNow.com, amidst a great deal of publicity and media comment, both positive and negative. Within hours, the Web site was shut down by the BCLC. The initial explanation provided by the BCLC was that an overwhelming rush of customers caused the shutdown. This continued to be the explanation offered to the public for four days thereafter. On July 20, 2010, the BCLC issued a news release stating that in fact, the problem leading to the shut down of PlayNow.com had been a serious privacy breach which resulted in 134 customers having their personal information revealed to other customers, including names, contact information and credit-card and bank information. Some customers were reportedly even able to gamble with the money of other customers.

The BCLC and the government of British Columbia suffered an onslaught of unfavorable media coverage, both for the security breach and for the delay in revealing the true cause of the shutdown. The BCLC, and other iGaming operations conducted by the provincial governments, will now have a harder task than before in building public confidence in their operations. As of the date of writing (August 9, 2010), the PlayNow.com Web site remained shut down.

iGaming Conducted and Managed by the Provincial Governments, and the *Earth Future Lottery* Reference Case

This chapter has focused to this point on the status of offshore iGaming in Canada. As we have noted, however, the Code theoretically grants the provincial governments a monopoly on the supply of gaming and betting services to Canadian residents where such gaming or betting is operated on or through a computer or video device. We have noted that the provincial governments presently offering iGaming operations feel constrained by the Code to offer iGaming only to customers within their provincial territorial boundaries. In this final portion of the chapter, we will examine whether the Code in fact constrains the ability of the provincial governments to offer iGaming in this manner, the extent to which the provincial governments are fully capitalizing on their authority to conduct and manage iGaming, and the legal and practical obstacles facing the provincial governments as potential providers of iGaming services.

Territorial limitations are built into the rights granted to the provincial governments to conduct and manage gaming and betting under s-s. 207(1)(a) of the Code (“Provincial Government Gaming”). Section 207(1)(a) of the Code states that “the government of a province” may “conduct and manage a lottery scheme in that province..in accordance with any law enacted by the legislature of that province.”

Territorial limitations are also built into the right granted to charities to conduct and manage gaming and betting under s-s. 207(1)(b) of the Code (“Charitable Gaming”). The statutory language used to impose these territorial limitations differs from that used in s-s. 207(1)(a). Section 207(1)(b) of the Code states that a charitable and religious organization may, “pursuant to a licence issued by” the government of a province, “conduct and manage a lottery scheme in that province if the proceeds from the lottery scheme are used for a charitable or religious object or purpose.”

The Prince Edward Island Court of Appeal in *Reference re Earth Future Lottery*⁵³ determined that a charitable organization could not be validly licensed to conduct and manage an online lottery pursuant to s-s. 207(1)(b) of the Code, where tickets in that online lottery were to be sold to individuals throughout Canada, and in the broader global market.

The court in *Reference re Earth Future Lottery* also made statements regarding the territorial limitations imposed on provincial governments by s-s. 207(1)(a) of the Code.⁵⁴ These comments, however, were “*obiter dicta*”: statements not directly disposing of the issue before the court, and therefore of debatable value as precedent. The Supreme Court of Canada has stated that *obiter* statements are not necessarily binding authority; and the further such statements move from the dispositive issues of the case (the *ratio decidendi*), toward statements merely intended to provide commentary, examples or exposition, the less likely they are to be “binding” authority on later courts.⁵⁵ The *obiter dicta* set out in the decision of the Prince Edward Island Court of Appeal is further not binding across

⁵³ (2002), 215 D.L.R. (4th) 656 (P.E.I. C.A.)

⁵⁴ *Ibid.*, at 671 – 673

⁵⁵ *R. v. Henry*, [2005] 3 S.C.R. 609, 2005 SCC 76, at paras. 56 – 57

Canada, as the Supreme Court of Canada affirmed that decision without providing any judicial reasoning, merely stating in a single-line judgment that it was dismissing the appeal “substantially for the reasons of the Chief Justice of Prince Edward Island.”⁵⁶

The *Reference re Earth Future Lottery* dealt with an online lottery that would have sold its tickets to residents of every province of Canada, as well as an international market. The legislative intent behind the territorial limitations imposed by section 207 of the Code was without a doubt to prevent provinces from competing amongst themselves for the gaming and betting revenues to be derived from each others’ residents.⁵⁷ The courts have yet to hear a case involving iGaming conducted and managed by a provincial government which excludes the residents of other provinces from participating, while permitting the participation of foreign individuals whose home governments permit such activity. A court considering this latter scenario could well interpret section 207 in a manner that gives effect to the legislative history of that provision.

Moreover, the Prince Edward Island Court of Appeal was not in the best possible position to consider whether judicial reasoning relating to Charitable Gaming could be applied mechanically to issues raised in the context of Provincial Government Gaming. Distinguished commentators have argued precisely the opposite, noting the divergent case law under the two different provisions.⁵⁸ In addressing Charitable Gaming, the courts have subjected the commercial relationships between those conducting and managing gaming and the private sector to considerable scrutiny. In Provincial Government Gaming, those conducting and managing the gaming have been accorded considerably more deference. There is no difference between the language of s-ss. 207(1)(a) and (b) of the Code that requires the granting of such deference to Provincial Government Gaming. The differential treatment is nonetheless legitimate, because charitable or religious groups are often not in a position to protect the public interest effectively in their dealings with private-sector operators, and the larger number of Charitable Gaming licensees makes the task of regulating such activities more difficult. Accordingly, the Code “has a different role to play in ensuring the protection of the public interest” in the context of Charitable Gaming activities than is the case in the context of Provincial Government Gaming.⁵⁹ As well, the legislative history of gaming conducted and managed by charitable and religious organizations, a history that predates the widespread legalization of gaming and betting in Canada in 1969, supports a more restrictive interpretation of the authority granted by s-s. 207(1)(b) of the Code. Similar justification for a restrictive approach does not exist with respect to Provincial Government Gaming.⁶⁰

⁵⁶ *Reference re Earth Future Lottery*, [2003] 1 S.C.R. 123, 2003 SCC 10, 222 D.L.R. (4th) 383 (S.C.C.)

⁵⁷ Canada. Parliament, House of Commons, Standing Committee on Justice and Legal Affairs, Minutes of Proceedings and Evidence, 28th Parl., 1st sess., issue 21, 13 Mar 1969: 388–395 and Canada. Law Commission of Canada, The Legalization of Gambling in Canada, by Colin S. Campbell, Timothy F. Hartnagel and Garry J. Smith. “What Is A Crime” series (Ottawa: Ministry of Supply and Services, 2005): 61

⁵⁸ Monahan, Patrick and A. Gerald Goldlist, “Roll Again: New Developments Concerning Gaming” (1999), 42 Crim. Law Q. 182

⁵⁹ *Ibid.* at 212–213

⁶⁰ Recently, a British Columbia court applied *Reference re Earth Future Lottery* in a manner that purported to limit the reach of Provincial Government Gaming so that it could not extend outside of Canada. The

Accordingly, a strong argument can be made that provincial governments have the authority under s-ss. 207(1)(a) and 207(4) of the Code to conduct and manage iGaming that seeks customers from its own residents, as well as from foreign countries whose laws do not prohibit such activity. This is an important point, as the provincial governments are unlikely to invest heavily in an iGaming infrastructure if their only market for those services would be residents of their own province.

Similarly, the Code was drafted to limit the sports betting services the provincial governments could offer. So long as these restrictions remain in place, Provincial Government Gaming will be unable to compete effectively with foreign iGaming sports books. Specifically, provincial governments cannot offer bets on single sporting events; all bets must be offered in parlay format. In addition, they cannot offer bets of any kind on fights or races.⁶¹

In order for Provincial Government Gaming to compete effectively with foreign iGaming services, the provincial governments will have to adopt a more expansive view of their authority to offer gaming and betting services to the international market. As well, the federal Parliament will have to amend s-s. 207(4) of the Code to broaden the types of betting the provincial governments can offer. There has been a concerted behind-the-scenes effort by the provincial governments to seek an amendment of this sort over the last few years, an effort which has very recently become public.⁶² While the immediate plans would be to operate land-based sports books once such an amendment is enacted, the amendment would also make iGaming conducted and managed by provincial governments a more practical proposition.

What the Future Holds

Canada is clearly approaching a crossroads concerning iGaming. Recent years have seen legislative gains made by private interests that favor prohibition of offshore iGaming. These are the same private interests that, prior to the popularization of the Internet, benefited from gaming and betting monopolies granted by the Code. While these interests occasionally use arguments that engage the public interest, the bottom line is that a truly open market in gaming and betting services is an existential threat to their financial stability.

It is in this context that the prospect of a Canadian version of UIGEA has been suggested. The difficulty facing proponents of this route is that the practicality of UIGEA has been questioned in the U.S. by legislators and financial industry groups, and there has been a

decision did not engage in a purposive analysis of section 207; moreover, the case involved neither a prosecution under the Code, nor a provincial government seeking to define the extent of its authority. Finally, it was a Provincial Court decision, which cannot establish a precedent that is binding upon the Superior Courts of any province: *British Columbia v. Hapton*, 2008 CarswellBC 905 (B.C. Prov. Ct.).

⁶¹ The government sports lotteries in some provinces offer parlay betting on automobile races; the authors are uncertain what interpretation of the Code these provincial governments rely upon to justify what appears on its face to be a violation of the clear language of the Code.

⁶² "Casinos eye sports betting," *Toronto Star*, June 3, 2008

concerted legislative effort in the House of Representatives Financial Services Committee to dismantle UIGEA and enact a licensing and regulatory regime in its place. As long as UIGEA continues to be the subject of such controversy in the U.S., it is difficult to imagine legislation that mirrors its approach being seriously proposed for enactment in Canada.

We see far less public lobbying in favor of an approach that would see iGaming as a regulated practice in Canada; however, that does not mean that such regulation is not being considered as an option at the higher levels of provincial and federal governments. The model of regulation enacted in the United Kingdom could not be utilized in Canada without wide-ranging reforms to the gaming and betting provisions of the Code. However, the existing provisions of the Code do allow for provincial governments to “conduct and manage” iGaming while using the services of private-sector iGaming companies as their “vendors of record.” These vendors of record could very well be the kinds of highly regulated, world-renowned iGaming companies seen in Europe and elsewhere. The arrangement would be very similar to that used in conducting and managing land-based casinos in Canada while using the operating services of global gaming giants such as Harrah’s and Casinos Austria, an approach sanctioned by s-s. 207(1)(g) of the Code.

That said, the forces opposing iGaming can be expected to continue waging their campaign even without support from parallel developments in the U.S. As always, we await to see developments unfold.