



THE CANADIAN GAMING MARKET

By Stuart Hoegner



Gaming sectors throughout the Americas seem eclipsed by the size and vibrancy of the United States marketplace, and Canada's gaming landscape is no exception. As a relative matter, this is understandable; after all, Canada's economy is smaller than California's. Still, in 2006, the gaming industry contributed \$15.3 billion¹ (all amounts Canadian dollars unless otherwise noted) directly to the Canadian economy. One estimate from October 2009 put the amount that Canadians spend annually on Internet gaming sites at more than \$1 billion.² Clearly this is a market worthy of attention and understanding.

Legal and Institutional Background

Many gaming and betting activities in Canada are illegal unless they are managed and conducted by the provinces or, potentially, are facilitated or licensed pursuant to an aboriginal right to do so. Generally, it is an offense under the federal Criminal Code³ to, for example, keep or be found in (without lawful excuse) a common gaming house or a common betting house⁴; record or register a bet or sell a pool (or undertake certain activities ancillary thereto)⁵; place a bet on behalf of another person⁶; or conduct a lottery scheme.⁷ It is also an offense under the code to use, transfer, deliver or deal with proceeds obtained from the commission of a designated offense,⁸ which is designed to prevent money laundering associated with many gaming and betting offenses, among others.

Private bets between individuals not engaged in the business of betting,⁹ gaming at a genuine social club meeting certain conditions,¹⁰ and so-called 'free-roll' online interactive Texas Hold'em poker events and tournaments,¹¹ for example, do not contravene the Criminal Code. Also, it is not an offense for a person to make or print in Canada anything relating to gaming and betting that is to be used in a lawful manner.¹² So, for example, it is not a crime in Canada to manufacture slot machines or produce Internet gaming source code for use in a place where those "things" can be used legally, including in Canada.

The Canadian Competition Act¹³ also addresses gaming. Where a person conducts a "contest, lottery, game of chance or skill, or mixed chance and skill," that person must take care not to engage in "reviewable conduct" within the meaning of the act. In order to stay

inside the reviewable conduct provisions, for example, the person promoting the contest must make adequate and fair disclosure of the number and approximate value of all prizes¹⁴ and must not unduly delay the distribution of those prizes.¹⁵ Sanctions can range from the relatively minor (an order not to engage in such conduct¹⁶) to the severe (an order to pay an administrative penalty,¹⁷ which can be substantial).

While the operation and supervision of horse race betting generally falls to the federal minister of agriculture and agri-food under the Criminal Code,¹⁸ much of the gaming in Canada is conducted or licensed by the provinces. Notwithstanding the extensive prohibitions contained elsewhere in the code, provincial governments may “conduct and manage” lottery schemes in the provinces¹⁹ and may license others to conduct lottery schemes under certain circumstances.²⁰ The phrase “lottery scheme” is unfortunate, as what are ordinarily understood to be lotteries are not the only things included. “Lottery scheme” in this context also includes such things as sports betting, casino games and poker. However, some games or bets may not even be offered by the provinces, for example, three-card monte²¹ and bets on any race, fight, single sport event or athletic contest.²² (Because of this latter restriction, Canadian provincial lottery corporations currently offer only parlay bets to sports bettors.)

The Criminal Code purports to reserve the operation of a lottery scheme on the Internet to the provinces—i.e., only a province may conduct and manage online interactive gaming or betting.²³ More will be said below about this, about the provincial interest in Internet gaming, and about aboriginal gaming rights in Canada.

There are considerable differences in how the concept of “conduct and manage” has been interpreted by the various provinces. Certain provinces (e.g., Quebec and Manitoba) directly own and operate their land-based casinos without private-sector operators. Others (e.g., Nova Scotia) own the facilities while the casinos themselves are operated by private corporations through joint ventures. Ontario has a variety of approaches to its resort casino properties. For example, the Caesars Windsor casino is owned by the Ontario Lottery and Gaming Corp. (OLG) and operated by subsidiaries of Harrah’s Entertainment Inc. Another example in Ontario is Casino Rama, which is located on the territory of the Chippewas of Rama First Nation near Orillia. While the land for the casino, hotel and parking facilities is on the Chippewas’ reserve, the casino is operated by Penn National Gaming Inc. or its affiliates and is regulated by the OLG.²⁴

Current Land-Based Developments

The allocation of revenues from Casino Rama has given rise to much litigation in Ontario in recent years. In one action before the Superior Court of Justice in 2008 the Chippewas (formerly known as the Chippewas of Mnjikaning First Nation) asserted that they were entitled to 35 percent of the net gaming revenues from Casino Rama in perpetuity, in addition to a portion of gross revenues for casino operating expenses. The Chiefs of Ontario (representing the other 133 First Nations in Ontario), the Ontario government, and others were named as defendants.

The basis for the Chippewas’ claim was that the selection of its reserve for the casino facility established not just the location of the casino but also a permanent revenue-sharing formula to govern it. The Chiefs of Ontario, by contrast, claimed that the casino’s revenues were to be shared (after operating expenses and the province’s “win tax”) among all of the First Nations of Ontario, in respect of which the Chippewas were entitled only to their pro rata share, as only one Nation out of 134. The Chiefs of Ontario argued that this was consistent with Ontario’s objective of choosing only one aboriginal site in Ontario for such a commercial resort casino. Net profits generated by Casino Rama since 1996 are in excess of \$1.2 billion, so the stakes for all of the parties were high.

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The trial court handed down judgment on Sept. 15, 2008.²⁵ Justice Arthur Gans dismissed the Chippewas' claim for 35 percent of the net gaming revenues in perpetuity, holding that a reasonable person would not have concluded that a binding agreement on revenue sharing for all time emerged from the casino site selection process. The case was appealed to the Ontario Court of Appeal, which issued a dismissal this past January.²⁶ The appellate court found no merit in any of the Chippewas' grounds of appeal. This case is ongoing, however; the Chippewas have sought leave to appeal to the Supreme Court of Canada and, at the time of writing, that application for leave is being considered.

Also at the time of writing, there is a bill (S-226) before Parliament to prohibit the provinces from conducting and managing video lottery terminals or slot machines outside of casinos, race courses or betting theaters.²⁷ This would have the effect of eliminating VLTs from venues such as pubs, which are common in some areas of Canada. Bill S-226 would also limit opportunities for VLT and slot machine manufacturers in Canada. More broadly, by limiting the provinces' regulatory powers, the bill would re-insert the federal government into certain areas of gaming in Canada that had, by previous agreement, been left to the provinces. Ultimately, if the bill were to receive royal assent and become the thin edge of the wedge for anti-gaming interest groups in Canada, it could have negative effects for many involved in Canadian gaming. At this writing, S-226 is before the Senate's Standing Committee on Legal and Constitutional Affairs and its prospects for passage by both the Senate and the House of Commons during the current parliamentary session are uncertain.

Internet Gaming

It is within the realm of Internet gaming that the most interesting action in Canadian gaming is happening this year. Several provincial governments have expressed an interest in either initiating or expanding their online interactive offerings. However, the success of these initiatives may be limited by competition from private operators that are already in the gaming space and the strictures on the provinces contained in the Criminal Code. It is possible that governments and regulators may turn for inspiration to the Mohawks of Kahnawá:ke, a community of indigenous people south of Montreal that has developed a robust framework for licensing and regulating global Internet gaming pursuant to their aboriginal rights under Canada's constitution.²⁸

The Atlantic Lottery Corp. (ALC) is the provincial government gaming operator in the four Atlantic provinces. The ALC is co-owned, directly or indirectly, by the provinces of New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador. The British Columbia Lottery Corp. (BCLC) is British Columbia's provincial gaming operator. Both the BCLC and the ALC already offer certain games online, but both are also working with the Société des lotteries du Québec (Loto-Québec, the provincial operator in Quebec) to share and offer to their respective customers a common online gaming platform that includes poker. The Ontario government and the OLG have also indicated that the OLG is exploring entrance the Internet gaming marketplace.³⁰ Quebec and Ontario together account for more than 60 percent of Canada's population. Loto-Québec estimates that it can capture a "significant" part of the estimated \$80 million in Quebec Internet gaming revenues with its initiative.³¹

However, an earnest attempt to enter the Internet gaming market does not necessarily guarantee they'll be successful. In the case of poker alone, online interactive game offerings from the provincial operators are going up against international poker operators with established businesses in Canada. Top poker sites and networks including PokerStars, FullTilt Poker, and the Cereus and Cake networks have in excess of 50,000 cash players combined on a randomly selected Saturday afternoon, with myriad game types, tournaments, stake levels and other differentiators.

These companies have years of experience and huge marketing budgets behind them. It is by no means clear that the provincial operators, even by pooling their player liquidity and offerings, will be able to compete effectively.

In addition, and as explained earlier, the Criminal Code itself mandates that only "the government of a province, either alone or in conjunction with the government of another province," may conduct and manage games or schemes "operated through a computer, video device or slot machine." While there is a continuing dispute about the meaning of "conduct and manage," it at least seems clear that, aside from aboriginal i-gaming, the province must be the operating mind or master of the games or schemes on offer.³⁴

However, the *Reference Re: Earth Future Lottery*³⁵ decision may prohibit the acceptance of international customers by a provincial government operator of a lottery scheme. In that reference, the Supreme Court of the province of Prince Edward Island (PEI) considered a lottery scheme proposed to be run by a charitable organization on the Internet from Prince Edward Island and pursuant to a licence issued by PEI. Lottery tickets would be sold to residents of PEI, to residents of other Canadian provinces and territories, and internationally. The court held that the lieutenant governor in council of PEI did not have the authority under the Criminal Code to licence such a lottery, though the implications and nuances of that decision are still being debated eight years post-judgment. Accordingly, provincial government agencies may have limited scope to delegate the operation of Internet gaming to private operators (whether foreign or domestic); however, if they operate the games themselves, they may be unable to take international business while having to compete with international operators. This could be the functional equivalent of being made to fight with one hand tied behind one's back.

Perhaps the provinces should turn to the Mohawks of Kahnawá:ke for guidance on Internet gaming. The Kahnawá:ke territory is a community of approximately 8,000 native persons on the south shore of the St. Lawrence River, just outside of Montreal, Quebec. The territory occupies approximately 20 square miles.³⁶ As noted by the general counsel to the Kahnawá:ke Gaming Commission: "The Mohawks of Kahnawá:ke have consistently and historically asserted sovereignty and jurisdiction over their territory. They have never been defeated in battle and have never entered into a treaty with any government that waives or diminishes their sovereignty."³⁷

The Kahnawá:ke Gaming Commission (KGC) was established by the Mohawk Council of Kahnawá:ke in 1996. All of the council's members are elected by the community. The KGC's mandate is to regulate gaming and ancillary activities that take place within or from the Kahnawá:ke territory. Mohawk Internet Technologies (MIT) is a non-incorporated entity owned and controlled by the council. MIT operates and manages a state-of-the-art co-location facility in the territory that offers a variety of services to e-commerce clients, many of whom are private Internet gaming operators licensed by the KGC. Neither the KGC, the council, nor MIT operates an interactive online gaming site.³⁸ At the time of writing, the KGC appears to license 46 separate operators as interactive permit holders (holders of Client Provider Authorizations).

The Mohawks of Kahnawá:ke assert, with considerable cogency, the right to conduct their regulatory regime based upon a fundamental and dynamic aboriginal right to conduct, facilitate and regulate gaming. While certain politicians in Quebec, among others, have complained about the alleged illegality of this in the past, neither the provincial nor the federal government have taken material steps to enforce what they purport to be the law. Likewise, they haven't engaged with the Mohawks on the issue of Internet gaming and how the provinces might learn from or work with the natives of Kahnawá:ke. This is unfortunate, as Kahnawá:ke quite likely has much to teach Canadian legislators and

regulators about how a profitable and vibrant Internet gaming sector might be established and maintained.

As to whether placing a bet or gambling on the Internet *qua* player is a criminal offense in Canada, the law is not clear. It is possible that the prohibition on buying, taking or receiving, *inter alia*, a ticket for disposing of a property by a mode of pure chance⁴⁰ or the prohibition on “participating” in an unauthorized lottery scheme⁴¹ could apply to individuals playing on Internet gaming sites. Also, as pointed out earlier, it is prohibited to be found without lawful excuse in a common gaming house or a common betting house.⁴² Such houses require a “place,” which under the Criminal Code includes “any place,” whether “used permanently or temporarily.” Is an Internet poker room, for example, a “place” within the meaning of the code? There have been no decided cases on point, but the code definition of “place” is broad.

Still, such constructions seem strained. The current deliberations of a working group comprising officials from the sundry federal and provincial departments of justice appear to indicate that the current version of the Criminal Code would not support a prosecution for participating in online interactive gaming or betting as a player or bettor, *per se*.

Final Thoughts

The Canadian gaming market has an established legal and regulatory framework with respect to land-based gaming. This should not be taken to mean that there is not considerable variety in how gaming is conducted and managed by the various provinces. As the Casino Rama case makes clear, there are also still live issues in how the fruits from bricks-and-mortar casinos are to be shared. However, it is in Internet gaming that the key players in Canadian gaming might find the most opportunity. Those benefiting from online interactive gaming could include Native groups, provincial governments, third-party suppliers of such things as marketing advice and gaming software, and private international gaming, sporting bet and horse-racing operators. The next few years should be an interesting ride in the Canadian gaming market.

1 Approximately U.S. \$14.9 billion at the time of writing. HLT Advisory, “Economic Impact of the Canadian Gaming Industry: Key Findings Report,” (2008) at 8, online: The Canadian Gaming Association <www.canadiangaming.ca/media/uploads/pdf/60.pdf> (accessed June 12, 2010).

2 B. Rutsey, “Encourage responsible gaming—and clear thinking” *Canadian Gaming Business* 4:5 (October 2009) 6.

3 R.S.C. 1985, c.C-46.

4 *Ibid.*, s. 201.

5 *Ibid.*, s. 202(1).

6 *Ibid.*, s. 203(a).

7 *Ibid.*, s. 206(1)(d).

8 *Ibid.*, s. 462.31(1).

9 *Ibid.*, s. 204(1)(b).

10 *Ibid.*, s. 197(2).

11 Although such free-roll Internet schemes have not been thus far considered in the decided cases, it is settled law that, as an element of the offense of gaming (in the definition of “common gaming house” in subsection 197(1) of the Criminal Code), the participants must stand to lose money or money’s worth. See, e.g., *R. v. DiPietro*, [1986] 1 S.C.R. 250.

12 Code, supra note 3, s. 207(1)(h).

13 R.S.C. 1985, c.C-34.

14 *Ibid.*, s. 74.06(a).

15 *Ibid.*, s. 74.06(b).

16 *Ibid.*, s. 74.1(1)(a).

17 *Ibid.*, s. 74.1(1)(c). For example, subparagraph 74.1(1)(c)(iii) provides for an administrative monetary penalty of up to \$10 million (Canadian) in the case of a first-time occurrence by a corporation.

18 Code, supra note 3, s. 204.

19 *Ibid.*, s. 207(1)(a).

20 For example, paragraph 207(1)(b) of the Criminal Code allows for a charitable or religious organization to be licensed by the Lieutenant Governor in Council of a province (or by another duly authorized person to whom the authority

has been delegated by the Lieutenant Governor in Council) to conduct and manage a lottery scheme if the proceeds from the lottery scheme are used for a charitable or religious object or purpose.

21 Code, supra note 3, s. 207(4)(a).

22 *Ibid.*, s. 207(4)(b).

23 *Ibid.*, s. 207(4)(c).

24 Recently, the OLG indicated that it will be accepting proposals for a new operator at Casino Rama; the current contract with Penn National expires on July 31, 2011. N. Taylor, “Casino operations up for grabs” (June 4, 2010), online: *The Barrie Examiner* <www.thebarrieexaminer.com/ArticleDisplay.aspx?e=2609427> (accessed June 19, 2010).

25 *Chippewas of Mnjikaning First Nation v. Ontario (Minister of Native Affairs)*, [2008] O.J. No. 3578 (Sup. Ct.).

26 *Chippewas of Mnjikaning First Nation v. Ontario (Minister of Native Affairs)*, [2010] O.J. No. 212 (C.A.).

27 Bill S-226, *An Act to amend the Criminal Code (lottery schemes)*, 2d. Sess., 40th Parl., 2009, cl. 1 (2nd reading Sept. 29, 2009).

28 M. Marshall, “Kahnawake” in M. Balestra & T. Cabot, eds., *Internet Gambling Report*, 5th ed. (St. Charles: River City Group, 2002) 321 at 329-331. The constitutional basis for the aboriginal claim is in the *Charter of Rights*, the relevant provision of which states as follows: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” *Canadian Charter of Rights and Freedoms*, s. 35(1), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

29 Loto-Quebec, News Release, “The government authorizes the Société des lotteries du Québec to offer online gaming” (Feb. 3, 2010), online: <www.loto-quebec.com/corporatif/nav/en/news-room/pressReleaseDetail?Id=19981&Sujet=&Mois=&MotCle=> (accessed: June 19, 2010).

30 “Ontario may allow online gambling, McGuinty says” *The Canadian Press* (Feb. 23, 2010), online: <http://toronto.ctv.ca/servlet/an/local/CTVNews/20100223/ont_gambling_100223/20100223/?hub=TorontoNewHome.> (accessed June 19, 2010).

31 Loto-Quebec, supra note 29.

32 Supra note 19.

33 Supra note 23.

34 See, e.g., *Great Canadian Casino Co. v. Surrey (City of)*, [1998] B.C.J. No. 904 (S.C.), rev’d on other grounds [1999] B.C.J. No. 2495 (C.A.).

35 (2002), 215 D.L.R. (4th) 656 (P.E.I. S.C. (A.D.)), aff’d [2003] 1 S.C.R. 123.

36 Marshall, supra note 28 at 321.

37 *Ibid.* at 322.

38 *Ibid.* at 323.

39 Kahnawáke Gaming Commission, “Interactive Permit Holders List (by Operator),” online: <<http://gamingcommission.ca/interactiveOp.asp>> (date accessed: 18 June 2010).

40 Code, supra note 3, s. 206(4).

41 *Ibid.*, s. 207(3)(b).

42 *Ibid.*, s. 201(2)(a).

43 *Ibid.*, s. 197(1), definition of “place.”



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