BY STUART HOEGNER

Further Thoughts on Jurisdictional Issues in Canadian Internet Gaming:

How Far Is Close Enough?

In a cogent and thought-provoking article in this magazine this past April, Michael Lipton and Kevin Weber set out some thoughts on criminal jurisdiction as it relates to internet gaming in Canada[1]. The issue is whether and under what circumstances the Canadian Criminal Code will apply to foreign internet gaming operators doing business with Canadian residents. While the cases in which online operators have been prosecuted by the Crown to date have had ample physical connections to Canada, practitioners should not blithely conclude that there is little or no conceptual basis for a Canadian court reaching out and exerting jurisdiction where Canada is merely the location of the internet gaming or betting customer. Foreign iGaming operators must be cautious in examining the issue of when criminal sanctions will apply to transactions that may assume take place outside Canada.

THE BASIC ISSUE: WHEN WILL THE CODE APPLY?

As Lipton and Weber point out, the Code sets out a number of prohibitions on unlicensed gaming and betting, and they rightly emphasize the Code provides that only the provincial governments may conduct and manage gaming and betting operated on or through a computer or video device[3] - including by means of the internet.

However, the Code also states that, generally, no-one shall be convicted of "an offence committed outside Canada."[4] So, the crux of the jurisdictional question in gaming with regard to Canadian criminal law is this: what factors should be considered in determining whether an offshore internet gaming site is committing an offence that is not "outside Canada" and subject to the Code? Is it enough that there is an interactive gaming or betting customer in Canada transacting business with a non-resident operator where that operator has no other connection to Canada? Or must the enterprise taking bets or wagers have some further nexus to Canada other than having a customer here?

FROM THE DECIDED CASES, THE ANSWER IS UNCLEAR

Whether the Code will apply in these various scenarios has not been conclusively addressed and answered by the Canadian courts. The judiciary has provided a broad framework for how these sorts of cases will be addressed, but Crown prosecutors and the courts have not applied it in a case where only internet gaming customers are in Canada.

The legal analysis invariably starts with *R.* v. *Libman*[5], an Ontario fraud case. For an offence to be subject to the jurisdiction of Canadian courts under the Code, "a significant portion of the activities constituting that offence" must take place in Canada[6]. Expressed another way, there must be a "real and substantial link" between the offence and Canada[7]. In Libman, the accused directed a sales team in Toronto, Canada to telephone United States residents and induce them to purchase mining securities. The accused's employees were directed to misrepresent the quality and value of the securities; the shares were worthless. The Supreme Court of Canada had no trouble concluding there was a real and substantial link with Canada; the preparatory activities, the initiation of the scheme, the essential operating functions, and its directing minds were all in Toronto.

How many connections must there be - and of what kind - in order to establish a real and substantial link with Canada? In *Society of Composers, Authors and Music Publishers of Canada* v. *Canadian Association of Internet Providers*[8], the Supreme Court considered the Libman test in a *Copyright Act*[9] context. The issue in *SOCAN* was who should compensate musical artists for their Canadian copyright in music downloaded in Canada from a foreign country by means of the internet. *SOCAN* stands for the proposition that relevant connecting factors under Libman, as regards the internet, "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."[10]

Justice Binnie went on to state in *SOCAN* that the Supreme Court "has recognized, as a sufficient 'connection' for taking jurisdiction," circumstances where Canada is the country of transmission *or the country of reception*[11]. As to this latter point, the majority in *SOCAN* cited *Canada* v. *Canadian Liberty Net*[12], a contempt of court case relating to the broadcast of racist and anti-Semitic messages on a telephone number in the United States available to Canadian callers. In *Liberty Net*, the majority of the court concluded that so long as part of an offence takes place in Canada, Canadian courts may take jurisdiction[13]. It would seem the Canadian courts have left the door open to asserting jurisdiction in situations where the only connection to Canada is that individuals there receive messages through the internet; conceptually, at least, this could include foreign internet gaming operators that have no nexus to Canada other than their customers being present there.

How have Crown prosecutors applied these rules in Canadian internet gaming cases? Thus far, there has been minimal guidance. In *R.* v. *Starnet Communications*[14], the operation of an online gaming enterprise was conducted in and from British Columbia, and the game servers of the business were located in B.C. In *R.* v. *3370861 Canada Inc.*, the gaming enterprise had a physical office in St. Laurent, Quebec that was raided by the police, although the criminal information in that case referred to computers in Kahnawá:ke, Quebec. The accused in each case was charged under paragraph 202(1)(b) of the Code (among other things, keeping or employing any machine or device for gambling or betting). Both prosecutions resulted in guilty pleas and disgorgement of substantial proceeds of crime. The question of the potential reach of the Code to foreign private internet gaming operators was not addressed in either case.

'THE COUNTRY OF RECEPTION' ALONE MAY BE SUFFICIENT TO GROUND CRIMINAL JURISDICTION

Some appear to believe it's unlikely the jurisdiction of the Code extends to non-Canadian private internet gaming and betting operators that have no nexus to Canada other than having their customers here. For example, Morden Lazarus and Brian Hall rightly state that such operators have not thus far been subject to criminal prosecution by Canadian authorities. However, they go on to dismiss *SOCAN*'s relevance because it is a copyright case and therefore "easily" distinguishable on its facts from a criminal matter[15]. On this view, the Libman test will not apply to confer jurisdiction on a Canadian court where an internet gaming operator's customers are the only connection to Canada.

There are two reported decisions that pose problems for this view. The first is *SOCAN* itself, where the Supreme Court conflates at least three different contexts in drawing up its 'significant connection' formulation: a copyright case (*SOCAN*), a criminal fraud matter (Libman), and the contempt power inherent to courts of common law jurisdiction in Canada (*Liberty Net*). Nowhere has the court indicated it will grind the sand fine enough to distinguish between Canada as "the country of reception" being good enough on its own to support jurisdiction in a contempt case but not in a criminal matter. The preferred view is that the court has at least left open the possibility of returning to *SOCAN* as good authority for exerting jurisdiction in a criminal case brought against an internet gaming operator that only has customers or end users in Canada.

The second is *R.* v. *Stucky*[16] , a 2009 decision of the Ontario Court of Appeal. David *Stucky* operated a direct mail business in Ontario that sold lottery tickets and merchandise exclusively to people outside of Canada. Mr. *Stucky* was charged with 16 counts of making false and misleading representations "to the public" between 1995 and 2002, contrary to subsection 52(1) of the Competition Act[17]. On appeal by the Crown from acquittals, the Court of Appeal applied the Libman test and held that "the public" in this provision can include persons both inside and outside of Canada.

Stucky stands for the proposition that the Act will be read in a broad and purposive manner. The purpose of the criminal law, says the court, "is to protect the public from harm. That purpose is not achieved only by direct means, but also by underlining the fundamental values of our society and, in so doing, reinforcing the law-abiding sentiments of our society."[18] From *Stucky*, one can infer that a leading appellate court in Canada may well entertain a complaint under the Act when the facts are reversed and any objectionable conduct occurs outside of Canada and is merely received in Canada by means of the internet. Given the effect that

section 74.06 of the Act has on gaming and contests in Canada, this is important enough on its own; but it gets worse for those relying on Canadian courts not to assert jurisdiction in criminal internet gaming cases. In *obiter dicta,* the Court of Appeal remarked that the Libman test has "general application" outside of criminal matters and again conflated the test across a series of legal matters, invoking the *SOCAN* decision, among others[19]. There is no indication in *Stucky* - especially given some of its ringing purposive language - that the court will not, where it deems appropriate, apply the criminal law to a set of facts where only internet users and customers are in Canada and all other connecting factors are outside Canada.

It's not abundantly clear that the Canadian courts will rely on decisions like *SOCAN*, *Liberty Net*, and *Stucky* to support a finding that internet gaming customers in Canada, as such, will sufficiently ground criminal jurisdiction. Thus far, the case law, such as it is, appears to show that Canadian authorities will not be interested in pursuing prosecutions in those circumstances. However, prudent counsel will not assume that non-criminal judicial decisions cannot inform the courts' evolving views; on balance, the courts themselves have not made much of such distinctions. **CGL**

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1. *M.D. Lipton & K.J. Weber, "Host Server Location and Jurisdiction over Extraterritorial iGaming in Canada" Canadian Gaming Lawyer 4:1 (April 2011) 14, online: http://www.gaminglawmasters.com/articles/ExtraterritorialiGaminginCanada_2011.pdf (accessed 3 August 2011).*
2. *R.S.C. 1985, c. C-46 (the "Code").*
3. *Supra note 1 at 14. The Code ignores the question of whether Canada's First Nations have a right to conduct and manage gaming—whether land-based or online—based on constitutionally-recognized aboriginal and treaty rights. This is a critical issue in Canadian internet gaming law and it complicates the jurisdictional question, e.g., how will the Canadian courts perceive a private foreign gaming operator with no connections to Canada other than customers and game servers only in the Mohawk Territory of Kahnawá:ke, Quebec, government agencies of which license and regulate internet gaming? While this aspect of the matter is crucial, it does not change the fundamental jurisdictional questions and, because of space limitations, it will not be addressed in this article.*
4. *Supra note 2, s. 6(2). This rule has clear exceptions, e.g., certain sexual offences committed against children by a Canadian citizen or permanent resident outside of Canada will be deemed to have been committed in Canada (and therefore prosecutable in Canada) pursuant to subsection 7(4.1) of the Code.*
5. *[1985] 2 S.C.R. 178 [hereinafter Libman].*
6. *Ibid. at 213, La Forest J.*
7. *Ibid.*
8. *[2004] 2 S.C.R. 427 [hereinafter SOCAN].*
9. *R.S.C. 1985, c. C-42.*
10. *Supra note 8 at 456, Binnie J.*
11. *Ibid. at 457.*
12. *[1998] 1 S.C.R. 626 [hereinafter Liberty Net].*
13. *Ibid. at para. 52, Bastarache J.*
14. *(17 August 2001), Vancouver 124795-1 (B.C.S.C.).*
15. *M.C. Lazarus & B.T. Hall, "Mobile Gaming & the Foreign Operator Principle" (5th Annual Legal and Business Guide to Gaming in Canada, The Canadian Institute, 4 March 2010) at 4, note 7 [unpublished], online: http://www.lazaruscharbonneau.com/news/php6EwwnEpdf (accessed 3 August 2011).*
16. *(2009) 256 O.A.C. 4, rev'g [2006] O.J. No. 4933 (Sup. Ct. Jus.) [hereinafter Stucky].*
17. *R.S.C. 1985, c. C-34 (the "Act").*
18. *Supra note 16 at para. 27, Weiler & Gillese JJ.A.*
19. *Ibid. at para. 33.*