

# GAMING OFFENSES SERIOUS UNDER CANADIAN CRIMINAL CODE

By Stuart Hoegner



New federal regulations recently came into effect in Canada, designating sundry gaming offenses under the Canadian Criminal Code<sup>1</sup> to be “serious offenses.” These changes have two broad effects in respect to gaming offenses committed by a criminal organization: (1) they allow for increased penalties in respect to participating in the activities of and ordering the commission of offenses for the criminal organization; and (2) more powerful tools are available to Canadian authorities to both investigate and prosecute these offenses. These regulatory changes did not single out gaming offenses; offenses in respect to prostitution and drug trafficking were also included in the regulations.

The federal government’s objective in promulgating these regulations is the provision of “more flexibility in responding to the threats posed by organized crime groups.”<sup>2</sup> The Regulatory Impact Analysis Statement in the regulations does not suggest that organized crime in Canada is on the rise, although it does make the general observation that “all organized crime groups pose serious threats to Canadian society.”<sup>3</sup> Instead, the regulations emphasize that organized crime attracts “widespread attention from the public, law enforcement, Parliamentarians and provincial legislators.”<sup>4</sup> This perception and attention may be what is driving regulatory changes of this type in Canada.

## Regulatory Changes

On Aug. 4, 2010, new regulations to the Criminal Code were released in the *Canada Gazette*.<sup>5</sup> The regulations expanded the definition of “serious offense”<sup>6</sup> under the code to include several gaming offenses. Specifically, certain offenses under sections 201 (keeping a common gaming or betting house, among others), 202 (betting, pool-selling, book-making, etc.), 206 (offenses in relation to lotteries and games of chance), and 209 (cheating at play with an intent to defraud) are now deemed to be “serious offenses” under the code. These changes took effect as of July 13, 2010.

Pursuant to subsection 467.1(1) of the Criminal Code, serious offense means: an indictable offense under the code or any other act of Parliament for which the maximum punishment is imprisonment for five years or more; or, another offense that is prescribed by

regulation. It is the latter deeming provision that was invoked here. By deeming an offense to be a serious offense, the federal government need not bring the matter before Parliament as an amendment to existing legislation. There was no change to the Criminal Code *per se*; the regulations were promulgated by the Governor General in council with the Queen's ministers of the federal cabinet.

None of the gaming offenses now deemed to be serious offenses are offenses with custodial terms that approach the five-year threshold stipulated in the first part of the definition of serious offense; most provided for a maximum liability of two years imprisonment. In fact, the offense of a landlord, tenant or occupier knowingly permitting a place to be used for purposes of a common gaming house or a common betting house is a summary conviction offense<sup>7</sup>—summary conviction offenses are more minor than indictable offenses under the Criminal Code—in respect to which the general penalty is a term of imprisonment not exceeding six months or a fine of not more than C\$5,000, or both.<sup>8</sup> Notwithstanding that, subsection 201(2)(b) (owner, etc., permitting use) is now a serious offense under the code.

In order to take advantage of the increased penalties and enhanced investigatory and prosecutorial powers associated with serious offenses, there must be a criminal organization. Pursuant to subsection 467.1(1) of the code, "criminal organization" means:

- "A group of three or more persons ..., " for example, a corporation with three employees/directors;
- "... however organized ..., " a very broad stipulation that could include a partnership, joint venture, corporation, trust, or any other group of three or more persons irrespective of organizational type or structure;
- "... inside or outside Canada ..., " for example, a non-resident corporation with three employees operating offshore could qualify;
- "... that has as one of its main purposes or main activities the facilitation or commission of one or more serious offenses ..." —even if there is no objective of committing the offense, if one of the main activities (as opposed to the singular main activity and/or the principal activity) is the commission or facilitation of the offense, that will be sufficient. This goes to the *mens rea* of the alleged serious offense, but the *mens rea* of the underlying offense still must be proved. That is, if one of the main activities is the commission of the offense of keeping a gambling device in contravention of paragraph 202(1)(b) of the code, that will satisfy this part of the criminal organization test (if all of the other elements are proved), but the prosecutor must still prove that the accused knew the device was a gambling device and knowingly kept it;<sup>9</sup>
- "... that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group." A material benefit need not necessarily result, so long as it is "likely" to result. The provision is similarly broad to the extent that the receipt of the likely material benefit may be direct or indirect and need not be shared equally (or at all) by the group.

However, a criminal organization does not include a group of persons that forms randomly for the immediate commission of a single offense. The conjunctive language makes this exception very narrow indeed. If any of the elements are missing, there will be no exclusion from the criminal organization provisions. For example, if there is an immediate commission of a single offense, but the group is not "formed randomly," the exception will not be met.

It is anyone's guess how Crown prosecutors in Canada will seek to

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leverage these deeming provisions against gaming interests. However, the statutory language is broad and it is not inconceivable that they could be used to target foreign Internet gaming operators, for example. Consider a corporation with three employees incorporated outside of Canada and with servers inside Canada and having sundry online interactive games of mixed chance and skill (e.g., various versions of poker) available to Canadian residents by means of the Internet. If the jurisdiction of the Criminal Code extends to such an operator and if the keeping offense for any machine or device for gambling is made out, an aggressive prosecutor may well be able to take advantage of the prescribed designation and seek to prosecute the operator and its principals as a criminal organization.

**Effects**

If there is a criminal organization, increased custodial terms may be sought against those who are involved in the organization. For example, every person who, for the purpose of enhancing the ability of a criminal organization to facilitate or commit an indictable offense under the Criminal Code or any other act of Parliament, knowingly, by act or omission, participates in or contributes to any activity of the criminal organization, that person is liable to imprisonment for not more than five years.<sup>10</sup> Where a person is one of the persons comprising a criminal organization and that person knowingly instructs, directly or indirectly, anyone else to commit an offense under the Criminal Code or any other act of Parliament for the benefit of or at the direction of the criminal organization, that person is liable to imprisonment for life.<sup>11</sup>

In addition, a sentence imposed under any of these provisions is to be served consecutively to any other punishment imposed for an offense arising out of the same event or series of events.<sup>12</sup> This removes the normal discretion of the sentencing judge to decide whether sentences are to be served concurrently or consecutively. The consecutive sentence rule puts persons convicted of these offenses on the same footing as those convicted of certain terrorist offenses under the code.<sup>13</sup>

Procedurally, more tools are available to the authorities. For example, where an offense under the criminal organization participation/commission/instruction offenses is being alleged and investigated, the federal attorney general may make an *ex parte* application for production of a wide variety of tax records or tax-related materials,<sup>14</sup> including financial statements, ledgers, tax returns, books of account, or any other book, record, writing, return or other document that may be of assistance “for purposes of the Income Tax Act.”<sup>15</sup> Also, the standards for demonstrating the necessity of intercepting private communications (including wire-tapping) between individuals is relaxed with respect to criminal organizations. In an application for authorization to intercept where criminal organizations are at issue, the police need not demonstrate, for example, whether other investigative procedures have been tried and have failed or urgency associated with the matter.<sup>16</sup>

One final point is worth noting. In August 2010, Internet gaming players resident in Canada began receiving notifications from a number of online interactive gaming sites advising them that Canadian residents would no longer be permitted to play on the sites as of Sept. 24, 2010. This ban was ascribed to “new regulations of the British Columbia Lottery Corp., Loto-Québec and the Atlantic Lottery Corp.”<sup>17</sup>

GTECH Corp. is a business unit of Lottomatica Group S.p.A. that is developing online interactive gaming software for certain provincial gaming operators in Canada. The GTECH segment includes Boss Media AB, and some of these notifications came from sites using

Boss Media software. The rules referred to in the notifications may have been terms and conditions in place as between GTECH and the provinces that presumably call for any non-Canadian, private operator using GTECH software (and its related and affiliated brands) to exclude customers resident in Canada. Any such “new regulations” were not the regulations discussed in this article, which were issued by the federal cabinet, not provincial gaming operators. Furthermore, the Sept. 24 date appears to be irrelevant insofar as the deeming regulations with respect to gaming offenses and the Criminal Code are concerned.

**Conclusion**

By deeming certain gaming offenses, among others, to be serious offenses, the new regulations potentially allow groups committing those gaming offenses to be characterized as criminal organizations. Such a designation allows for increased punishments in respect of participating in the activities of and ordering the commission of offenses for the criminal organization and opens up a broader investigatory and prosecutorial toolkit to Canadian authorities. While gaming offenses were not singled out, they form an important part of the regulatory changes. Time will tell how aggressively Canadian prosecutors, police and governments will use the new tools at their disposal.

1 R.S.C. 1985, c. C-46.  
 2 Regulations Prescribing Certain Offences to be Serious Offences, S.O.R./10-161 at 1432.  
 3 Ibid.  
 4 Ibid.  
 5 Ibid., s. 1.  
 6 Supra note 1, s. 467.1(1).  
 7 Ibid., s. 201(2)(b).  
 8 Ibid., s. 787(1).  
 9 See e.g., *R. v. Kent*, [1994] 3 S.C.R. 133.  
 10 Supra note 1, s. 467.11(1). Interestingly, this provision and the commission of offense for criminal organization provision (subsection 467.12(1) of the Criminal Code) is confined to indictable offenses, which does not include paragraph 201(2)(b), (landlord, tenant or occupier knowingly permitting a place to be used as a common gaming house or a common betting house, discussed above), irrespective of the fact that that knowing permission by an occupier is now a serious offense under the code. As a corollary, note that the gaming offense need not be the offense in respect to which the person is charged with participating under this subsection.  
 11 Ibid., s. 467.13(1). Note that any offense (not just an indictable offense) may be the subject of the instruction under this provision.  
 12 Ibid., s. 467.14.  
 13 See e.g. *ibid.*, s. 83.26.  
 14 Ibid., s. 462.48(1.1)(c).  
 15 Ibid., s. 462.48(2)(c).  
 16 Ibid., s. 185(1.1)(a).  
 17 “Canadian Online Gamblers Banned By Some Operators,” (2010), online: <[www.gamingbiz.com/news/tag/canadian-gambling-regulations/](http://www.gamingbiz.com/news/tag/canadian-gambling-regulations/)> (accessed Nov. 8, 2010).



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