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Case Comment on *Bérubé* v. *Rational Entertainment Ltd.*

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A CURIOUS CASE came out of the Ontario courts last fall that may be a good omen for offshore private operators offering Internet gaming services to Canadian players. If the approach of other appellate courts is the same as in this case, operators could find themselves the beneficiaries of a general hands-off approach by Canadian courts based upon a lack of jurisdiction and a disclaimer of liability for illegal use of online gaming software.

On Oct. 7, 2010, the Ontario Superior Court of Justice (Divisional Court) released its decision in *Bérubé* v. *Rational Entertainment Ltd.*[1] Clotilde Bérubé was the plaintiff. She brought an action against the owner of PokerStars®, among others, for money lost playing poker on <www.pokerstars.com> (the Site) and for damages. The plaintiff's claim—filed in summer 2009—proceeded quickly through the courts, even by Small Claims Court standards; in the fall of 2010, Ms. Bérubé's appeal was dismissed by the Divisional Court. While *Bérubé* is a lower-court judgment (even at the Divisional Court level), with limited precedential value, and although it is only a part of a larger picture as far as the enforceability of Internet gaming debts in Canada, the decision signals a reluctance by the Ontario courts to interfere with private Internet gaming obligations, even where the operation of the games themselves are in a grey area under applicable Canadian law. While operators will no doubt cheer this development, players may not universally welcome this deference to contractual terms.

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OVERVIEW

Bérubé arose from a case in the Ottawa-Carleton Small Claims Court. Ms. Bérubé started her action on Aug. 27, 2009, naming Rational Entertainment Limited (Rational),[2] the Isle of Man Gambling Supervision Commission (the GSC), and the Isle of Man Department of Trade and Industry (the DTI) as defendants. Ms. Bérubé asserted that she "invested" US$983.45 on the Site between late July and early August of 2009. In fact, she deposited this amount into her virtual account on the Site (through her credit card) and lost it playing one or more variations of poker against other PokerStars® players. Before depositing, though, Ms. Bérubé was compelled to register with an account on the Site, agree to the Site's End User License Agreement (the Agreement) by means of toggling a checkbox beside text stating "I have read and understood the End Users [*sic*] License Agreement published on the PokerStars website," and download the software allowing participation in poker games on the Site.[3] Rational alleged that if the checkbox were not toggled, the plaintiff would not have been able to create the account and would not have been able to play on the Site (and, by extension, lose her stake).[4]

The preamble and paragraphs 1.2 and 13 of the Agreement stated as follows:

[1][2010] O.J. No. 4328 (Can.), *aff'g* [2009] O.J. No. 5619 (Div. Ct.) (Can.).
[2]The Divisional Court noted that the proper name of the defendant was Rational Entertainment Enterprises Limited. *Bérubé*, [2009] O.J. No. 5619, ¶¶ 2, 5 (Can.). Rational owns and operates the Site—*see* <http://www.pokerstars.com/poker/room/tos/> (last visited Dec. 28, 2010).
[3]*Bérubé*, *id.* at ¶ 6.
[4]*Id.*

> This end user license agreement (the "Agreement") should be read by you (the "User" or "you") in its entirety prior to your use of PokerStars' [*sic*] service or products. Please note that the Agreement constitutes a legally binding agreement between you and Rational Entertainment Enterprises Limited (referred to herein as "PokerStars", "us" or "we") which owns and operates the Internet site found at www.pokerstars.com (the "Site"). In addition to the terms and conditions of this Agreement, please review our Privacy Policy, the Poker Rules, and the VIP Club terms and conditions as well as the other rules, policies and terms and conditions relating to the games and promotions available on the Site as posted on the Site from time to time, which are incorporated herein by reference, together with such other policies of which you may be notified of by us from time to time.
>
> By clicking the "I Agree" button below as part of the software installation process and using the Software (as defined below), you consent to the terms and conditions set forth in this Agreement, the Privacy Policy and the Poker Rules as each may be updated or modified from time to time in accordance with the provisions below and therein …
>
> GRANT OF LICENSE/INTELLECTUAL PROPERTY…1.2. The Software is licensed to you by PokerStars for your private personal use. Please note that the Software is not for use by (i) individuals under 18 years of age, (ii) individuals under the legal age of majority in their jurisdiction and *(iii) individuals connecting to the Site from jurisdictions from which it is illegal to do so*. PokerStars is not able to verify the legality of the Service in each jurisdiction and it is the User's responsibility to verify such matter …
>
> 13. GOVERNING LAW The Agreement and any matters relating hereto shall be governed by, and construed in accordance with the laws of the Isle of Man. *Each party irrevocably agrees that the relevant courts of the Isle of Man shall have exclusive jurisdiction in relation to any claim, dispute or difference concerning the Agreement and any matter arising therefrom* and irrevocably waives any right that it may have to object to an action being brought in those courts, or to claim that the action has been brought in an inconvenient forum, or that those courts do not have jurisdiction. [Emphasis added.][5]

This is reasonably common, if not standard, language in the interactive gaming industry, and it would prove to be critical to Rational's success in the case.

Rational was (and continues to be) licensed by the GSC to provide online poker gaming services. Rational had no physical presence in Ontario.

Ms. Bérubé's pleadings were somewhat lacking in cogency, but the specific causes of action asserted by the plaintiff appeared to boil down to the following:

1. the Agreement was contrary to public policy because Rational was not licensed to operate the Site in Canada,[6] therefore the Agreement should not be enforced by the courts and the plaintiff should recover damages; and,
2. Rational defrauded the plaintiff by rigging the games on the Site and cheating her out of her stake.

There appears to have been no evidence tendered remotely establishing that Ms. Bérubé was defrauded. The substance of the courts' decisions in *Bérubé* therefore focused on the first cause of action. The plaintiff did not file any affidavit evidence at first instance.[7]

The plaintiff sought aggregate damages of Can$7,200.00, being what she described as the Canadian dollar equivalent of her initial deposit on the Site, the value of her time spent investigating the de-

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[5]*Id.* at ¶ 7 D.G. Power J.

[6]Contrary to subsections 197(1) and 201(1) of the Criminal Code, R.S.C. 1985, c. C-46 (Can.) (the Code) (keeping a common gaming house).

[7]*Bérubé*, [2009] O.J. No. 5619, ¶ 19 (Div. Ct.) (Can.).

fendant and in discussions with them, and punitive and aggravated damages.[8]

After the exchange of initial pleadings, Rational moved before the Small Claims Court to dismiss the plaintiff's claim based on the court's lack of jurisdiction. Rational was based and licensed in the Isle of Man and the Agreement specifically set out that any dispute would be governed by the laws of the Isle of Man and that the courts of the Isle of Man would have exclusive jurisdiction in relation to any "claim, dispute or difference concerning the Agreement and any matter arising therefrom." The court quoted the following passage from *Sarabia* v. *Oceanic Mindoro*,[9] a British Columbia Court of Appeal case addressing forum selection in a labor dispute between a professional seaman and his employers:

> Since forum selection clauses are fundamentally similar to arbitration agreements…there is no reason for (them) not to be treated in a manner consistent with the deference shown to arbitration agreements. Such deference… achieves greater international commercial certainty, shows respect for the agreements that the parties have signed, and is consistent with the principle of international comity.[10]

The court concluded that, as Ms. Bérubé and Rational had agreed that the Isle of Man courts would have exclusive jurisdiction, Rational should not be forced to litigate in Canada. The Small Claims Court dismissed the claim for lack of jurisdiction and fixed costs at Can$250.00.[11]

In Ontario, an appeal lies to the Divisional Court as of right, *inter alia*, from a final order of the Small Claims Court in an action for the payment of money in excess of Can$500.00.[12] The plaintiff appealed.

THE DIVISIONAL COURT'S ANALYSIS

The proceedings before the Divisional Court took place in two stages. First, Rational brought a motion to quash Ms. Bérubé's appeal. This was decided by a single judge of the Divisional Court, who issued an order granting the motion and quashing the appeal. Second, Ms. Bérubé appealed the order of the single judge quashing the appeal; that appeal was heard by a three judge panel of the Divisional Court.

In the first hearing before Justice D.J. Power, Rational brought a motion to quash the appeal pursuant to subsection 134(3) of the Ontario *Courts of Justice Act*.[13] Citing controlling case law from the Supreme Court of Canada and the Ontario Court of Appeal, Justice Power held that Ms. Bérubé's appeal should be quashed because it was manifestly devoid of merit.[14]

The appellant claimed that paragraph 13 of the Agreement (the governing law and attornment clause) didn't apply to her and, indeed, that her cause of action had nothing to do with the Agreement, i.e., that it was founded outside of a contractual claim. Justice Power held that Ms. Bérubé's claim clearly concerned the Agreement; it was the operating instrument between the parties and the reason why she was able to deposit into her PokerStars® account and download poker software from the Site. The language of paragraph 13 of the Agreement was wide and applied not just to "any claim, dispute or difference concerning the Agreement," but to "any matter arising therefrom," which Justice Power held clearly included the present claim, appeal, and motion to quash.[15] Justice Power found that the decision of the Small Claims Court was correct. For good measure, he expressly endorsed the

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[8]There are a number of problems with the quantum and heads of damage and their specific relationship to the underlying causes of action that are unaddressed in the pleadings and that were (perhaps wisely) left alone by the Ontario courts. For example, arguably, the plaintiff's claim is for damages based on restitution, but nowhere does the plaintiff justify the extensive damages sought over and above the initial deposit on the Site. If the claim is framed in tort (based on the alleged fraud), punitive or exemplary damages are permissible in concept, but only where an expression of "outrage at the egregious conduct of the defendant" is warranted. *See Hill* v. *Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 1208–1209 (Can.). There is no discussion of exactly why punitive damages are claimed here, let alone how they are calculated. As the plaintiff's claim and appeals were dismissed for other more fundamental reasons, this point will not be explored further here, but it gives some indication of the incoherent nature of the plaintiff's claims and allegations in the first place.

[9][1996], B.C.J. No. 2154 (Can).

[10]*Id.* at ¶ 33, Huddart, J.

[11]The court also dismissed the claims as against the GSC and the DTI, holding that those claims had no hope of success and that the plaintiff had failed to show any reasonable cause of action as against them. No appeals were taken with respect to the dismissals of the claims as against the GSC and the DTI.

[12]*Courts of Justice Act*, R.S.O. 1990, c. C.43, § 31(a) (Can.).

[13]*Id.*

[14]*Bérubé*, [2009] O.J. No. 5619, ¶ 23 (Div. Ct.) (Can.).

[15]*Id.* at ¶ 26.

deference to forum selection clauses accepted by the trial judge and propounded by Rational, calling it well-settled law in Ontario.[16]

Justice Power also made an order requiring security for costs to be tendered by the appellant in case his order to quash the appeal was overturned. In February of last year, Justice Power fixed the costs of the appeal (due from Ms. Bérubé to Rational) at Can$3,500.00.[17]

Both Divisional Court orders (allowing the motion to quash and the order for security for costs) were appealed to a full three-judge panel of the court. The hearing before that panel took place on Oct. 5, 2010, and the Divisional Court's decision was released two days later.

This panel focused on the prohibitions in the grant of license in paragraph 1.2 of the Agreement—specifically, the bar on use of the software on the Site by "individuals connecting to the Site from jurisdictions from which it is illegal to do so." The Divisional Court held as follows:

> We find that this clause is a complete answer to the appellant's submissions concerning the enforceability of an illegal contract or one that is prohibited by statute. The provisions of s. 1.2 of the end user licence agreement are abundantly clear. Until the appellant verified the legality of PokerStars in this jurisdiction, the end user licence agreement obligated her not to participate in poker games on PokerStars.[18]

Therefore, it was incumbent on the appellant, pursuant to the terms of the Agreement, to perform her own investigation to determine the legality of Internet poker in Canada (whatever that means—more on this point below). Once she downloaded the software, deposited, and played on the Site, she was taken to have completed her due diligence on "the legality of PokerStars in this jurisdiction." After that, she had to respect the governing law and attornment clause; her exclusive judicial remedy, if any, was before the courts of the Isle of Man.

The Divisional Court (correctly) noted that the standard of review on appeals before it as to questions of law was correctness, and that the standard of review on findings of fact was palpable and overriding error. The court found that Justice Power did not make any palpable and overriding error in his factual findings that: a) the appeal was manifestly devoid of merit; and b) the security for costs order was appropriate in the circumstances, having regard to the Ontario Rules of Civil Procedure.[19] The Divisional Court awarded costs to the respondent on this appeal in the amount of Can$3,000.00.[20]

COMMENTS

This package of decisions from the Ontario courts is a victory for offshore poker Web site operators taking wagers from Canadian residents. Terms and conditions on such a site that clearly put the onus on the player to determine the legality of the games in which she is participating, and that have an unambiguous governing law clause to remove jurisdiction overseas in case of a dispute, should—based on the reasoning of the Divisional Court—provide a complete answer to any civil litigation claim in Ontario. To the extent that they have not done so already, poker (and other gaming and betting) operators will want to review their applicable terms and conditions to ensure conformity with Rational's formulation.

However, it should be remembered that this decision has limited application and precedential value. Small Claims Court decisions are not uniformly considered good authority in Ontario. Even in the case of the Divisional Court, all of its members (in this case) were judges of the Ontario Superior Court of Justice. Their decisions, while cogent and convincing, do not have the same level of authority as judgments of the provincial Court of Appeal, whose decisions are binding authority in Ontario. It is also uncertain how this precedent will travel, i.e., how it may be used and applied in the other nine provinces and three territories in Canada. While *Bérubé* may, again, be seen as convincing authority outside of Ontario, it is certainly not binding.

Furthermore, as a practical matter, how the courts are willing to adjudicate these kinds of disputes is just one part of a larger picture. Another important element is how credit card charges incurred on or directed at online interactive gaming are addressed and processed by Canadian financial institutions.

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[16] *Id.* at ¶ 27.
[17] *Bérubé*, [2010] O.J. No. 524 (Div. Ct.) (Can.).
[18] *Bérubé*, [2010] O.J. No. 4328, ¶15 (Can.).
[19] R.R.O. 1990, Reg. 194 (Can.).
[20] Note that this was in addition to the costs awards made by the Small Claims Court and by Justice Power.

Several credit cards issued in Canada still permit deposits to foreign private online gaming accounts, whether as cash advances or otherwise. With some credit cards, gaming chargebacks (i.e., a denial of the credit card amount charged by the cardholder) are treated differently from other categories of chargebacks because of a purported high level of fraud in the Internet gaming industry. With other cards, online gaming chargebacks are treated no differently than other types of chargebacks. Substantially all institutions will have regard to the cardholder's chargeback history in some measure when assessing a denial of a charge by that cardholder.

There is no discussion in the decisions about whether Ms. Bérubé considered denying the charges made on her credit card. By her own admission in the pleadings before the court, she made the deposits to her PokerStars® account, so such a claim would have been fraudulent. However, a less scrupulous person than the appellant might very well avail himself of the chargeback route. Happily for Internet gaming operators, many of those financial institutions in Canada that accept I-gaming transactions will contest the chargeback, provided that the merchant can demonstrate through established procedures and personal data collection that the charge was, in fact, incurred. Accordingly, from a practical perspective, Internet gambling transactions made using credit cards in Canada are already being enforced on behalf of I-gaming merchants, irrespective of the uncertainty about the legality of those merchants taking Canadian business.

This leads to an interesting part of the last Divisional Court judgment. Subparagraph 1.2(iii) of the Agreement was key to the court's reasoning. Recall that this clause stated that the software running on the Site was not to be used by "individuals connecting to the Site from jurisdictions in which it is illegal to do so." But what does this provision mean? To what does "it" refer? On a plain reading of the clause, it appears to say that players must verify that they are permitted to play on the Site. That is, they must ensure that it is not illegal to "connect" to the Site to play poker. In addition to being consistent with the wording of the Agreement, this interpretation has the virtue of being within a player's span of control, the player is inquiring into the legality of her own actions, not of the actions or business of other parties. While the law in Canada is not completely clear on the point, the current provisions of the Code may not support the prosecution of a customer playing a game of online interactive poker on a Web site from Canada.[21]

However, the Divisional Court appears to think the clause means something different, although we cannot be entirely sure. In the crucial part of the holding, the court said that, "[u]ntil the appellant verified the legality of PokerStars in this jurisdiction, the end user licence agreement obligated her not to participate in poker games on PokerStars." While vague, "verified the legality of PokerStars" appears to be something different from the appellant verifying that her own conduct (as a player) was lawful. It sounds like an obligation of Ms. Bérubé's to verify that the Site was operating legally in Canada. This is a much more involved question under Canadian law and it may very well be beyond the reasonable capacity of the appellant—or any player—to answer.

The interpretation of the clause matters. If the player needs to verify the legality of her own play, that seems reasonable enough and, indeed, it's arguably legal, in any event, to connect from Canada and play on the Site. If the player needs to inquire about PokerStars®'s legal position in Canada, clearly that's the bigger issue, but is it fair for Rational to put that burden on its players and for the court to sanction it? A player might reasonably ask: what question do *I* have to answer? What's required of *me* to satisfy my obligations under the Agreement? The point is left unexplored by the court.

Bérubé throws up some practical issues for an offshore operator actually selecting a jurisdiction. On the facts, Rational was licensed and operating in the Isle of Man, and chose the Isle of Man for the governing law and attornment clause. However, is it open to others to select governing law, venue, and/or attornment outside of the jurisdiction in which they are licensed? Possibly, but the prudent operator wishing to exploit these decisions will want to place itself on all fours with the facts and holding of *Bérubé* and select a jurisdiction that is the same as where the operator has a physical nexus and is licensed. Another issue is whether that jurisdiction has sufficient and robust enough laws and procedures to handle a judicial dispute. While a Canadian court will generally defer to the

[21] *See e.g.,* S. Hoegner, *The Canadian Gaming Market*, CASINO ENTERPRISE MANAGEMENT, Aug. 2010 38 at 41.

governing law of a private contract, courts will be more hesitant to enforce a governing law clause if the selected jurisdiction lacks the institutions and procedures that can reasonably give a potential plaintiff some redress. A foreign private operator will want to select and understand the governing law carefully to ensure that it's sufficiently robust, because, once chosen, the operator may be stuck with it.

Will players welcome this approach to Internet gaming terms and conditions by Canadian courts? One theory (consistent with the Divisional Court's view) is yes; it leads to stability and certainty in contractual relationships and respects the parties' intentions and foreign laws. Those virtues should be good both for the operator and the player. It may not matter to most players. However, what of the case where a player is cheated by an Internet poker site? Does *Bérubé* create an access to justice problem by compelling players to go to a far-off jurisdiction to sue? Perhaps not—the governing law and attornment are set out before downloading the software, before depositing any funds, and before playing poker. It establishes the framework to address all disputes, including any fraud in the games. It should not be forgotten that sufficiently robust and responsible regulators should be available to respond to player complaints and enforce their rights to some degree. In the end, however, players may have mixed feelings about the approach to jurisdiction in these decisions.

Bérubé is an interesting case that the operators of online interactive poker Web sites and their Canadian players will want to keep in mind. Operators should be happy with the result, even if the decision may have limited applicability in other Canadian provinces and in Ontario. In considering the legality of facilitating Internet wagers from Canadian poker players, foreign private operators will want to have regard to how credit card deposits by Canadian residents (like the deposits made by Ms. Bérubé) are treated by financial institutions and will want to select their governing law carefully. Players, on the other hand, may be left wondering what due diligence they are supposed to perform before signing up for an account and depositing on a poker Web site. They may also not see the Divisional Court's approach to an offshore Web site's terms and conditions as an unqualified good thing in the event that they have a dispute with the site.