

# **THE LEGALITY OF** **INTERNET GAMING IN** **CANADA**

**by Michael D. Lipton, Q.C.  
and Kevin J. Weber**

**March 2005**

**Elkind, Lipton & Jacobs LLP  
Barristers & Solicitors  
One Queen St. East, Suite 1900  
Toronto, Ontario M5C 2W6**

**Telephone: (416) 367-0871  
Facsimile: (416) 367-9388**

**E-mail: [MDLIPTONQC@AOL.COM](mailto:MDLIPTONQC@AOL.COM)**

## **DISCLAIMER**

**This material, and the conference at which it was presented, were prepared and delivered for informational purposes only. Neither this document nor the accompanying presentation made at the said conference constitute legal, financial, tax, or accounting advice, or advice on the suitability or profitability of any investments. This document is copyrighted by Elkind, Lipton & Jacobs LLP and may not be copied or disseminated to third parties without our written consent.**

**Every effort has been made to achieve accuracy in the information provided. However, the law constantly changes and is subject to differing interpretations, and nothing in this document or the accompanying presentation constitutes legal advice. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. We are not responsible for any damages resulting from inaccuracy or omission.**

**Neither attendance at the said presentation, nor the receipt or distribution of this document in any way constitutes the formation of a solicitor-client relationship between Elkind, Lipton & Jacobs LLP and the attendees of the presentation and/or the recipients of this document, until and unless a retainer agreement has been executed and delivered and the conditions contained therein have been satisfied.**

# Criminal Prohibitions Against Gambling in Canada

- Part VII of the Canadian Criminal Code (“Code”) makes all activities related to operating or acting in support of a commercial betting enterprise an offence, unless it is an enterprise licensed by a provincial government
- Section 201 makes it an offence to keep a common gaming house or a common betting house, or to be found in such a place

# Criminal Prohibitions Against Gambling in Canada

- Section 202(1) creates offences re betting (waging stakes on external events); Section 206 creates offences re lotteries or gaming (waging stakes on one's own competitive activity)
- Although these provisions were enacted to deal with “bricks & mortar” gambling operations, they may be applied to enterprises that offer casino-style games or sportsbooks over the Internet

# Criminal Prohibitions Against Gambling in Canada

- Poker – the fastest-growing area of online gambling at the moment – poses an interesting question. If poker is “gaming,” rather than “betting,” s. 202 shouldn’t apply
- However, a number of the provisions that relate to “gaming” in s. 206 shouldn’t apply either, as they only apply to games of pure chance. Poker is a game of mixed skill and chance (*R. v. Grossman*, [1991] O.J. No. 869 (Ont. Prov. Ct.))
- Prosecutions relating to poker can still be brought under s. 201 (keeping a common gaming house)

# Exceptions to Prohibition

## Government-Operated Computer Gaming

- Internet gaming (a “lottery scheme...operated on or through a computer”) may only be conducted by provincial government– ss. 207(1)(a) and (b) and 207(4) of the Code
- Subsection 207(4) specifically provides that a provincial government may conduct and manage a lottery scheme on or through a computer, but may not license others to do so

# Exceptions to Prohibition

## Government-Operated Computer Gaming

- Governments at considerable disadvantage vis-à-vis existing offshore sports-books – cannot offer betting on single sport events – only multiple-bet parlays are allowed
- At present, only the Atlantic Lottery Corporation and the British Columbia Lottery Corporation offer online gaming

# Exceptions to Prohibition

## “Private Bets”

- Section 204(1)(b) – sections 201 and 202 (i.e. “betting”) offences N/A to “a private bet between individuals not engaged in any way in the business of betting”



# Exceptions to Prohibition

## “Legal” TAB on Horse-Races Via Internet – Canada

- “TAB” – Telephone Account Betting
- Pari-mutuel horse racing is the one form of betting regulated by the federal government, as opposed to the provinces
- Specific exemptions for pari-mutuel horse-racing are created by section 204 of the Criminal Code, and regulated by the Canadian Pari-Mutuel Agency, under the federal Ministry of Agriculture

# Exceptions to Prohibition

## “Legal” TAB on Horse-Races Via Internet – Canada

- Pursuant to regulation, telephone betting on horse races has been allowed for a while now
- 2003: Minister of Agriculture after consulting with stakeholders, amended regulation to redefine telephone betting: “telephone” was now to include “any telecommunication device”
- This clarified the regulations re TAB and accessing TAB accounts through the Internet, thereby giving pari-mutuel associations the right to operate Internet horse race betting

# Exceptions to Prohibition

## “Legal” TAB on Horse-Races Via Internet – Canada

- January 2004: Woodbine Entertainment Group launched a new racetrack betting website
- August 2004: The Ontario Racing Commission (“ORC”) challenged the validity of federal regulatory change, arguing that the Minister of Agriculture cannot, by regulation, make far-reaching changes to the definition of “telephone”
- November 2004: ORC withdraws its challenge
- By comparison, the right of provincial governments to run gaming through a computer is explicit in the Criminal Code

# Internet “Exchange” Betting

- Individuals bet with each other – no bookmaker
- Relies on players accepting bets offered by other users on the exchange, or by players setting their own odds. Result is a market similar to a stock exchange
- To function, exchanges require many players and high traffic to create reliable market

# Internet “Exchange” Betting

- Betfair – major player, matching approximately \$80-million U.S. in wagers/week, taking small commission (as low as 3%) from each bet.
- Betfair does not currently accept bets from U.S. residents – it does, however, accept bets from Canadians. However, other betting exchanges plan to expand into U.S. market

# Internet & Criminal Jurisdiction

## “Connecting Factors” Test

- Could Canadian courts exert jurisdiction to prosecute casinos and sportsbooks conducted over the Internet, where the servers are offshore, and only the bettors are in Canada? The law is uncertain
- Criminal offence subject to prosecution in Canada if “a significant portion of the activities constituting the offence” took place in Canada, establishing a “real and substantial” link between the offence and this country (***R. v. Libman***)

# Internet & Criminal Jurisdiction

## “Connecting Factors” Test

- ***Libman***: telephone fraud scheme operated from Canada that victimized U.S. residents, money sent to offices in Central America – accused went outside Canada to meet with associates and receive his share of proceeds, some of which went back in Canada – accused convicted
- ***Libman*** precedent would allow for conviction for acts undertaken in Canada in pursuit of a commercial gaming enterprise, even where Canadians could not place bets on the site

# Internet & Criminal Jurisdiction

## “Connecting Factors” Test

- ***R. v. Chapman***: Ontario Court of Appeal held that a fraudulent scheme initiated and realized in Canada was an offence committed in Canada, even though inducements made under the fraud were only extended to persons outside Canada
- ***R. v. Ede***: trial judge willing to convict accused for providing information relating to pool-selling to Canadians, although both the pool-selling and the sporting events upon which it was based occurred in the U.K. (ss. 202(1)(i) of the Code)



# Internet & Criminal Jurisdiction

## *SOCAN v. Canadian Association of Internet Providers*

- “Real and substantial connection” test has not yet been applied to Internet betting, but for an idea of courts’ thought re Internet activity generally, see: ***SOCAN v. Canadian Association of Internet Providers***
- Supreme Court of Canada: “[i]n terms of the Internet, relevant connecting factors would include the *situs* of the content provider, the host server, the intermediaries and the end user”

# Internet & Criminal Jurisdiction

## *SOCAN v. Canadian Association of Internet Providers*

- **SOCAN** involved applying the federal *Copyright Act* to music files exchanged over the Internet
- **SOCAN** wanted to impose a tariff on Internet service providers (ISPs) pursuant to the *Copyright Act*, and it wanted to extend the Act's reach beyond Canadian borders, to offshore websites that serve Canadians
- While court ruled against **SOCAN**, it explicitly left open the possibility of imposing Canadian law on websites that communicate with Canadians

# Internet & Criminal Jurisdiction

## *SOCAN v. Canadian Association of Internet Providers*

- Supreme Court de-emphasized the importance of the location of the host server as a factor, going on to state that “[t]he weight to be given to any particular factor will vary with the circumstances and the nature of the dispute”
- In the following passage, the court laid the theoretical groundwork for exerting jurisdiction in the classic Internet betting scenario, where transmission of online betting originates offshore, and is only received in Canada:

# Internet & Criminal Jurisdiction

## SOCAN v. Canadian Association of Internet Providers

- *“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...[g]enerally speaking, this Court has recognized as a sufficient "connection" for taking jurisdiction, situations where Canada is the country of transmission (Libman, supra) **or the country of reception...**” [emphasis added]*

# Internet & Criminal Jurisdiction

## *Advertising Internet Betting*

- Some Canadian media advertise offshore-based Internet betting to Canadian residents – ads in print, radio, signs at sporting events
- Advertising or otherwise giving notice of “any offer, invitation or inducement” to bet on the results of contests is forbidden by ss. 202(1)(h) of the Code – applicable to ads for interactive sportsbooks

# Internet & Criminal Jurisdiction

## *Advertising Internet Betting*

- Much of the advertising of Internet gaming that goes on in Canada is subject to prosecution – however, no one has been prosecuted for this activity, and we see no evidence that the authorities consider this matter to be a priority

# Internet & Criminal Jurisdiction

## *Advertising Internet Betting*

- October 12, 2004: Bowman International Sports Ltd., an Internet betting and gaming site which has been advertising on Canadian radio for years, announced an advertising deal with the Canadian Football League – comprehensive in-stadium advertising program throughout CFL post-season & a cross-promotional free game offered on CFL and Bowman’s websites.
- CFL deal represents mainstream acceptance of such advertising – makes it harder to someday use the Code to put the genie back in the bottle

# Internet & Criminal Jurisdiction

## Advertising Internet Betting – Poker

- Poker – Is it illegal to advertise a game of mixed skill and chance?
- Two provisions explicitly forbid advertising:
- ss. 202(1)(h): only applies to betting on external events (“contests”)
- ss. 206(1)(a): bars advertising of schemes for “...disposing of any property by lots, cards, tickets or any mode of chance whatever” – but must be pure chance (***R. v. Roe***, [1949])



# Internet & Criminal Jurisdiction

## Advertising Internet Betting – Poker

- 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 to run afoul of s. 206 (*R. v. Shabaquay*, [2004] O.J. No, 2357)
- Cases appear to carve games of mixed skill and chance out of the Code’s advertising bans

# Internet & Criminal Jurisdiction

## *Starnet Prosecution*

- Authorities have demonstrated a willingness to prosecute Internet gaming sites that (a) keep servers in Canada, and (b) take bets from Canadian residents. Starnet Communications International Inc. (“Starnet”) pleaded guilty to one criminal gambling count under ss. 202(1)(b), was fined \$100,000 and forfeited approximately US\$4-million as proceeds of crime
- Starnet kept most of its servers in Antigua, but one gaming-related server was in Vancouver

# The Mohawks of Kahnawake

## *The Legality of the Activities of the Mohawks*

- Kahnawake Reserve: 20 square-mile community of 8,000 Mohawk Indians located on south shore of St. Lawrence River, 20 minutes from Montreal
- Mohawks claim jurisdiction as a “sovereign nation” to issue gaming licenses for lottery schemes, including race- and sports- books, notwithstanding the provisions of the Code – have set up their own “Gaming Commission” complete with probity checks, etc.

# The Mohawks of Kahnawake

## *The Legality of the Activities of the Mohawks*

- Quebec & federal governments, and provincial police, have investigated these activities – Quebec Minister of Public Security stated publicly that Internet gaming operating from Quebec on the Kahnawake Reserve is illegal: ***L. Moore, Montreal Gazette.com, June 10, 2001***
- Case law to date has repeatedly ruled against the existence of an inherent aboriginal right to operate a commercial gaming enterprise – however, this issue must be re-examined in light of particular facts re each individual First Nation

# The Mohawks of Kahnawake

## *The Legality of the Activities of the Mohawks*

- ***Pamajewon v. The Queen***: 1996 case where Supreme Court held that two Ontario First Nations bands had no inherent aboriginal right to conduct or regulate gaming on their reserves
- No evidence that traditional wagering games played in the bands' past was "of central significance" to their culture, or that such gaming was subject to regulation by the bands

# The Mohawks of Kahnawake

## *The Legality of the Activities of the Mohawks*

- Supreme Court came close to making a blanket statement against recognizing commercial gaming as an aboriginal right, agreeing with the trial judge's observation that "commercial lotteries such as bingo are a twentieth century phenomena and nothing of the kind existed amongst aboriginal peoples and was never part of the means by which those societies were traditionally sustained or socialized."

# The Mohawks of Kahnawake

## *The Legality of the Activities of the Mohawks*

- No police action has been taken against the Kahnawake, possibly due to residual tensions dating from summer of 1990, when a police raid on the reserve led to a stand-off between the Mohawks and the Canadian military
- Sources tell us that Quebec considers the Kahnawake situation embarrassing – the corporation that manages gaming in Quebec may not like it, but Quebec clearly does not intend to interfere with the operations on the Kahnawake Reserve at this time

# The Mohawks of Kahnawake

## *The Legality of the Activities of the Mohawks*

- The Kahnawake community wants the federal government to pass legislation designating Kahnawake, and perhaps other reserves, as Internet gaming jurisdictions – Kahnawake is so far the only North American jurisdiction to license the interactive websites. Currently, the Mohawks host about 30 cybercasinos, race- and sports- books, and they remain open to discussions with jurisdictions, including Quebec and Canada, to harmonize their respective legislative provisions concerning gaming



# Betting Services & The WTO

## *Betting and GATS*

- Canadian attempts to enforce the Code against offshore betting could be problematic under international trade law – “gambling” is a service covered by the General Agreement on Trade in Services (“GATS”)
- Using Canadian criminal law to frustrate the efforts of non-Canadian Internet horse-race and other sports betting sites to access the Canadian market, while at the same time allowing the Kahnawake Mohawks to offer such gaming services to non-Canadians may violate GATS

# Betting Services & The WTO

## Antigua – U.S. Dispute

- World Trade Organization (“WTO”) Dispute Settlement Body recently determined Antiguan complaint that certain U.S. laws, regulations and other measures are inconsistent with U.S. commitments & obligations under GATS
- Some U.S. government authorities take the view that U.S. state and federal laws (separately or in combination) have the effect of prohibiting the online supply of gambling and betting services from outside the U.S. to consumers in the U.S.

# Betting Services & The WTO

## Antigua – U.S. Dispute

- U.S. position comes within scope of a WTO dispute to the extent that the laws in question could prevent operators from Antigua from lawfully offering gambling and betting services in the U.S. under competitive conditions that are compatible with U.S. obligations under GATS
- Canada supported Antigua's position that U.S. commitments under GATS include betting and gambling services – chose not to opine on whether U.S. law breaches those commitments

# Betting Services & The WTO

## Antigua – U.S. Dispute

- March 26, 2004: WTO panel decided in favour of Antigua – U.S. held to be in breach of its obligations under GATS
- U.S. and Antigua attempted to resolve the issue through negotiations, which recently failed –WTO released full text of the panel decision
- U.S. appeal of decision proceeding – senior U.S. trade official said the administration “fundamentally rejects” idea that GATS signatories can’t limit services affecting public morals – that member states must consult with each other before modifying “public morality” laws

# Betting Services & The WTO

## Antigua – U.S. Dispute

- Were Canada to use the Code to keep foreign Internet betting operators from accessing Canada's betting market, while allowing the Kahnawake Mohawks to benefit from the betting activities of non-Canadians, it would not be in breach of its obligations under GATS, as Canada has explicitly excluded all entertainment-related services from its GATS commitments
- However, such a policy shift could well result in bilateral trade disputes with countries that license Internet betting, including countries with whom Canada has important trade ties, i.e. Australia & the U.K.

# Course of Public Policy for Canada and Online Gambling

- Combination of open area of law dealing with application of criminal law in Internet context, and complications added by Canada's obligations under international trade law, it is doubtful that Canada will come down hard on Internet gambling as the U.S. has done
- Barring major policy change, the authorities will not be cracking down on Internet gambling based in offshore jurisdictions

# Course of Public Policy for Canada and Online Gambling

- Future will likely depend more on consumer tastes, government policy and international developments than domestic court decisions. By standing pat, Canadian governments will lose gaming revenue to foreign websites
- Governments must be satisfied that there is a need to regulate the industry
- UK government became convinced of this need, and a bill permitting and regulating UK-based Internet betting sites should be law by late 2005

# Course of Public Policy for Canada and Online Gambling

- Low-level studies are being undertaken by some provincial governments to determine whether there is a public need to regulate the industry and if so, the manner of regulation including the regulatory and control framework
- Legalized Internet betting in Canada will begin when provincial regulator takes initiative to enact regulatory code of conduct under which Internet betting companies may be registered



# Course of Public Policy for Canada and Online Gambling

- Such a code will stipulate very high thresholds of conduct to be attained & maintained by Internet betting companies, but once these companies are approved by provincial regulators, they will be able to achieve integrity and credibility comparable to existing “brick & mortar” casinos and pari-mutuel operators