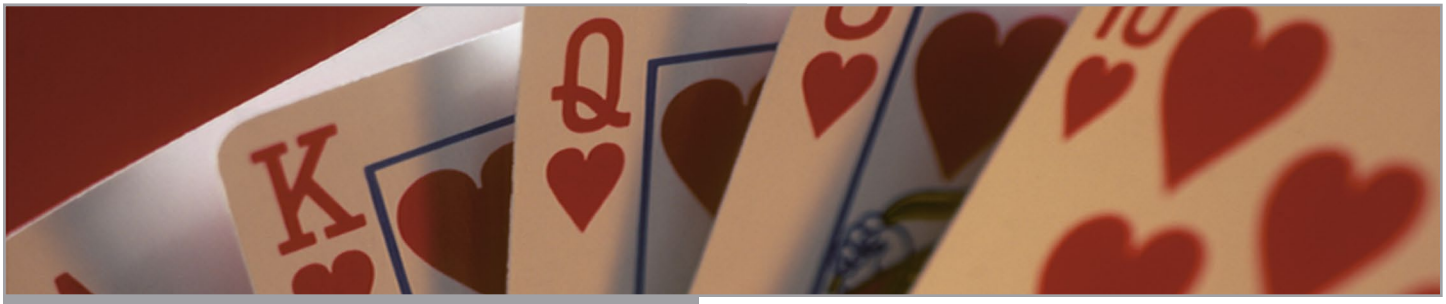
GAMING**LEGAL**NEWS



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GAMING WEB SITES OF INTEREST

www.indianz.com
www.pechanga.net
www.indiangaming.org
www.nigc.gov
www.michigan.gov/mgcb
www.gaminglawmasters.com
www.casinoenterprisemanagement.com

I-GAMING INDICTMENTS AND CANADA-U.S. MUTUAL LEGAL ASSISTANCE TREATIES

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

In light of recent indictments released by the U.S. Department of Justice concerning persons connected with offshore Internet gaming ("I-Gaming") which accepted customers in the U.S., we note with interest that among the orders being sought by prosecutors are orders for seizure of foreign bank accounts. Should the prosecution obtain orders for seizure from U.S. courts, the enforceability of those orders will to a large extent be determined by reference to the *Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters* (the "MLAT").[1]

The MLAT specifically provides that Canada and the U.S. "shall assist each other to the extent permitted by their respective laws in proceedings related to the forfeiture of the proceeds of crime, restitution to the victims of crime, and the collection of fines imposed as a sentence in a criminal prosecution."[2]

Pursuant to the MLAT and the *Mutual Legal Assistance in Criminal Matters Act*,[3] the U.S. may make a request for assistance in a criminal investigation to the International Assistance Group of the federal Ministry of Justice. If such a request is approved, it will be sent to a competent authority for completion.

The dual criminality concept applicable in extradition requests, whereby the unlawful conduct alleged must be of a kind that would result in the commission of an offense in both countries before extradition is granted, is not applicable to a request made pursuant to the MLAT. Canada's model mutual legal assistance treaty does not include a dual criminality clause, and Canada does not seek to include dual criminality as a requirement in its mutual legal assistance treaties. Accordingly, a U.S. prosecutor can request assistance in relation to offenses that have no equivalent in Canada.

The procedure depends a great deal upon the exercise of political discretion, and may accordingly be blocked for purely political reasons. This is because the approval of the Minister of Justice must be obtained before any request for assistance from U.S. authorities will be sent to the International Assistance Group of the Ministry of Justice.

If the Minister approves the request, the International Assistance Group will provide Canadian law enforcement authorities with information for use on *ex parte* applications to a Canadian judge. If the judge is satisfied that there are grounds to believe that an offense has been committed, and that evidence of the commission of the offense or property relating to that offense will be found in Canada, the judge will be able to provide authorities with a variety of orders, including:

1. search warrants that permit evidence to be seized and sent to the U.S.;
2. orders compelling witness testimony, including compelling witnesses to give evidence in foreign proceedings by means of audio or video link;
3. production orders for the obtaining of documentary evidence;
4. orders to enforce orders made by a U.S. court of criminal jurisdiction for the restraint, seizure or forfeiture of property situated in Canada; and
5. orders for inspections of a place or site in Canada.

The Minister's decision of whether to approve a request for assistance that could result in an order to enforce a U.S. seizure order relating to a Canadian bank account could bring any number of domestic political and legal considerations into play. Where the bank accounts in question belong to a status Indian under the *Indian Act*,[4] considerations of aboriginal law may come into play. One may envision scenarios in which the Canadian constitution may come into play as well. Recall that the MLAT limits the pledge of assistance under that treaty "to the extent permitted by their respective laws." In some circumstances, it may be open to the Minister of Justice to take the position that certain "grey areas" of Canadian gaming law or aboriginal law do not permit him to approve the request for assistance.

As the request will not be made publicly, and any court hearing that may result from the request will be held *ex parte*, we will not be privy to these proceedings until after property is seized. We await with interest to see how these issues will work their way through the international legal system.

[1] Canada Treaty Series 1990/19.
[2] *Ibid.*, Paragraph 2, Article XVII.
[3] S.C. 1985, c. 30 (4th supp.), as amended.
[4] R.S.C., 1985, c. I-5.

OKLAHOMA TRIBE DISAVOWS GEORGIA PROJECT

by Dennis J. Whittlesey

When it was announced two weeks ago that a small Indian tribe in Oklahoma was seeking trust and reservation status for land at St. Simons Island in Georgia, the news went through Indian Country like wildfire. The story broke during the National Indian Gaming Association's Annual Trade Show and Convention in Phoenix and immediately became the subject of both widespread concern and jokes.

The Kialegee Tribal Town was identified as the applicant on documents submitted to the Eastern Regional Office of the Bureau of Indian Affairs, and the associated press release declared that the Kialegee Tribe, which was part of the historic Creek Confederacy, was returning to claim its ancestral lands in Georgia from which the Creeks were removed during the Administration of President Andrew Jackson. The Creek Confederacy members today live in Eastern Oklahoma, and Kialegee is one of three Creek tribal towns which today are federally recognized independently of the Muscogee (Creek) Nation.

Only a few weeks before that announcement, a group claiming to represent the Tribal Town accompanied by a developer from St. Simons Island reportedly met with officials at the Department of the Interior to announce intentions to submit such an application, with the stated goal of developing a tribal casino in Georgia. Their actions have come to the attention of Georgia elected officials, and legislation to block the land acquisition has been introduced in the state legislature.

Finally, the immediate reaction on the national scene was widespread criticism of the Kialegee for opening a new front in what is known by some as the "Reservation Shopping War." The application seemed to confirm that Indian tribes were wildly pursuing gaming projects based on slender, if not nonexistent, threads of legal qualification to do so.

One caustic comment was that the Kialegee seemed to think that the Yellow Brick Road goes to Georgia, rather than the Land of Oz. It all seemed to be too far-fetched to be true. And, it turns out that it was.

Someone forgot to ask the Kialegee Tribal Town about this. We now know that the Tribe's governing body had neither approved such a project nor submitted the application and that the Tribe's Special Legal Counsel had formally advised the Georgia developer in December that he was not authorized to take any actions on the project in the name of the Tribe. In short, the application was never authorized by either the Kialegee Business Committee or the tribal General Membership.

By letter dated April 11, Kialegee Special Legal Counsel formally advised Eastern Regional Director Franklin Keel that the application was "unauthorized" and had not been filed by the Tribe. That letter was also signed by Tribal Chairman (or "Mekko") Tiger Hobia.

With this, the Kialegee's Magnificent Georgia Adventure is over, St. Simons Island is not the terminus for the Yellow Brick Road, and the developer is no longer the modern day Wizard of Oz. This little story goes into the bin of projects which were not realistic from the outset. It may be the latest such project, but it almost certainly will not be the last.

Finally, the ultimate irony is that the adjudicated historic lands for the Creek Confederacy were in southwest Georgia, far from St. Simons Island – thus, even if the novel theory of returning to tribal roots across several states had credibility, this site was doomed to fail as a matter of geography because the Creeks were never there in the first place.