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GAMING LEGAL NEWS EDITORIAL BOARD

Robert W. Stocker II, Gaming Law
517.487.4715 • rstocker@dickinsonwright.com

Dennis J. Whittlesey, Gaming Law/Indian Law
202.659.6928 • dwhittlesey@dickinsonwright.com

Michael D. Lipton, Q.C., Gaming Law
416.866.2929 • mdliptonqc@dickinsonwright.com

Peter H. Ellsworth, Gaming Law/Indian Law
517.487.4710 • pellsorth@dickinsonwright.com

Peter J. Kulick, Gaming Law/Taxation
517.487.4729 • pkulick@dickinsonwright.com

Kevin J. Weber, Gaming Law
416.367.0899 • kweber@dickinsonwright.com

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BREAKING NEWS!

MICHIGAN GOVERNOR SNYDER SIGNS EXECUTIVE ORDER TRANSFERRING OVERSIGHT OF CHARITABLE POKER TO MICHIGAN GAMING CONTROL BOARD

On April 11, 2012, Michigan Governor Rick Snyder signed Executive Order 2012-4, transferring to the Michigan Gaming Control Board (MGCB) the regulatory oversight of “millionaire parties” from the Michigan Bureau of Lottery. “Millionaire parties” are broadly defined in Michigan’s Traxler-McCauley-Law-Bowman Bingo Act as charitable gaming activities that include “an event at which wagers are placed upon games of chance customarily associated with a gambling casino ...” The Executive Order will affectively give the MGCB regulatory oversight of the increasingly prevalent “charitable” poker events hosted at bars and other establishments across the state of Michigan. The Executive Order does not become effective for 60 days and is subject to legislative disapproval, although that is considered unlikely.

ALDERNEY GAMBLING CONTROL COMMISSION RELEASES THE DEAN REPORT DETAILING THE REGULATORY REVIEW OF FULL TILT POKER

by Peter J. Kulick and Robert W. Stocker II

The failure of an operator is the worst nightmare of a gaming regulator. Failure calls into question the robustness of the regulatory regime and can lead to second-guessing of licensing and regulatory oversight. The meteoric fall of Full Tilt Poker during six short months in 2011 placed the highly respected Alderney Gambling Control Commission (AGCC) in a potentially precarious situation. Questions were undoubtedly raised relative to the actions and inactions of the AGCC, including whether AGCC missed warning signs concerning the precarious financial situation of Full Tilt Poker. The recently released independent report prepared by Peter Dean (the Dean Report), the former chairman of the British Gambling Commission, sheds considerable light on the circumstances surrounding AGCC’s regulatory actions with respect to Full Tilt Poker. The Dean Report is available online via the AGCC’s website and accessible through the following link: <http://www.gamblingcontrol.org/userfiles/file/FTP%20Report%2026%20March%202012.pdf>.

The Dean Report largely vindicates the regulatory actions of the AGCC. Mr. Dean concludes that overall “AGCC fulfilled its statutory obligations in relation to [Full Tilt Poker] and that its actions were appropriate, timely and fair.” The Dean Report offers an exposé of the Full Tilt Poker licensing review. The Dean Report also suggests recommendations to strengthen the regulatory oversight of i-gaming businesses licensed in Alderney.

The Dean Report undertakes a chronological examination of the regulatory process, beginning with the licensing of Full Tilt Poker and its affiliated entities through AGCC’s hearing that culminated in the revocation and suspension of the gaming licenses held by Full Tilt Poker and its affiliated marketing entities.

First, with respect to the initial licensing of Full Tilt Poker, Mr. Dean bluntly delves into difficult territory. Mr. Dean raises the tough question: did AGCC relax its licensing standards in order to attract Full Tilt Poker to Alderney? Implicit in Mr. Dean’s inquiry is the competition among i-gaming jurisdictions to attract i-gaming businesses as licensees. At the time of its initial licensing in 2007, Full Tilt Poker was widely recognized as an industry-leading online operator. Back in 2007, attracting Full Tilt Poker was viewed as a significant accomplishment. Mr. Dean concludes that, while AGCC was forced to resort to unusual measures to review the credentials of owners of companies affiliated with Full Tilt Poker, “AGCC conducted the ‘fit and proper’ tests with appropriate rigour.”

Second, the Dean Report reexamines the decision of the AGCC to grant Full Tilt Poker and its affiliates licenses despite the fact that Full Tilt Poker was accepting, and actively soliciting, bets from within the United States. The enactment of the Unlawful Internet Gaming Enforcement Act (UIGEA) in 2006 prohibited engaging in the business of “unlawful Internet gambling” in the United States. While UIGEA was explicit in its criminal prohibition of “unlawful Internet gambling,” the activities that constitute “unlawful Internet gambling” have been subject to intense legal debate. The Dean Report is generally accurate in its characterization of the uncertainty in U.S. law – a criticism of UIGEA’s lack of a meaningful definition of “unlawful Internet gambling” – but the report does not take into account that Full Tilt Poker (along with other i-gaming sites operating in the U.S. market) likely relied on overly aggressive legal positions with respect to the legality of poker in the vast majority of U.S. jurisdictions. The uncertainty in U.S. law has been more the product of whether the Wire Act, 18 USC § 1081, extends to non-sports wagering, rather than the status of poker as illegal gambling under relevant U.S. state law. In any event, the Dean Report concluded the AGCC’s stance – that AGCC is not responsible for interpreting or enforcing the laws of other jurisdictions – “was reasonable and appropriate and in line with that taken in other soundly regulated gambling jurisdictions.”

Third, the Dean Report reviews the propriety of the annual regulatory inspections conducted by the AGCC and raises the question of how the AGCC failed to detect the perilous financial condition of Full Tilt Poker. The Dean Report concludes that there was nothing amiss with AGCC’s annual regulatory inspections. The failure to detect the financial difficulties facing Full Tilt Poker was attributed to several factors. First, the Dean Report notes that “a regulatory inspection is not designed to uncover fraud, but is an operational process review.” Second, the Dean Report stresses that at the time of the last annual regulatory inspection – conducted in October 2010 – the events of Black Friday, which in a significant manner triggered the financial collapse of Full Tilt Poker, had not occurred.

Fourth, the Dean Report examines the events leading to the financial instability of Full Tilt Poker. The report characterizes the precipice of Full Tilt Poker’s financial problems as coming to a head on the infamous Black Friday, April 15, 2011. Black Friday was the day the U.S. Department of Justice (DOJ) unsealed criminal indictments of Full Tilt Poker, Absolute Poker and PokerStars alleging criminal violations of UIGEA. The aftermath of the indictments included the DOJ’s seizure of Full Tilt Poker’s Internet domain name and approximately U.S. \$160 million in funds. The U.S. criminal indictment had a profound effect on the continuing viability of Full Tilt Poker.

The Dean Report reveals that AGCC’s response to the U.S. criminal indictment of Full Tilt Poker, however, was swift. Five days after the unsealing of the criminal indictment, April 20, AGCC commenced a regulatory investigation of Full Tilt Poker and its affiliates. By September 2011, AGCC had held full hearings involving the licensure of Full Tilt Poker and ultimately revoked or suspended licenses held by Full Tilt Poker and its affiliated companies.

Interestingly, the Dean Report tends to gloss over whether Full Tilt Poker knew of the pending U.S. criminal investigation surrounding its activities. The Dean Report mentions that news reports surfaced in early 2010 alleging that Full Tilt Poker was the subject of an investigation by U.S. law enforcement officials. While AGCC apparently inquired with Full Tilt Poker with respect to the veracity of the criminal investigations, Full Tilt Poker dismissed the reports as innuendo and rumors perpetuated by business rivals. The Dean Report does not address whether the AGCC undertook any independent efforts to verify the existence of an ongoing U.S. criminal investigation. Hindsight would suggest that Full Tilt Poker was likely under a grand jury investigation in the United States at the time. This failure to discover the then-impending U.S. criminal investigation can potentially be attributed to a breakdown in communication among international law enforcement agencies and a lack of candor by Full Tilt Poker.

The Dean Report concludes by identifying “lessons to learn” from the Full Tilt Poker licensing review process that can strengthen the robustness of the Alderney i-gaming regulatory system. The lessons identified by the Dean Report include:

1. Arrange for back-up availability to assist with legal work. A challenge faced by the AGCC was the short period of time to conduct the licensing review on top of an already heavy workload. The AGCC was able to mitigate the demands to its accounting staff by engaging outside chartered accountants to assist with the Full Tilt Poker investigation. The Dean Report recommended that similar measures be in place to assist with legal work.
2. Establish a direct relationship with the licensees, rather than relying on intermediaries. The Dean Report recommendation is premised on the fact that the communications with Full Tilt Poker principally were conducted through Full Tilt Poker's external lawyers.
3. Increase AGCC's in-house capacity relative to better understanding corporate structure and governance arrangements. A fact that became apparent in the investigation of Full Tilt Poker was that it had a relatively strong technical and operational expertise, but it had a weak corporate structure and corporate governance arrangement.
4. Increase player protections and tighten supervision of the player funds on a risk-assessed basis. With respect to player protections, the Dean Report points out that regulatory attitudes vary significantly with respect to protection of player funds. AGCC, to its credit, has made the policy decision to prioritize the protection of player funds.

For the legal community, the Dean Report ultimately presents a case study of an i-gaming regulatory system's response to the failure of an operator, which includes identifying early warning signs of potential trouble and swift regulatory response to troubled situations. The Full Tilt Poker regulatory review offers an opportunity to assess existing regulatory systems to ensure that safeguards are in place to identify potential financial problems.