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ADVERTISING FOREIGN CASINOS IN CANADA

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

U.S. residents of the states bordering Canada are familiar with advertisements for Canadian casinos, which are directed at them through television, radio, and print. It is a natural assumption that U.S. casinos are equally free to advertise in Canada, but some advertising outlets in Canada are in fact refusing to accept advertisements for U.S. casinos that depict gambling activity. This arises from an interpretation of the Criminal Code (the "Code") that we find questionable, but which understandably risk-averse media outlets are not inclined to challenge.

The Code includes a provision that prohibits advertising in relation to a "foreign lottery," but the text of the Code is unclear as to whether these prohibitions apply to a foreign lottery that is carried on lawfully outside of Canada, as opposed to unlawfully either in or outside Canada. Applying criminal prohibitions to lawful foreign gambling activities would contravene the principles of the statutory construction of criminal statutes, as this interpretation both (a) results in obvious absurdities, and (b) declares conduct which members of the community view as innocent or morally neutral to be criminal.

The application of the Code to activities that occur in both Canada and a foreign country requires that there be a real and substantial connection between the activities and Canada, in the sense that those activities that are connected to Canada represent an "integral" part of a "scheme" initiated in Canada. The integral parts of a "scheme" of the type under consideration that would bring them under the jurisdiction of the Canadian courts is that the foreign lottery (a) must represent a scheme devised and initiated in Canada, and (b) must allow participation in the foreign lottery in a jurisdiction in which such activity is unlawful. Neither of these integral parts of the scheme exists in the situation under consideration, and accordingly the advertising of that scheme is a matter beyond the jurisdiction of the Code.

As well, the phrase "foreign lottery" as used in the Code does not apply to every form of gambling. The word "lottery" as used in Part VII of the Code applies solely to the disposition of property by modes of *chance alone*. At its highest, the prohibition applicable to foreign lotteries might therefore apply to prevent the advertising of casino games that involve no element of skill, (e.g., slot machines), but it could not

prohibit advertising that depicts games that involve some element of skill (e.g., poker, blackjack, bingo, or sports betting).

The "foreign lottery" provision impacts only section 206 of the Code. In the opinion of some commentators, advertising of foreign casinos may also be prohibited by certain provisions of section 202 of the Code, specifically the following which provide that everyone commits an offence who:

(f) prints, provides or offers to print or provide information intended for use in connection with book-making, pool-selling or betting on any horse-race, fight, game or sport, whether or not it takes place in or outside Canada or has or has not taken place;

(g) imports or brings into Canada any information or writing that is intended or is likely to promote or be of use in gambling, book-making, pool-selling or betting on a horse-race, fight, game or sport, and where this paragraph applies it is immaterial,

(i) whether the information is published before, during or after the race, fight game or sport, or

(ii) whether the race, fight, game or sport takes place in Canada or elsewhere,

but this paragraph does not apply to a newspaper, magazine or other periodical published in good faith primarily for a purpose other than the publication of such information;

These provisions on their face appear to apply the Code in an extraterritorial manner. However, it is clear that the extraterritorial language in s-s. 202(1)(f) and (g) is stating that it is immaterial whether the activity that is the focus of the gambling or betting (the "race, fight, game or sport") takes place in Canada. These provisions do NOT state that it is immaterial whether the "gambling, book-making, pool-selling or betting" takes place in Canada. Nothing in s. 202 of the Code explicitly applies the Code to *gambling* that takes place outside Canada. Unfortunately, this is how some commentators have chosen to interpret these provisions, and this is having a chilling impact upon freedom of commercial expression for foreign casinos in Canada.

Commentators who suggest that advertising foreign gambling is unlawful in Canada also point to the Ontario Court of Appeal decision in ***R. v. Ede***. In that decision, there is no indication whether the information the accused was providing on British football betting pools was intended to be used by persons placing bets from Canada. If it was intended that people in Canada were going to be betting using these pools, any comments made by the court concerning the relevance of "whether the gambling takes place in or outside Canada" were *obiter dicta:* statements that do not directly dispose of the issue before the court and which are therefore of dubious value as precedent. The Supreme Court of Canada has stated that *obiter* statements are not necessarily binding authority. The further such statements move from the dispositive issues of the case towards statements merely intended to provide commentary, examples or exposition, the less likely they are to be binding authority on later courts.

With respect, the *obiter* statements of the Ontario Court of Appeal in ***R. v. Ede*** concerning the relevance of "whether the gambling takes place in or outside Canada" to charges under s-s. 202(1)(f) and (g) of the Code are incorrect and cannot serve as binding authority. The statement that "Parliament has seen fit to prohibit the use, in a particular way, of information about certain types of gambling, whether the gambling takes place in or outside Canada" is simply wrong on a careful examination of the text of s-s. 202(1)(f) and (g). The Court of Appeal erroneously imported language into these provisions which does not exist. Subsection 202(1)(g)(ii) clearly states that it is immaterial whether the "race, fight, game or sport takes place in Canada or elsewhere," with no reference to the "gambling, book-making, pool-selling or betting" referred to in s-s. 202(1)(g).

Consistency demands that the word "it" as used in s-s. 202(1)(f) be interpreted to refer to the same activities, so that s-s. 202(1)(f) is properly interpreted to mean "whether or not the *horse-race, fight, game or sport* takes place in or outside of Canada."

There is no support in the text of the Code for interpreting either of s-ss. 202(1)(f) or (g) to apply regardless of whether or not *the gambling, book-making, pool-selling or betting* takes place in or outside of Canada.

In our opinion, the Code must be interpreted in light of the principles espoused by the Ontario Court of Appeal in its more fulsome decision in ***Boardwalk Regency Corp. v. Maalouf*** ("*Boardwalk Regency*"). The court should look to whether the advertising of a foreign lottery to Canadians in circumstances where the lottery could only be played outside Canada is "blameworthy conduct which strikes at the fundamental values of the community," or "conduct so inconsistent with the shared morality of society so as to warrant public condemnation and punishment." If such advertising represents conduct "which members of the community view as innocent or morally neutral," the court will not likely interpret the foreign lottery provision to criminalize that activity, because to do so would do "a disservice to the overall operation of the criminal law." In *Boardwalk Regency*, the majority of the Court of Appeal held that the enforcement against a Canadian of a New Jersey gambling contract and a court judgment for payment on such gambling contract was not barred as being contrary to public policy. The court looked to whether the enforcement of a foreign gambling debt would "violate conceptions of essential justice and morality," and it held as follows:

> It would be anomalous and, it seems to me, contrary to the international aspect of national policy in this regard, to conclude that Part VII of the Criminal Code reflects a policy applicable on the international level. This would be the result of refusing to give effect to the law of New Jersey on grounds of public policy. It cannot be said that the enforcement of a debt, valid by the law of New Jersey, which

> is the proper law of the contract, would violate any fundamental principle of justice or the Canadian conception of good morals. I must assume that a sovereign country or state which licenses casino operations has enacted regulations and controls for the general protection of participants and of society. The essential question to be resolved is whether the *Gaming Act*, which is inapplicable, nonetheless effectively represents public policy, and whether the strictures of the Criminal Code of Canada against gaming houses reflect the public policy issue.

The Court of Appeal in *Boardwalk Regency* recognized that "since the 1970 amendments to the Criminal Code, there has been a significant increase in various forms of legitimate gambling in this province and everywhere in Canada. Governments not only have condoned gambling activities, but also have actively promoted and derived substantial revenue from them. Charities and public-spirited social clubs have also benefited. Since the amendment to the Criminal Code, gambling has been decriminalized to a large extent and legalized gambling has become, on the basis of provincial statistics, a multi-billion dollar industry…This court takes judicial notice of the fact that a large number of Canadians participate in games of chance, even though other Canadians disapprove of such activities." In conclusion, the Court of Appeal applied "the community standard" to activities carried on in foreign gambling jurisdictions and held that "[t]here is nothing to indicate that the general Canadian public would be offended by the enforcement of foreign judgments for debts incurred in jurisdictions where commercial gambling is licensed and legal. Consequently, I am satisfied that, in accordance with the Canadian community standard, the participation in licensed gaming abroad, and the enforcement of a foreign judgment based on a gaming debt incurred in a licensed and regulated casino, are neither immoral nor unjust…In my opinion, the contemporary Canadian community standard of morality would prefer that personal responsibility be attached to Canadians who engage in licensed gaming activities abroad and that these citizens not be sheltered from enforcement proceedings when debts result."

The precedent in *Boardwalk Regency* has been followed by courts throughout Canada. Accordingly, it is settled law in Canada that Part VII of the Code does not reflect "a policy applicable on the international level" and that in accordance with Canadian community standards, participation by Canadians in licensed gambling abroad, in licensed and regulated casinos, is neither immoral nor unjust. It is also settled law that under the contemporary Canadian community standard of morality, it is expected that the law has no role to play in sheltering Canadians from engaging in licensed gaming activities abroad.

Accordingly, no court in Canada would consider the advertising of what *Boardwalk Regency* termed "licensed gaming activities abroad" to be "blameworthy conduct which strikes at the fundamental values of the community" or "conduct so inconsistent with the shared morality of society so as to warrant public condemnation and punishment." On the contrary, under the principles stated in *Boardwalk Regency*, the Canadian community would find it inconsistent with morality that the law should purport to play a role in sheltering Canadians from being informed of the existence of such licensed gaming activities. In these circumstances, it would do a disservice to the operation of the criminal law to criminalize advertising that the community views as "innocent or morally neutral."

The idea that it is criminal behaviour to advertise foreign casinos in Canada, and yet there exists no public policy argument that bars the collection of debts incurred in those same foreign casinos through Canadian courts, is frankly absurd. The law abhors an absurd interpretation of a statute, and accordingly advertising for foreign casinos in Canada cannot be unlawful under the Code. However, unless the federal government seeks to clarify the law, foreign casino operators may find themselves unable to advertise freely through some media outlets.