GAMING**LEGAL**NEWS

December 13, 2012 • Volume 5, Number 27

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 • pellsworth@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

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
www.ggbmagazine.com

Disclaimer: Gaming Legal News is published by Dickinson Wright PLLC to inform our clients and friends of important developments in the fields of gaming law and federal Indian law. The content is informational only and does not constitute legal or professional advice. We encourage you to consult a Dickinson Wright attorney if you have specific questions or concerns relating to any of the topics covered in Gaming Legal News.

INDIVIDUAL LIABILITY FOR BEING AN ONLINE GAMING CUSTOMER IN CANADA

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

When asked whether "gambling" is lawful in Canada, the focus has often been upon the commercial enterprises that provide gaming and betting services to people in Canada. Less frequently asked is the question of whether the individual in Canada who registers with a website based outside Canada that allows him or her to bet or play "real money" games online is breaking any criminal law.

Over a century of Canadian case law indicates that the Criminal Code (the "Code") does not render gaming unlawful.[1] Part VII of the Code criminalizes the seeking of profit from the betting of others;[2] it does not make the playing of games for stakes illegal *per se*.

Under the common law that existed prior to the enactment of the Code, gaming was not illegal. For a brief period of time, the Code included a provision which explicitly made it unlawful to play in a "common gaming house" (although no similar prohibition ever applied to those who bet in a "common betting house"). Section 199 of the Code, enacted in 1892, stated: "Every one who plays or looks on while any other person is playing in a common gaming-house is guilty of an offence…"[3]

This provision was repealed in 1909. In 1913, the Code was amended to make it an offence to be "found in" a common gaming house or common betting house, a prohibition which in its basic form remains in the Code to this day. However, the prohibition against playing in a common gaming house was never re-enacted.[4]

In the years that have followed, it has been held that in the absence of "clear and unequivocal language" in the Code that explicitly criminalizes the activities of bettors and gamers, no existing provision of the Code can be interpreted to have this effect.[5] Creative interpretation of the present provisions of Part VII of the Code cannot render the activities of individual bettors and gamers illegal; nothing short of an amendment of the Code will suffice for that purpose. In a 1974 case in which the prosecution attempted to characterize the actions of consumers of gaming as "aiding and abetting" other gaming offences, the Alberta Court of Appeal stated that s. 186 (now s. 202) of the Code:

> …is chiefly concerned with a certain class of society, bookmakers, pool sellers, gaming housekeepers and their activities. In addition, the section is aimed at those who assist or aid these people, and their activities are made criminal. Parliament has not made it a crime to buy a pool ticket or to place a bet with the bookmaker. To make such activity criminal requires, in my opinion, clear and unequivocal language. Section 186 contains no such language.[6]

Subsection 206(1) of the Code sets forth a number of offences relating to disposing of property by modes of chance, and in some cases by modes of chance and skill. Subsection 206(4) of the Code also makes it an offence to buy, take or receive "a lot, ticket or other device" referred to in s-s. 206(1). This provision requires the accused to have physically received a lot, ticket or device. In all likelihood, this makes the provision inapplicable to online gaming, which by its nature precludes the physical receipt of a lot, ticket or device. That physically "taking" the item in question, in person, is a necessary element of the offence is made clear by the decision of the Ontario Court of Appeal in *R. v. Pilon*.[7] In *Pilon*, a woman was charged under the predecessor to s-s. 206(4) with buying a lottery ticket to participate in a contest held at a theatre. A niece of the accused bought two tickets to enter the theatre, in exchange for which she was given two attendance cards. On one of these cards, the niece wrote the name and address of the accused, and on entering the theatre the niece deposited the card in the receptacle for that purpose. The card thereafter remained in the possession of the theatre officials, and at no time was it in the possession of accused. The card bearing the name of the accused was drawn, with the result that she received the sum of $120. The accused did not, in person, attend the theatre or buy the ticket. The accused was convicted and appealed. The Ontario Court of Appeal quashed the conviction, as on the evidence the accused did not, in person, buy, take or receive a ticket for the purpose of taking part in a scheme as charged in the indictment or for any other purpose. Accordingly, this case stands for the proposition that unless the accused takes physical possession of the "lot, ticket or device" in question, the offence in s-s. 206(4) of the Code is not made out.

Subsection 207(3) of the Code makes it an offence to do anything for the purpose of the conduct, management, operation of, or participation in a lottery scheme unless the doing of it is authorized by or pursuant to some provision of 207.[8] One case exists which indicates that the offence created by s-s. 207(3)(b) may be limited to games of pure chance.[9] There exists no case that has found that a person who plays a game is "participating" in a "lottery scheme" for the purposes of s-s. 207(3). The 1974 decision of the Alberta Court of Appeal cited earlier held that if Parliament desires to make it a criminal activity to play a game for money, it must do so by inserting "clear and unequivocal language" to that effect into the Code. Subsection 207(3) of the Code falls short of that standard.

This is consistent with case law in Manitoba which held that s-s. 202(1)(b) of the Code "…does not prohibit gambling itself, but rather is aimed at penalizing the conduct of persons who attempt to profit from the gambling of others…this provision does not prohibit the keeping of those things which an individual might use for his or her own gambling…but rather prohibits those things which a commercial operator would keep as part of his or her enterprise in profiting from the gambling of others." The Manitoba court accordingly limited the application of s-s. 202(1)(b) of the Code to the commercial context, in which the impugned machines or devices for gambling are used as part of "the business of betting," and further extended this "commercial operation" interpretation to Part VII of the Code in its entirety.[10] This decision stands in the way of those observers who have suggested that an individual's home computer may be a "device for gambling or betting," such that a Canada online gaming player could be liable under s-s. 202(1)(b) of the Code for "keeping" that device.

Could a successful prosecution be brought against a person for being "found in" a place where a computer is being used for online gaming, on the basis that such activity transforms the "place" into a "common gaming house" as defined by s. 197 of the Code? Section 197 defines a "common gaming house" as:

> …a place that is
>
> (a) kept for gain to which persons resort for the purpose of playing games, or
>
> (b) kept or used for the purpose of playing games
>
> (i) in which a bank is kept by one or more but not all of the players;
> (ii) in which all or any portion of the bets on or proceeds from a game is paid, directly or indirectly, to the keeper of the place,
> (iii) in which, directly or indirectly, a fee is charged to or paid by the players for the privilege of playing or participating in a game or using gaming equipment, or
> (iv) in which the chances of winning are not equally favourable to all persons who play the game, including the person, if any, who conducts the game.

It does not appear that any such "place" exists in the circumstances of online gaming. The Deputy Ministers Responsible for Justice Coordinating Committee of Senior Officials Working Group, formed in 2006 to consider and report on a number of issues relating to the Code and online gaming (the "Working Group"), seems to have operated from the same point of view. One of the questions that the Working Group has considered is whether an offence should be introduced into the Code which would penalize the actions of Canadians who access online gaming that is not conducted lawfully in Canada. We are advised that the Working Group has shown no interest in criminalizing the activities of individuals who bet or gamble in this manner, being fully aware of the authoritarian tactics that would be required to enforce such a prohibition. The very fact that the question is being considered by the Working Group tends to confirm that senior Justice officials do not believe that the *existing* provisions of the Code provide a basis for

prosecuting individuals in this manner.

As online gaming continues to expand worldwide and as the provincial governments of Canada expand their own online gaming activities, the unfettered ability of Canadian residents to participate in foreign-based online gaming will continue to present itself as a policy issue. The approach of the provincial and federal governments to this issue can be expected to evolve, and as a consequence it will remain a subject well worth revisiting from time to time.

---

[1] *R. v. Dillon* (1884), 10 P.R. 352 (Ont. C.A.); *Walsh v. Trebilcock* (1894), 23 S.C.R. 695 (S.C.C.); *Windsor Hotel Co. v. Silverman* (1934), 62 C.C.C. 247 (Man. K.B.); *R. v. Michael* (1974), 18 C.C.C. (2d) 282 (Alta. C.A.); *R. v. Arundel*, 1986 CarswellAlta 408 (Alta. C.A.).

[2] *R. v. Nelson*, 1997 CarswellMan 680 (Man. Prov. Ct.); affirmed (1999), 180 D.L.R. (4th) 186 (Man. C.A.).

[3] *Criminal Code*, 1892, c. 29, section 199.

[4] *Criminal Code Amendment Act*, S.C. 1909, c. 9, s. 2; *Criminal Code Amendment Act*, S.C. 1913, c. 13, s. 12.

[5] *R. v. Michael* and *R. v. Arundel*, supra note 1.

[6] *R. v. Michael*, supra note 1.

[7] [1950] 1 D.L.R. 850 (Ont. C.A.).

[8] *Reference re Earth Future Lottery* (2002), 215 D.L.R. (4th) 656 at para. 15 (P.E.I. C.A.), affirmed [2003] 1 S.C.R. 123 (S.C.C.).

[9] *R. v. Gardner*, 2004 CarswellOnt 2308 (Ont. Ct. of J.).

[10] *R. v. Nelson*, supra at note 2, paras. 97 to 106 (Man. Prov. Ct.).