CANADIAN GAMING LAWYER MAGAZINE

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IMGL
INTERNATIONAL MASTERS OF GAMING LAW

High Stakes, Higher Expectation

HONESTY AND INTEGRITY IN CANADIAN GAMING

The State of Mobile Gaming | De-fine-ing the Law | Integrity in Sports and Single-Event Betting | US Table Games Patents Facing Unprecedented Challenges

In my first President's Message of 2012, I wrote: "For the members of the International Masters of Gaming Law, the New Year has arrived with a bang. In December, it was announced that the United States Justice Department has reversed its longstanding position that the Wire Act prohibits all forms of on-line gaming." With this momentous development came the anticipation that the United States finally would join Canada, parts of Europe, and elsewhere and embrace Internet gaming. The adoption of laws and regulations by several states that are designed to allow them to participate in the multi-billion dollar Internet gaming industry would suggest to some that legal Internet gaming in the U.S. is ready for prime time. But is it?

The U.S. Department of Justice's opinion of September 11, 2011 that came to light at the end of 2011 seemed to open the door for Internet gaming in the U.S. for all forms of gaming other than sports betting. But it left unanswered a number of questions. Absent the adoption of comprehensive federal legislation, those who recall the arrests of Internet gaming operators in the past remain guarded.

The global membership of IMGL brings an unparalleled level of expertise to address these difficult issues. Whether addressed in the very fine articles that appear in our four gaming law magazines – Casino Lawyer, Canadian Gaming Lawyer, European Gaming Lawyer and La Ley del Juego – with a worldwide readership in excess of 20,000 gaming lawyers and other gaming industry professionals – or our twice a year gaming law conferences, these leading sources of gaming law education are invaluable tools to help anyone involved in the gaming industry navigate these difficult issues now being faced in the U.S. I would add that our Autumn Conference in London from October 10-12, 2012, will include several sessions devoted to exploring the difficult issues surrounding Internet gaming in the U.S.

In addition to the outstanding journals we publish and the conferences that we hold twice a year, IMGL will again host its immensely popular reception at G2E in Las Vegas on October 2. A few days after our Autumn Conference in London concludes, IMGL will be joining fellow IMGL members Santiago Asensi, Justin Franssen, Wulf Hambach and Quirino Mancini of the website portal GamingLaw.eu in hosting a reception at EiG in Barcelona on October 16. These by invitation only receptions, in spectacular settings, provide high level networking opportunities for IMGL members and their guests to meet with other important individuals actively involved in the gaming industry throughout the word and discuss the latest developments in gaming.

Please visit the IMGL website, found at www.gaminglawmasters.com. It is an invaluable source of all matters involving gaming law education and up to date details about IMGL activities, services and members. Also, please remember that you can always contact me at kduncan@joneswalker.com or our very able Executive Director, Melissa Lurie at imgldirector@aol.com.

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BY JOSEPH COHEN-LYONS

High Stakes, Higher Expectation

The gaming industry relies significantly on the honesty and integrity of individuals for its successful and profitable operation. The nature of the gaming industry, and games of chance in particular, leaves casinos particularly susceptible to loss as a result of dishonest or fraudulent patrons. Furthermore, with large amounts of cash visible at any given time, casinos are uniquely vulnerable to loss as a result of theft.

Honesty and integrity is not only required by casino patrons, but also by the employees who are responsible for running the day to day operations of a casino. The employees are the gatekeepers to all of a casino's cash and have the greatest opportunity to profit at the expense of a casino though dishonest conduct. For this reason, it is important that employees in the casino industry are held to strict standards of conduct.

In Ontario, the honesty and integrity of casino employees is maintained through a combination of government regulation and adjudicative application of employment and labour law principles which take into account the unique nature of the gaming industry. Government regulation allows for the screening of candidates to ensure only individuals who have a pristine record of honesty and integrity are permitted to become casino employees. Government regulation also allows for the monitoring of employees to ensure they continue to uphold such standards throughout the course of their employment. The careful application of labour and employment law principles ensures casino employees are held to a strict standard of performance and allows casino employers to act swiftly in response to breaches of such standards.

GOVERNMENT REGULATION OF CASINO EMPLOYEES

The Gaming Control Act, 1992 (the "Act") requires that all casino employees whose duties involve access to a gaming facility where games are played, or part of a gaming facility that is not open to the public, register as "gaming assistants" with the Alcohol and Gaming Commission of Ontario (AGCO).[1] The Registrar of the AGCO is empowered to grant or deny applications for registrations of a gaming assistant and, in doing so, is empowered to inquire into the applicant's "character, financial history and competence" before deciding whether to grant an application.[2] In this way, the Act works to ensure that only those with the highest levels of honesty and integrity are permitted to become casino employees.

The Act not only serves as a gatekeeper for those who wish to become casino employees; it requires individuals registered as gaming assistants to adhere to strict standards of conduct[3] and administer all games in accordance with the established rules of play.[4] The Act also allows the Registrar to inquire into and investigate the conduct of individuals who are currently registered as gaming assistants and employed in a casino. During such an investigation, the Registrar is again entitled to investigate into the character, financial history, and competence of the gaming assistant.[5] If, following the investigation, the Registrar determines that the conduct in question jeopardizes the gaming assistant's honesty and integrity, or otherwise brings the administration of the gaming industry into disrepute, the Registrar may suspend or revoke the individual's registration. Such decisions are subject to a right to appeal to a Licence Appeal Tribunal, where the individual is entitled to an oral hearing.[6]

The registration and investigation procedures also allow for the suspension or revocation of a gaming assistant's registration in situations where the misconduct in question did not occur during the course of employment. For instance, when the Registrar investigates the character, financial history, and competence of a gaming assistant, outside criminal convictions and credit reports may become relevant. This has led to the revocation of registration in situations

where a gaming assistant has been convicted of theft, fraud, or any other crime that brings into question his or her moral turpitude.

The regulations imposed by the Act have the effect of providing a casino, as an employer, the ability to terminate an employee without notice in circumstances which may not justify summary dismissal in other industries. Since an individual is required to be registered as a gaming assistant in order to be employed in a gaming capacity at a casino, the loss of such a licence, even if as a result of off-duty conduct, serves to frustrate the employment relationship by operation of statute. As such, the offending employee may be properly terminated from his or her employment at a casino. In other industries, an employee's off-duty conduct is not generally considered to be the concern of the employer and, therefore, is often considered as insufficient grounds to justify termination for cause. Therefore, the termination of a casino employer who has lost his registration as a result of some form of off-duty conduct is a break from the general principles of labour and employment law, and represents a situation in which casino employers are given greater latitude to regulate the conduct of their employees.

LABOUR AND EMPLOYMENT LAW IN THE CASINO INDUSTRY

Courts and labour arbitrators have also played a vital role in ensuring that casino employees adhere to the high level of honesty and integrity required of their position. In particular, judges and arbitrators have imposed high standards of conduct for casino employees, and upheld terminations in situations which may not have justified summary dismissal in other industries. These higher standards have most often been imposed in the context of employee misconduct involving the handling of cash or failing to abide by the rules of play in games of chance.

The high standard imposed on casino employees, whose responsibilities include the handling of cash, is demonstrated by the decision in Windsor Casino Ltd. V. C.A.W. Canada, Loc. 444 (Faubert).[7] In this case, a cashier was discharged for placing a $50 bill in the trash can. In support of the discharge, the employer relied on its zero-tolerance policy for theft or misappropriation. The Union, for its part, alleged that the cashier had mistakenly placed the $50 bill in the trash. After considering the evidence, the arbitrator ultimately determined the cashier's explanation was implausible and upheld the discharge. In so doing, the arbitrator relied solely on the employer's zero-tolerance policy without considering the existence of any mitigating circumstances.

What is striking about the decision in Windsor Casino is not that the termination was upheld, but rather the conviction with which it was upheld. Theft or fraud is considered a serious employment offence in all industries, and arbitrators often consider a single incident to be sufficient to justify discharge. However, in most situations, it is incumbent upon an arbitrator to consider the circumstances surrounding the alleged theft, including the disciplinary history of the employee and the likelihood of recurrence, before determining whether discharge was an appropriate response. Furthermore, arbitrators are generally reluctant to blindly uphold a zero-tolerance policy without, at the very least, considering the circumstances surrounding the misconduct. In Windsor Casino, however, the arbitrator upheld the termination without any consideration of mitigating circumstances, relying instead on the employer's zero-tolerance policy to justify the dismissal. Such an approach signals arbitral recognition of the importance of honesty and integrity in the casino industry and the high standards of conduct to which casino employees are held.

A similar result was reached in Great Blue Heron Charity Casino v. C.A.W. Canada, Local 444 (George).8 In this case, the casino terminated a dealer for allowing improper bets in a game of chance, in contravention of the rules of play. After assessing the evidence, the arbitrator concluded that while the dealer had indeed improperly taken bets, he had not colluded with the player to defraud the casino. Nevertheless, the arbitrator upheld the dealer's discharge and held that the dealer's misconduct was not only dishonest, it brought the game and therefore the casino into disrepute.

The decision in Great Blue Heron demonstrates that adjudicators are not only concerned with the actual honesty and integrity of casino employees, but also with the public perception of such honesty and integrity. As recognized by the arbitrator in Great Blue Heron, games at a casino must not only be operated in a fair manner, they must be perceived by the public to be operated as such. Where an employee's misconduct jeopardizes the public's faith that a casino is operated fairly, he or she may be subject to discipline, up to and including termination.

As this article has demonstrated, casino employees in Ontario are held to a relatively high standard of conduct as compared to employees in other industries. This high standard of conduct is achieved through two principle mechanisms: government regulation and judicial/arbitral jurisprudence. The need for such a high standard of conduct in the gaming industry is clear: where the risks of loss as a result of misconduct are high, strict rules need to be in place to ensure that such misconduct does not occur. The fact the mechanisms exist to service this need is a testament to the adaptability of lawmakers and the development of labour and employment law through thoughtful jurisprudence. CGL

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1. *S.O. 1992, c. 24; 5(1).*
2. *S.O. 1992, c. 24; 9(1).*
3. *S.O. 1992, c. 24; 19(2).*
4. *S.O. 1992, c. 24; 22(1).*
5. *S.O. 1992, c. 24;9(1).*
6. *S.O. 1992, c. 24; 13(1)and(2).*
7. *(2007), 88 C.L.A.S. 230 (Crljenica) [hereinafter Windsor Casino].*


BY MICHAEL D. LIPTON, Q.C. AND JACK I. TADMAN

De-fine-ing the Problem

Provincial Prosecutorial Power, Self-Exclusion Agreements, and Pathological Gambling in R. v. Trins[1]. Trins is a decision of the Provincial Court of Alberta (Alberta's lowest court). Therefore, it does not bind any courts outside of Alberta, nor does it bind any other level of court in Alberta. It is an instructive decision, however, in that it illustrates some inherent difficulties with the validity and enforcement of agreements related to Voluntary Self-Exclusion Programs ("VSE").

If adopted by other courts, Trins would appear to render voluntary self-exclusion agreements void due to a lack of consideration.

R. V. TRINS

"On April 10, 2010 Trins attended at Grey Eagle Casino, wearing a female styled wig and playing Baccarat in the 'high limit room.' Staff identified Trins, who cashed out and left the property. AGLC contacted Trins, who attended on May 13, 2010 and received violation ticket A10733030Z." - Justice Lamoureux, Trins.[2]

FACTS

On May 16, 2009, Len Trins signed an agreement to enter into the Alberta Gaming and Liquor Commission's VSE. As part of the VSE, Mr. Trins was prohibited from entering any casinos or racinos for one year. In spite of the agreement, Mr. Trins was caught four times in casinos during his self-exclusion period. He received one warning and two tickets under s. 34.2(2) the Alberta Gaming and Liquor Act Regulations (the "Regulations")[3], which states:

34.2(2) No person who is enrolled in a self-exclusion program shall enter into or remain in licensed premises that are operated under a Casino Facility License or a Racing Entertainment Centre Facility License.[4]

In Alberta, violating 34.2(2) of the Regulations could result in a fine of up to $10,000, up to six months in jail, or both.

LAW: CONSENSUS, CONSIDERATION, & CAPACITY

Concerns over whether self-exclusion agreements are binding generally centre on one or more of the following issues:

- Did the self-excluded individual understand the agreement (was there a meeting of the minds)?
- Did the self-excluded individual have capacity to enter the agreement (due to his or her gambling addiction)?
- Did the self-excluded individual offer valid consideration for entering into the agreement (did he or she give up something of value)?

Justice Lamoureux cited a lack of consideration in holding the VSE agreement was void. Alternatively, Justice Lamoureux held, the VSE agreement is voidable at law and may be terminated by Mr. Trins. Evidence of Mr. Trins's termination could be provided by a verbal communication of intention to rescind the agreement, written communication of the intention to rescind, or re-entering the casino. As part of her analysis, Justice Lamoureux went through the three elements of a valid agreement.[5]

CONSENSUS AD IDEM

Entering into the VSE required Mr. Trins to sign a standard form agreement. The Court has a heightened duty to analyze whether the party who did not draft the agreement fully understands it. One of the preconditions to establishing a voluntary meeting of the minds, or consensus ad idem when dealing with a standard form agreement, is that the party providing the agreement must prove beyond a reasonable doubt that it has taken reasonable steps to bring any unusually onerous condition included in a standard form agreement to the attention of the other party.[6] In Trins, Justice Lamoureux held the risk of prosecution and fines which resulted from a breach of the VSE agreement was an unusually onerous condition.

The Court concluded there was no meeting of the minds between Mr. Trins and the casino's agent Mr. Alvio at the time Mr. Trins signed the VSE for following reasons:

- Mr. Alvio merely pointed out the onerous clause to Mr. Trins, which fell short of taking all reasonable steps to point out the risk of prosecution and fines resulting from Mr. Trins breaching the agreement.[7]
- When questioned, Mr. Trins did not appear to appreciate the meaning of the word "prosecution" and its consequences.

CAPACITY

Justice Lamoureux questioned Mr. Trins's capacity to enter into the VSE. Though not formally diagnosed with a "gambling addiction" or pathological gambling, the Court seems to accept Mr. Trins's evidence that he had been suffering from a serious gambling addiction for 15 years. Justice Lamoureux also questioned how a person could enter into an agreement not to gamble, if, according to the DSM-IV-TR: Diagnostic and Statistical Manual of Mental Disorders, problem gambling is a mental illness.[8]

VALID CONSIDERATION

What did Mr. Trins give up? Justice Lamoureux considered the argument that Mr. Trins gave up the right to enter into a casino (which would be a detriment to Mr. Trins's freedom). However, Justice Lamoureux held that giving up the right to enter into a casino fails as consideration because:

- there is no economic value that is reasonably attached to a notional right to enter a gaming venue;[9]
- exclusion as a notional form of consideration lacks the necessary sufficiency and certainty to be recognized in law as valid consideration[10]; and
- the casino cannot be inferred to be bargaining for the right to exclude patrons, as this is contrary to the financial interest of the casino.[11]

FUTURE CONSIDERATIONS

"One cannot argue that problem gambling is a real and serious mental illness while affirming in the same breath that such a mentally ill person can voluntarily self-exclude through contract."[12] Emir Crowne, Food for Tort at 170-171.

Provinces have prosecutorial power under provincial gaming legislation. As noted earlier, violating 34.2(2) of the Regulations could result in a fine of up to $10,000, six months in jail, or both. Is it an appropriate use of provincial prosecutorial power to (i) impose financial hardships on individuals who have likely lost a substantial amount of money gambling, and (ii) imprison individuals for an inability to control an addiction/ impulse control-disorder?

Without enforcement mechanisms, self-excluded gamblers are free to repeatedly return to the casino without consequence. Some self-excluded gamblers have been labeled "prolific violators" in a recent review by the British Columbia Centre for Social Responsibility ("BCCSR") of the British Columbia Lottery Corporation's ("BCLC") VSE program.[13] "Prolific violators" attempt to access casinos on a regular basis, do not take advantage of resources offered to them, and cause a substantial amount of work for casino staff.[14] Self-excluded gamblers who have repeatedly attempted and been successful entering gaming facilities have, on occasion, sued those gaming facilities.[15]

The purpose of fining and imprisoning individuals who breach self-exclusion agreements is to deter those individuals from entering the casino. However, the use of punishment as a deterrent is based on the premise that people act rationally. A person usually entering into a VSE does so because he or she is not able to act rationally (he or she is not able to control his or her gambling). In fact, one of the indicators of pathological gambling under the Diagnostic Statistical Manual of Mental Disorder (DSM-IV-TR) is "repeated unsuccessful efforts to control, cut back, or stop gambling."

It would seem to violate the spirit of VSE programs to fine and imprison individuals who elect to self-exclude due to their difficulty controlling gambling. It would also seem to violate the spirit of VSE programs for individuals who breach the VSE agreement, often employing deceptive tactics, to sue the casino for failing to exclude them. Trins highlights the reluctance of the court to hold that a VSE agreement constitutes a valid contract.

Instead of a valid contract, it may be useful to conceptualize the VSE agreement as an acknowledgement by self-excluding individuals to agree to certain obligations and forego certain rights. BCCSR's report recommended increasing the psychological barriers to casino re-entry[16]. If these psychological barriers provide a useful enforcement mechanism against violators of VSE programs, perhaps provincial regulatory authorities will be less likely to charge violators with offences under gaming control legislation. **CGL**

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1. *2012 A.B.P.C. 156 [hereinafter Trins].*
2. *Ibid. at para. 2.*
3. *Gaming and Liquor Regulation, Alta. Reg. 143/1996.*
4. *Ibid., s. 34.2(2).*
5. *Supra note 1 at para 12.*
6. *Tilden Rent-a-Car Company v. Clendenning, 1978 CarswellOnt 125, cited in Trins at para 7.*
7. *Supra note 1 at para 7.*
8. *Pathological gambling was first recognized as a clinical disorder by the American Psychiatric Association in 1980 in the DSM-III. The criteria for determining pathological gambling were the same as substance abuse, save for the fact that one of the indicators of pathological gambling was "chasing losses". Pathological gambling is in the DSM-IV as an "Impulse Control Disorder Not Otherwise Classified." The most recent draft of the DSM-V (scheduled to be released in May, 2013) would add a new category of "behavioral addictions," containing one disorder: gambling addiction.*
9. *Emir A. C. Mohammed, "Food for Tort: Giving the Casino Some Consideration, a Continued Defence of the Gaming Industry," (2009) 27 Wind Rev Leg and Soc Issues 169 at 169-170.*
10. *Ibid.*
11. *Alina Slavina, "Don't Bet on it: Casinos' Contractual Duty to Stop Compulsive Gamblers from Gambling," (2010) 85 Chicago-Kent Law Review 369 at 379, cited in Trins.*
12. *Supra note 9 at 170-171.*
13. *"Report Recommends 'Prolific Violators' of VSE Agreements Be Removed From Program," August 25, 2011, BCLC on Responsible Gambling retrieved August 1, 2012 at http://blogs.bclc.com/2011/08/25/report-recommends-prolific-violators-of-vse-agreements-be-removed-from-program/.*
14. *Ibid.*
15. *See, for example Treyes v. Ontario Lottery and Gaming Corp., O.J. No. 2772; Dennis v. Ontario Lottery and Gaming Corp., 2010 ONSC 132,*
16. *Examples given by BCCSR include mandatory counseling or participation in a gaming workshop, and extension of the self-exclusion period for anyone breaching the self-exclusion agreement between one and nine times. At the tenth violation, the VSE agreement would no longer be of force and effect, and individuals would not be permitted to re-enroll for at least a 3-month period.*

BY DANIELLE BUSH

Integrity in Sports and

Single-Event Betting in Canada

Sports betting in Canada is about to change significantly. Bill C-290 (an Act to amend the Criminal Code (sports betting)) is presently before the Senate for final consideration before it receives Royal Assent and becomes law (likely in October 2012). The Act will repeal s.200(4)(b) of the Criminal Code (the "Code") in its entirety and thereby remove, amongst other things, the prohibition against betting on "a single sport event or athletic contest". At present, the provision of sports betting services falls exclusively within the purview of provincial lottery corporations and so to date most of the legal sports betting taking place in Canada has been through provincial government products such as Sport Select, ProLine, and Mise – O-Jeu. Given that Bill C-290 has all-party support, it can be concluded that there is general enthusiasm for the proposed change amongst the majority of provincial governments and their respective lottery corporations. It is therefore likely that provinces such as British Columbia ("BC"), Ontario and Quebec will now move into the sports betting space, and particularly the online sports betting arena, relatively aggressively.

Match-fixing is considered to be a particular threat in any sport or league where the players and/or officials are young and/or underpaid and are therefore susceptible to bribery and extortion. For that reason, many jurisdictions, where sports betting is otherwise legal, do not permit betting on the performance of teams who are composed of underage players. It appears that this is frequently a matter of negotiation between operators and leagues. For example, in 2004, Loto-Quebec found itself in the middle of a public dispute with the Quebec Major Junior Hockey League ("QMJHL"). Because of the work stoppage in the National Hockey League ("NHL") that year, Loto-Québec (through Mise-O-Jeu) had started, once again, to accept bets on the outcome of QMJHL games as an alternative to NHL action. It had previously stopped accepting such bets because the league had too many under-age players but apparently needed to replace the NHL revenue with another hockey stream. The QMJHL stated at the time that it was very concerned about the integrity of the league because a third of their players were 16 or 17 years old. Loto-Quebec halted betting on the league after only three days of betting.

UNITED KINGDOM

Match-fixing is viewed by most developed countries as a major threat to the integrity of sports in general, and to specific sports such as soccer and cricket in particular. Individual countries have responded to a greater or lesser extent, perhaps reflecting the prominence of sports betting in their cultures. As one would expect, the United Kingdom ("UK") has been one of the most proactive jurisdictions in this arena. One of the mandates of the UK Gambling Commission is to keep crime out of gambling. The Commission licenses betting operators who must comply with licence conditions, including condition 15.1 which requires operators to provide information regarding suspicious activity to the Commission and/or the relevant sports governing body

"The level of (legal) sports betting in this country has been minimal to date and so attempts to throw games for betting purposes is perceived as unlikely."

("SGB"). Importantly, "cheating" is an offence under s. 42 of the UK Gambling Act 2005 and the Commission has the power to void bets, or to temporarily stop winnings being paid out in certain circumstances. In response to concerns about match-fixing in tennis, football, and cricket, the UK Gambling Commission brought together a panel (including representatives from sports betting operators William Hill, Ladbrokes, and Betfair) to report on sports integrity.

The panel's report (the "Parry Report") was released in February 2010. It included recommendations (i) for the UK government including clarifying the definition of "cheating", (ii) for SGBs, including a new Code of conduct on integrity in sports in relation to sports betting to include minimum standards that all sports have to observe and cover in their rules on betting, a requirement that each SGB have effective mechanisms in place to ensure compliance with its own rules, investigate potential breaches and to impose sanctions, formation of a body that is responsible for the governance of the applicable sport in the UK, and that each SGB put in place mechanisms for recognising and capturing intelligence in relation to sports betting integrity and communicating it to the government's Sports Betting Intelligence Unit ("SBIU"); and (iii) for betting operators, including varying betting terms and conditions to make the contravention of sports or other professional rules on betting a breach of the operator's own terms and conditions; and (iv) regarding creation of a SBIU. The Panel also recommended that licence condition 15.1 be amended to provide for more consistency and transparency around the decisions to report under 15.1 and to ensure betting operators and SGBs continue to exchange information in real time to improve the flow of intelligence to the SBIU so that suspect betting patterns are identified as quickly as possible.

Following the release of the Parry Report, the UK established the SBIU which, as recommended, receives intelligence generated by a number of sources including SGBs and operators, analyses it, makes connections and identifies patterns. One of its functions is to monitor the betting activity of individuals associated through intelligence with potential or actual betting corruption in real time. The SBIU does not monitor movements in the betting market itself but instead relies on the reporting of the betting operators for this purpose.

CANADA

In Canada, there is no equivalent to the prohibition against cheating found in the UK's Gambling Act. In fact, it is not clear whether match-fixing constitutes an offence in this country. A review of the Code does not disclose any obvious avenue for laying charges in this situation. Perhaps the closest one could come is a charge of fraud under s.380 of the Code on the basis that the participants (the player and the bettor who was paying the player) had defrauded the gaming operator that paid out to the bettor on a fraudulently achieved outcome. There is also the possibility of charges under s.426 which governs secret commissions. However, it is clear that obtaining a conviction under either one of those sections in a match-fixing situation would be difficult. This may explain why each of the RCMP, the OPP and the Toronto Metropolitan Police have taken the position (verbally in response to telephone enquiries) that their force was not responsible for match-fixing activity. As well, the various Canadian sports leagues have not been responsive to enquiries about how they do (or would) handle match-fixing. This may be in part explained by the fact that the level of (legal) sports betting in this country has been minimal to date and so attempts to throw games for betting purposes is perceived as unlikely. That situation is likely to change sooner rather than later, given that a number of lottery corporations are interested in providing single event sports betting. In particular, the BC Lottery Corporation's partnership with sports betting giant Paddy Power suggests that single event betting is likely to be available in BC as soon as the Code and BC lottery legislation are amended as needed.

Provincial lottery corporations that provide any form of sports betting are equivalent to the UK gaming operators that are required to report suspicious betting activity under UK licence condition 15.1. Given that we are now at a point where the integrity of Canadian sports may be adversely affected by the activities of provincial lottery corporations, it is time for the various players, including the federal government (re amending the Code to add a "cheating" offence), the provincial gaming regulators and lottery corporations (as operators), and the various SGBs (e.g., FIFA and the Canadian Soccer Association), to put in place a structure based on the UK model before a scandal makes the need for oversight all too apparent. CGL

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BY STUART HOEGNER

The State of Mobile

Gaming in Canada

The rise of mobile gaming is not something that is coming; it is upon us. The amount spent on mobile games worldwide is expected to reach $11.4 billion by 2014 (more than doubling from $5.6 billion in 2010).[1] Right now, there are 500 million smartphone owners globally. By 2015, the number of owners is projected to triple to 1.5 billion.[2] We are in the middle of a growth spurt. Gaming suppliers, developers, and operators must have a strategy for addressing this medium or a very strong reason for avoiding it.

While smartphone ownership in Canada is significant and growing (ownership ranging from 38% among the NGen cohort to 15% among those 65 and older),[3] the mobile gaming picture is more nuanced. Perhaps unsurprisingly, 65% of NGen'ers and 54% of GenX'ers play games on mobile devices by themselves. However, a mere 2% of NGen'ers and 1% of GenX'ers play networked games with others on their mobiles.[4]

THE LEGAL STATUS OF MOBILE GAMING IN CANADA

We shall return to what this means for mobile product development and delivery, but first a few words on the law of mobile gaming. In Canada, the Criminal Code prohibits all but the governments of the provinces from conducting and managing what's termed a "lottery scheme" (but which generally includes such gaming as sports betting, casino games, and poker) "on or through a computer."[5] Thus, Internet gaming — according to the Code, at least — must be conducted and managed by the provinces.[6] Though there is no case law (yet) on point, the same logic appears to apply to mobile gaming. At a basic level, such wagering is operated "on or through" computers, and must therefore be conducted and managed by the provinces.

Some of the same issues that online gaming operators must grapple with in Canada crop up in mobile gaming, e.g., the threshold issue of jurisdiction. Under the Code, and with many important exceptions, a person is not to be convicted "of an offence committed outside Canada".[7] The issue is whether private foreign (mobile and Internet) gaming operators accepting business from Canadians are potentially committing offences that are not "outside Canada." I have written in this magazine before about selected jurisdictional issues in i-gaming.[8] Whether Canadian courts will assert jurisdiction where mobile gaming operators have little or no nexus to Canada — other than their customers being here — is very much a live issue. That said, I take the view that Canadian courts will not likely hesitate to intervene and make use of the Code in appropriate mobile gaming cases, even if only an operator's customers are in Canada. Mobile gaming operators must also pay attention to advertising restrictions under the Code and under applicable provincial legislation.

As with land-based and online platforms, the Canadian Competition Act[9] also addresses gaming, including mobile gaming. Among other things, contest promoters must make adequate and fair disclosure about certain contest particulars and must not unduly delay the distribution of prizes. Mobile gaming operators and advertisers will also do well to consider, for example, the implications of Canada's anti-spam legislation[10] and the Personal Information Protection and Electronic Documents Act.[11]

WHO'S ASTRIDE THE CANADIAN STAGE?

Some of the provincial monopolies have tentatively dipped their toes into the mobile gaming pool, most notably Quebec. Loto-Québec has iPhone and Android apps available to prepare selections on Quebec sports betting offerings and to place bets (through www.espacejeux.com) and to buy and check lottery tickets. British Columbia, through BCLC, is not developing a mobile application, but has plans to optimize www.playnow.com for viewing on web-enabled mobile devices. (BCLC is still exploring the scope of this project.) The Atlantic Lottery Corporation, which offers games on behalf of the four Atlantic provinces, allows players to check winning lottery numbers and other items by means of mobile alerts.

If their objective is to service the demands of the gaming public and look to where wagering is going, government providers might be well-advised to shift into a higher gear. Mobile gaming is on the rise and will only be in greater demand, and operators like PokerStars and Bodog have more user-friendly, sophisticated, and functional mobile options available to Canadian wagerers.

MOBILE IS DIFFERENT

One common assumption supposes that mobile gamers want the same games as online gamers, only 'fitted' for a mobile device. This may be true for a segment of the gaming universe, but at least one pioneer in mobile gaming, Charles Cohen of Probability Games, suggests that the experience mobile users want is very different. According to Cohen, many mobile users want "a distraction, a sideways glance, a momentary lapse of concentration."[12] His data suggests that the average mobile play session is 10–15 minutes.[13]

These data points, along with the paucity of Canadians playing networked games on their mobiles to date, may spell bad news for games like poker being played on mobile devices. However, it may work out fine for sports betting. It may also give a push to innovation in mobile gaming and lead to more efforts to monetize wagering activities in skill-based video games, social gaming, and gaming requiring less of a time and learning commitment. This cross-over of sorts between traditional console video gaming, casino, and other money wagering could be the next part of mobile development.

We will not have to wait long to see where the mobile sector is going. Attention to legal and institutional structures — though such structures are likely inadequate to comprehensively deal with mobile gaming — and to market demands will pay big dividends in the mobile gaming space, both in Canada and internationally. **CGL**

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1. *Jeff Beer, Rise if Mobile Gaming Surprises Big Video-Game Developers, Canadian Business, available at http://www.canadianbusiness.com/article/75215--rise-of-mobile-gaming-surprises-big-video-game-developers; Gary Beal, The Future of Mobile Gaming and Financial Markets, World Online Gambling Law Report, July 2010, at 14.*
2. *Beer, supra note 1.*
3. *Delvinia Interactive, Managing the Hype: The reality of mobile in Canada, April 2010, at 5, available at http://www.techvibes.com/blog/managing-the-hype-the-reality-of-mobile-gaming-in-canada.*
4. *Ibid., at 13.*
5. *Criminal Code, R.S.C. 1985, c. C-46, s. 207(4)(c).*
6. *It has been said before, but bears repeating, that there is a tension between the Code's provisions on this point and the rights of Canada's aboriginal peoples to conduct and manage gaming from their territories. This point will not be explored further here.*
7. *Supra note 5, s. 6(2).*
8. *Stuart Hoegner, Further Thoughts on Jurisdictional Issues in Canadian Internet Gaming: How Far Is Close Enough? Canadian Gaming Lawyer, Fall 2011, at 8, available at http://gamingcounsel.co/pdf/CGL_fall_2011_final.pdf.*
9. *Competition Act, R.S.C. 1985, c. C-34.*
10. *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, S.C. 2010, c. 23.*
11. *Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5.*
12. *David Briggs, A Candid Discussion on Mobile Gaming, Casino Enterprise Management, August 2012, at 32, available at http://www.casinoenterprisemanagement.com/articles/august-2012/candid-discussion-mobile-gambling.*
13. *Ibid.*

BY JOHN ARTZ

U.S. Table Games Patents

Facing Unprecedented Challenges

Blackjack, craps, roulette, poker, and baccarat are table games that have entertained gamblers around the world for hundreds of years.[1] To enjoy blackjack, poker and baccarat, all one needs is a deck of cards and an understanding of the rules. Similarly, craps and roulette can be readily enjoyed by one armed with knowledge of the game and dice or a roulette wheel, respectively. The simplicity of these games likely contributes to their strong popularity and, despite their long histories, they are still played in virtually every casino around the world. The success of these games has inured to the benefit – including through revenue generation – of the proprietors who have made these games available.

While these table games are still widely successful, new table games are constantly being explored, developed, and introduced with the hope that they can capture at least some of the same success (and revenue) as the prior long standing table games. Success in the gaming industry, however, is not only predicted on the popularity of the game itself, but often resides in the ability of a company to obtain a patent and thus exclusively manufacture, market, and sell the game. Accordingly, most companies seek to secure patents for any table and card game developments in the hopes they can avail themselves of these significant benefits. However, the United States Patent and Trademark Office (USPTO) has begun to question whether table games are the proper subject of a patent.

The traditional blackjack, craps, roulette, poker and baccarat games – which all predate the U.S. patent system – are not the subject of U.S. Patents. However, over the last twenty years, the USPTO has awarded patents to inventors for various improvements and variations of these traditional games. For example, over that period, patents have been awarded for brand new table games which incorporate different rules and set ups[2], improvements on existing table games[3], and new betting options and/or payouts for existing games[4]. Like with most developments, the owners of these patents

hope to take advantage of the exclusivity they afford in the event the patented game experiences success in the marketplace.

As is known, the patent system will reward any person with a patent who invents "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof" as long as the other conditions for patentability are satisfied. 35 U.S.C. §101. As indicated above, inventions for new methods (processes) of playing card games or other table games have been uniformly accepted by the USPTO for the last couple of decades, without any objection as to whether they constitute patentable subject matter. Now, however, the patentability of table games and card games in the U.S. is under attack with the USPTO beginning to reject patent applications directed to table game methods under the premise that some are directed to non-patentable subject matter.[5]

Part of the attack stems from a recent decision of the United States Court of Appeals for the Federal Circuit ("CAFC") – the court having exclusive jurisdiction over any appeal involving patents. In that case, In re Bilski, 545 F.3d 943 (Fed. Cir. 2008), the CAFC considered the issues of when method claims qualify for patent protection in the U.S. In Bilski, the court held that patent claims directed toward a method of hedging risks in commodities trading were not patentable as they constituted an abstract idea. In so doing, the court relied on the machine-or-transformation test, which essentially provides that a claim needs to recite some kind of a machine or some sort of transformation to qualify for patentability.[6] In response to the Bilski decision, the USPTO has issued guidelines to its examiners as to how to evaluate whether method claims constitute patentable subject matter, including the machine or transformation test.[7]

While the Bilski decision dealt with business method patents, the USPTO has taken the position that the decision also applies to table game methods. Of particular interest is the fact that the USPTO continues to issue patents for table and card game methods that are played in an electronic environment, such as on an electronic gaming device or over the Internet. The USPTO apparently believes that an electronic version of these table games employs a machine (i.e., computer) and thus electronic table games constitute patentable subject matter. However, according to the USPTO, the identical table game method performed in a gaming floor environment does not satisfy the requirements for patentability. Thus, a company that invents a new table or card game can secure a patent for the electronic version, but not the version played on the casino floor.

A review of the USPTO records indicate that owners of many patent applications that seek protection for the floor version of new table games, are of the opinion that the USPTO has incorrectly denied them patent protection. Accordingly, many have filed appeals within the USPTO. In support of these appeals, many claims directed to card games in a non-electronic environment specifically recite structure in the form of the playing cards themselves, which arguably satisfies the machine portion of the machine-or-transformation test. Alternatively, many claims directed to card games in a non-electronic environment recite transformation of the playing cards, e.g., dealing hands (some face up, some face down), dealing further cards, drawing cards, and flipping cards over, any of which arguably satisfy the transformation portion of the machine-or-transformation test.

Most of these appeals are still pending and are awaiting a decision. To the extent any decision requires a review outside of the USPTO, an appeal to the Federal Circuit is also available. While the belief is that these appeals will ultimately be successful, there are no guarantees; and in any event, a final resolution still appears to be a couple years away. In the short term, companies will likely face challenges securing patent rights and the exclusivity afforded thereby for new table or card games. To address this issue, patent applicants could limit the claims to an electronic environment. Alternatively, patent applicants should look for creative ways to include structural elements in the claims, such as the table, betting implements or other features attendant to the game.

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1. *Blackjack dates back to England and at least the 1700s. http://www.casino.org/games/blackjack/history.php. Craps dates back to at least 17th century France with modern day craps taking shape in America in the 19th century. http://www.worlds-best-online-casinos.com/Articles/craps-history.html. Baccarat was introduced in France in the late 1400s. http://www.gambling-baccarat.com/baccarat_history.htm. Roulette appears to date back to England in the 1500s and may have origins all the way back to Ancient Rome. http://www.casinonavigator.com/games-strategies/roulette-history/. Poker is thought to have its origins in France in the 15th century. http://www.cardschat.com/poker/history/.*
2. *See e.g., U.S. Patent No. 5,997,002.*
3. *See e.g., U.S. Patent Nos. 6,702,289 and 8,128,472.*
4. *See e.g., U.S. Patent Nos. 5,788,574 and 6,450,500.*
5. *This issue applies only to table game methods that are played in gaming establishments, such as casinos, and not the identical method played on an electronic device or the Internet. The USPTO has determined that the electronic versions of table game methods employ structure (i.e., a computer) that is not present in the table game version. Indeed, the USPTO continues to issue patents for inventions related to such games played in an electronic environment.*
6. *The Supreme Court affirmed the CAFC decision, but held that the machine-or-transformation test is not the sole test for determining patentability as other criteria for making this determination were also available. Bilski v. Kappos, 130 S. Ct. 3218 (2010).*
7. *http://www.uspto.gov/patents/law/exam/bilski_guidance_27jul2010.pdf.*




IMGL 2012-2013 EVENTS

INTERNATIONAL MASTERS OF GAMING LAW

IMGL CONFERENCES

2012 Autumn Conference
OCTOBER 10-12, 2012
Sofitel St James
London, United Kingdom

2013 Spring Conference
TO BE ANNOUNCED

2013 Autumn Conference
OCTOBER 1-3, 2013

IAGR International Association of Gaming Regulators
SEPTEMBER 29 - OCTOBER 1, 2012
co-located at
Le Grand Hotel, Oslo, Norway

All gaming professionals are welcome to attend.
A registration fee applies.

2012 EVENTS

G2E
IMGL Member Reception
OCTOBER 2, 2012
5:00 – 7:00 p.m.
La Cave, Wynn Las Vegas
Las Vegas, Nevada
Strictly by invitation for members and their guests.
Visit us at Exhibit Booth #3911

GLOBAL GAMING WOMEN
Welcome Reception
OCTOBER 10, 2012
Sofitel St. James
London, United Kingdom
All female gaming professionals are welcome to attend.

GLOBAL GAMING WOMEN
Luncheon
OCTOBER 12, 2012
Included in the London conference registraton fee. Event tickets available for purchase.

EiG
IMGL Member Reception
OCTOBER 16, 2012
7:00 - 9:00 p.m.
Opium Barcelona
Barcelona, Spain
Strictly by invitation only for IMGL members and guests of GamingLaw.eu
Co-sponsored by GamingLaw.eu

2013 EVENTS

ICE
IMGL Reception
FEBRUARY 3, 2013
Pool Area, Haymarket Hotel
London, UK
Co-sponsored by Jeffrey Green Russell

global gaming expo G2E ASIA
IMGL Reception
MAY 21, 2013
Portofino Restaurant
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