VOLUME 8 NUMBER 1
SUMMER 2015

Canadian GamingLawyer

SHAPING THE FUTURE OF CANADIAN GAMING LAW

IMGL
INTERNATIONAL MASTERS OF GAMING LAW

GAMING AND THE DUTY TO PROTECT

THE "OUTERMOST REACHES" OF NEGLIGENCE

Towards First Nations Self Governance

New Directions in Canadian iGaming

Advertising Standards for Gambling

Risk Management and Risk Assessment

"The older I get the better I was" – I quote a sign I saw in a shop window in Gibraltar the other week which made me laugh. What a wonderful thought. One can hardly disagree. I love the subtleness of British humor. Fortunately, when I think about the IMGL, I feel that the IMGL not only gets older but also continues to succeed in reaching its aims and is very much focused on the present and future.

The way this year's conference season has kicked off demonstrates this. Reaching out to new destinations, we held our first conference in the Caribbean and I am happy to report that our Spring Conference in St. Thomas, U.S. Virgin Islands, was a conference of the highest quality. It boasted top level speakers, experts from all around the world and lively discussions on topics such as changes in offshore gaming regimes, the legality of fantasy sports, AML compliance standards and many more. Further we received a very warm welcome from the U.S. Virgin Island government and Casino Control Commission. I want to thank Violet Anne Golden, Chairman of the Virgin Island Casino Control Commission, and the Honorable Kenneth E. Mapp, Governor of the U.S. Virgin Islands, who acted as our keynote speaker, for making this conference possible and so special.

IMGL's present-and future-oriented approach is also demonstrated by the continuous growth of our membership numbers. Due to the particular care the IMGL takes when checking membership applications, IMGL ensures that only experts in the field may become members of the IMGL.

In order to attract more members from all over the world, the IMGL has decided to demonstrate a greater presence in regions such as Asia/Pacific region as well as South America. Hence we have introduced the Asian Gaming Lawyer, our fifth publication in the Gaming Lawyer series, which will be launched at G2E Asia. The Asian Gaming Lawyer principally focuses on the Asian and Pacific region gaming markets and regulation regimes and will inform its readers about the latest legal, technological and market developments in the industry.

Our next Autumn Conference will take place in Lima, Peru. Again, this marks a milestone in IMGL history as it will be the first conference to be hosted in South America. Further, it will be the first conference to be hosted together with the IAGR (International Association of Gaming Regulators) where joint sessions will be held. This opportunity will provide unparalleled opportunities to discuss certain issues with regulators from all over the world and to exchange viewpoints. The conference will occur from 14-16 October 2015 and relevant information, registration details and deadlines will be posted on our IMGL website (www.gaminglawmasters.com).

IMGL's strength is further demonstrated through the regular attendance of its members at conferences all over the world. Additionally, our IMGL masterclasses which have proven to be well-received and a very popular conference format. Our next IMGL masterclasses are scheduled to be held on 25 June at the iGaming Supershow in Amsterdam and on 28 September 2015 at G2E Las Vegas.

Finally, let me conclude by saying that it is a great pleasure for me as the President of the IMGL to read the most recent Chambers Global ranking. I am very proud to find that out of 53 individuals listed as leading individuals in the category "Global-wide Gaming & Gambling", 46 are IMGL members. Considering that Chambers Global performs its rankings in 185 countries all over the world it is even more remarkable that more than 86% of the best practitioners worldwide are IMGL members.

I hope we can keep up this good work and continue to grow old the way wine does: getting better as we age. Cheers!

Joerg Hofmann
President

Canadian GamingLawyer
SHAPING THE FUTURE OF CANADIAN GAMING LAW

Publisher	Chuck Nervick chuckn@mediaedge.ca
Editor	Michael D. Lipton Q.C. mdliptonqc@dickinsonwright.com
Advertising Sales	Chuck Nervick chuckn@mediaedge.ca
Senior Designer	Annette Carlucci annettec@mediaedge.ca
Designer	Jennifer Carter design2@mediaedge.ca
Production Manager	Rachel Selbie rachels@mediaedge.ca
Production Coordinator	Karlee Roy karleer@mediaedge.ca
Circulation Manager	Maria Siassina circulation@mediaedge.ca

Proudly published by:

CANADIAN GAMING BUSINESS

IMGL
INTERNATIONAL MASTERS OF GAMING LAW

Publisher
Chuck Nervick
chuckn@mediaedge.ca

IMGL President
Joerg Hofmann
j.hofmann@melchers-law.com

Editor
Sean Moon
seanm@mediaedge.ca

IMGL Director of Education
Morten Ronde
morten@gaminglawmasters.com

Canadian Gaming Lawyer is published twice a year as a joint venture between Canadian Gaming Business Magazine and the International Masters of Gaming Law (IMGL).

For advertising information,
Contact Chuck Nervick 416-512-8186 ext. 227
chuckn@mediaedge.ca

For editorial information,
For editorial information: Contact Michael D. Lipton at mdliptonqc@dickinsonwright.com

Canadian Gaming Business Magazine is owned and published by:

MediaEdge

CANADIAN GAMING ASSOCIATION

Canadian GamingLawyer
SHAPING THE FUTURE OF CANADIAN GAMING LAW

Joerg Hofmann
President

Michael E. Zatezalo
First Vice President

Jamie Nettleton
Second Vice President

Quirino Mancini
Secretary

Marc H. Ellinger
Assistant Treasurer

D. Michael McBride III
Treasurer

Justin Franssen
Assistant Secretary

Douglas L. Florence, Sr.
VP Affiliate Members

Keith C. Miller
VP Educator

J. Kelly Duncan
Immediate Past President

Morten Ronde
Director Education and
Association Development

BY BRENT OLTHUIS‡

The "Outermost Reaches" of Negligence:

Gaming and the Duty to Protect

Legalized gaming is a significant source of revenue for provincial governments. For many patrons, it is a form of simple entertainment: a way to spend an evening out. For others, it may be a more serious avocation or competitive enterprise. For yet another class of persons, as one judge recently noted, gambling is problematic: these persons may have difficulties ensuring they do not gamble more than they can afford.[1]

These baseline facts give rise to a series of legal issues. Do gaming operators in Canada owe a duty of care to problem gamblers? If so, how far does the duty extend? Do operators meet the standard of care when they take reasonable efforts to minimize the risk of harm, or must they ensure that the gambler is not exposed to a risk of harm? Bound up in the responses to these questions are the misfeasance/nonfeasance distinction, the general reluctance of tort law to compensate for purely economic losses, and the role of public policy in permitting legalized gaming under heavily regulated circumstances. In each of those respects, and as the Chancery Division noted in Calvert: "Recognition of a common law duty to protect a problem gambler from self-inflicted gambling losses would involve a journey to the outermost reaches of the tort of negligence in the realm of the truly exceptional."[2]

While courts in foreign jurisdictions – notably the US, UK and Australia – have been grappling with the tort duties gaming operators may (or may not) owe to problem gamblers,[3] Canadian trial courts had not squarely addressed the matter until two recent judgments in British Columbia.

Ross v British Columbia Lottery Corp involved a suit brought by a participant in the Lottery Corporation's self-exclusion programme.[4] Ms Ross sought damages for all of the monies she lost gambling at two Lower Mainland casinos during her self-exclusion. Among other causes of action, Ms Ross pleaded that the Corporation and the two casino service providers were negligent in the operation of the exclusion programme – and, specifically, for failing to detect and remove her from the premises on those occasions when she breached her self-exclusion and gambled. After a lengthy trial, Mr Justice Truscott of the BC Supreme Court rendered judgment in March 2014, dismissing Ms Ross' claim on the basis that, while the Corporation did owe her a duty of care, it had met the applicable standard. Ms Ross did not appeal.

Just over four months later, the court issued reasons in Haghdust v British Columbia Lottery Corp. Mr Haghdust was one of two representative plaintiffs in a class action challenging the Lottery Corporation's jackpot entitlement rule, which renders self-excluded persons ineligible to claim any prizes for which identification is requested. The plaintiffs argued, among other things, that the Lottery Corporation could not enforce the jackpot entitlement rule against any person who had self-excluded prior to the rule's adoption. Mr Justice Savage[5] dismissed this argument and held that the jackpot entitlement rule was a valid exercise of the Corporation's statutory power to impose conditions and establish qualifications for entitlement to prizes. As in the Ross case, the Haghdust plaintiffs did not appeal from that finding.

For the time being, the Ross and Haghdust decisions stand, respectively, as the leading Canadian authorities on the existence of a duty of care and the steps that gaming operators might legitimately take in their efforts to meet the standard of care. In this connection, the judgments carry important lessons for gaming operators throughout the country. This article will focus in

this regard on four of the most salient aspects of the two decisions.

First, the court in Ross found that, notwithstanding the fact that the plaintiff sought to recover only economic losses, her claim fell within the "third situation" discussed in Childs v Desormeaux[6] – where defendants "offer a service to the general public that includes attendant responsibilities to act with special care to reduce risk". The Lottery Corporation and casino defendants therefore owed her a duty of care in negligence.[7] This finding subjects parties offering gaming services to extraordinary legal responsibilities. Not only do they owe "positive duties" to guard against the occurrence of harm, which may entail interference with their customers' autonomy, but they also owe those duties independent of whether the customers may be expected to suffer consequential physical harm or damage to property. While the ruling has the benefit of resolving uncertainties in the law, the lesson is that the gaming industry is held to a particular standard of vigilance and must have problem gamblers in mind when it formulates and carries out procedures.

The second point concerns the content of the duty. Truscott J described the duty as follows:

[N]one of the defendants owed the plaintiff a duty of care to guarantee or ensure that she would not be able to continue to gamble in any BC casino during her self-exclusion period of 2007-2010, nor any duty of care to indemnify her for her losses when no other gambler is owed this duty.

However, I do find that the three defendants did owe the plaintiff a duty of care to put in place a voluntary self-exclusion program that required the casinos to exercise all due diligence to prevent and not knowingly permit any person who has been barred from the casino or barred from participating in casino games by BCLC, from entry or being present in the casino or participating in casino games.[8]

This duty bears a strong resemblance to the regulatory requirement on the Lottery Corporation in BC, and to the terms of the operating service agreements between the Corporation and the casino service providers. There is however significance in recognizing an independent, common law source of this duty: it means that there is potential for the courts in other provinces to follow suit, and to impose a duty of care in tort even where a self-exclusion programme is not (as it is in BC) mandated by the regulator. Indeed, the duty might potentially be recognized even where the province in question has not yet established a formal exclusion programme.

The third point relates more specifically to the standard of care. Ross makes clear that gaming operators are permitted to formulate policies that harmonize with their broader commercial goals, but also specifies that: (i) gaming operators must assume that all enrolees in the self-exclusion programme have "some kind of a gambling problem", and potentially a serious one; and (ii) one must also expect that enrolees might attempt to find a way to continue gambling despite their enrolment – in other words, that they might act contrary to the intention implicit in their self-exclusion.[9] Those formulating policies and procedures will need to bear these assumptions in mind.

The fourth and final point emerges from Haghdust, and relates to the evolving nature of self-exclusion as a response to problem gambling. The Lottery Corporation adopted the jackpot entitlement rule in 2009, a decade after introducing the self-exclusion programme. At trial, the Corporation relied on expert evidence to the effect that such a rule was wholly consistent with the theory of self-exclusion and, indeed, that the absence of one could be expected to harm enrolees. The plaintiffs' response, not surprisingly, was that the evidence did not show the rule to be necessary given that it did not exist between 1999 and 2009, and that the court ought not to fear striking the rule down. Mr Justice Savage did not accede to the plaintiffs' argument. Although Haghdust was not a case alleging negligence, it suggests that gaming operators should be free to explore improvements to their self-exclusion programmes without having to fear that: (a) the courts might take a restrictive view as to the necessity of a given change and, potentially, find it ultra vires; or, alternatively, (b) that they might view a given change as evidence (or an admission) that the prior regime fell short of the required standard of care.

Gaming law remains in "early days" in Canada, and Ross and Haghdust are certainly not the final words on the duties owed to problem gamblers.[10] The judgments do, however, function as harbingers and provide a number of lessons for gaming providers. Doubtless, conduct in keeping with those lessons is the prudent course for the gaming industry at this time. CGL

‡ *Brent Olthuis is counsel at Hunter Litigation Chambers in Vancouver, where he practises in almost all areas of civil and constitutional litigation. He wishes to note, as a caveat, that he appeared as counsel for the British Columbia Lottery Corporation in both cases discussed in the article.*

1. Haghdust v British Columbia Lottery Corp, 2014 BCSC 1327 at para 2.

2. Calvert v William Hill Credit Ltd, [2008] EWHC 454 (Ch), aff'd on other grounds [2008] EWCA Civ 1427 at para 13.

3. See, eg: Merrill v Trump Indiana, Inc, 320 F 3d 729 (7th Cir 2003); Stulajter v Harrah's Indiana Corp, 808 NE 2d 746 (Ind App 2004); Taveras v Resorts International Hotel, Inc (19 September 2008), 2008 WL 4372791 (DNJ); Caesars Riverboat Casino, LLC v Kephart, 903 NE 2d 117 (Ind App 2009), aff'd 934 NE 2d 1120 (Ind 2010); Calvert, supra; Reynolds v Katoomba RSL All Services Club Ltd, [2001] NSWCA 234; Foroughi v Star City Pty Ltd, [2007] FCA 1503 at para 128, 163 FCR 131; Kakavas v Crown Limited, [2007] VSC 526 at paras 39-45.

4. 2014 BCSC 320.

5. Since elevated to the Court of Appeal for British Columbia.

6. 2006 SCC 18 at para 37, [2006] 1 SCR 643.

7. Ross, at para 533.

8. Ross, at paras 533-34.

9. Ross, at paras 541-42.

10. Neither case was appealed, and we remain without appellate consideration of these issues in a Canadian jurisdiction.

FEATURE

BY MICHAEL D. LIPTON AND KEVIN J. WEBER

Toward First Nations

Self-governance Over Gaming in Canada

The Canadian Criminal Code ("Code") provides that only provincial governments have the full authority to govern ("conduct and manage") gaming and betting in Canada. The right of an entity under section 207(1)(b) of the Code that can be characterized as "charitable" to conduct and manage gaming exists at the whim of those same provincial governments. This is the legacy of Federal-Provincial Agreement that gave rise to the current division of jurisdiction over gaming in 1985. During the negotiations over this 1985 Federal-Provincial Agreement, gaming was being carried out on First Nations reserves throughout Canada, but this fact did not earn them a seat at the negotiating table. The new division of powers was dictated to First Nations without consultation.

The existence of constitutional protections over what section 35(1) of the Constitution Act, 1982 calls "Aboriginal rights," while inclusive of a right of self-government, have to date been of little assistance in addressing gaming issues. In 1996, the Supreme Court of Canada in R. v. Pamajewon held that because neither gaming, nor the regulation of gaming, was an "integral part" of the cultures of two Ontario First Nations in question at the time of European contact, they did not represent rights protected by s. 35(1). While the Supreme Court did not go so far as to say that such a constitutional right could never be recognized, the nature of the test established in that case presented seemingly overwhelming obstacles to the establishment of a right to self-government over gaming-related economic activity.

However, the law relating to First Nations' constitutional rights moves quickly. In the summer of 2014, the Supreme Court rendered two landmark decisions which set out principles that would likely have been unthinkable to the court that decided Pamajewon 18 years earlier. The judgments in Tsilhquot'in Nation v. British Columbia and Grassy Narrows v. Ontario shook the foundations of the federal structure of Canada, indicating that the law of the land is no longer exhaustively distributed between the federal and provincial governments.

In Grassy Narrows, the Supreme Court held that an acknowledged right of the provinces (the authority to "take up" land) is not unconditional. Rather, it must be exercised in conformity with the honour of the Crown and be subject to the fiduciary duties imposed upon the Crown in dealing with Aboriginal interests. In Tsilhqot'in Nation, the Supreme Court expanded upon the requirement for governments to consult and accommodate First Nations' interests before proceeding with natural resources projects, stopping just short of requiring First Nations' consent before such project can proceed. This, just 10 years after the Supreme Court first imposed the consultation and accommodation duty upon governments.

These decisions forced governments to reassess the strategies and processes they had put in place to address their duty to consult with First Nations over resources projects. Such decisions validate efforts by First Nations to have the courts revisit tests established by the Supreme Court in the 1990s for the establishment of constitutionally protected self-government rights, including those relating to the conduct and regulation of gaming.

The Supreme Court has acknowledged the concept of a First Nations sovereignty that predated the European arrival, in that First Nations lived in organized societies and exercised political authority as independent nations. This recognition gives rise to the core component of the inherent right of First Nations to self-government, arising from the right to use the land over which it had sovereignty as it may determine, including for economic purposes

Courts have clearly recognized that First Nations prior to European contact were self-governing nations engaged in a form of communal living involving rights and responsibilities that were effectively administered within First Nation bands. These self-government rights were integral to First Nations culture, providing the foundation for First Nations' survival over countless generations and governing how they lived, occupied, and used the lands prior to first contact.

Contact with Europeans eventually led to the assertion of Crown sovereignty, but First Nations laws survived the assertion of Crown sovereignty. These laws were absorbed into the common law as rights, unless they were surrendered voluntarily by the treaty process, or the government extinguished them or were incompatible with the Crown's assertion of sovereignty.

The right of a First Nation to use its land for economic purposes relating to gaming would be compatible with Crown sovereignty as long as the gaming is carried out in a highly regulated environment, comparable to that provided by a state or provincial gaming commission.

To date, courts interpreting s. 35(1) have looked at rights of First Nations on an individual basis. One commentator describes this as the "Empty Box" formula: First Nations begin with the assumption that they have no Aboriginal rights worthy of constitutional recognition, and must seek to establish rights singly, filling the box with a right to hunt here, and a right to fish there. It is this much-criticized approach that resulted in the decision in Pamajewon.

This approach fails to take a realistic approach to reconciling the existence of First Nations rights with the assertion of Crown sovereignty. If the courts acknowledge the existence of prior First Nations sovereignty, that must have a meaning. Clearly, before the assertion of Crown sovereignty First Nations had a "Full Box" of jurisdictional powers, since as independent nations they would have had complete authority within their own territories and over their own citizens.

Using the "Full Box" approach, unless it can be established that the right of self-government under discussion was surrendered voluntarily by treaty or extinguished by explicit government action, the test should focus on whether the First

Nations right can be exercised in a manner compatible with Crown sovereignty. In that analysis, the onus of proving that a First Nations right cannot be exercised because it offends Crown sovereignty should rest upon the Crown.

The recognition that First Nations had plenary jurisdiction at the time of European colonization leads to an analysis whereby Crown and First Nations jurisdiction in the modern era are reconciled through the doctrine of sovereign incompatibility. If a First Nation right is incompatible with Crown sovereignty, Crown sovereignty must prevail. If a First Nations right is not incompatible, the First Nations right continues to be available to First Nations.

This plenary jurisdiction was acknowledged by the Crown in the Royal Proclamation of 1763. The historical record demonstrates that before European contact, First Nations were organized into societies, with intricate political and commercial alliances among themselves and regulation of land use. The arrival of Europeans drew the First Nations into European-based intrigues, conflicts and commercial activity. The Crown eventually attempted to stabilize relations between First Nations and colonists by way of the Royal Proclamation of 1763, which refers to First Nations living under Crown protection on lands within the Crown's dominion and territories, while acknowledging that the Crown did not own unceded First Nations' lands and could not appropriate them, but had to purchase them on a nation-to-nation basis.

The legal import of the Royal Proclamation of 1763 is that the Crown and First Nations simultaneously held sovereign rights to the same land, resulting in shared sovereignty. The only way the Crown could obtain plenary jurisdiction over First Nations lands was to purchase those lands. By necessary implication, this means that plenary jurisdiction over the lands occupied by First Nations throughout North America belonged to the First Nations prior to the arrival of Europeans, when the "shared sovereignty" regime began to be established.

In order to diminish a First Nations inherent right, the Crown would have to show there has been a clear extinguishment of the right, either unilaterally through surrender or by valid legislation prior to 1982. In the absence of such extinguishment or surrender, any legislative restriction of those rights would be an infringement which the Crown would have to justify, pursuant to the test as set out in R. v. Sparrow. In establishing justification, the Crown is required to demonstrate good faith efforts to consult with First Nations claiming infringement.

In the 2001 decision in R. v. Mitchell, two judges of the Supreme Court adopted a "doctrine of sovereign incompatibility" test. This test opened the door to moving the legal analysis away from the more artificial construct of whether a specific, narrowly defined "right" is "integral" to a First Nation's culture (the test applied in Pamajewon), and towards an analysis dealing with real issues of sovereign compatibility. This analysis, if more widely accepted, could open the door to a "Full Box" test for First Nations rights.

The failure of the provincial and federal governments to consult with First Nations in the making of the 1985 Federal-Provincial Agreement was a breach of the Crown's duty to consult, and a failure to adhere to its fiduciary obligations and the honour of the Crown. To this day, the federal government continues to refuse to consult with First Nations on gaming jurisdictional matters, on the grounds that the federal government delegated its power to regulate gaming in the 1985 Federal-Provincial Agreement. In so doing, it is relying upon the fruits of the Crown's dereliction of duty in 1985 to justify the continuing inaction on the issue. This novel adverse impact of the failure of 1985 arguably imposes a new duty to consult on the part of the federal government in the area of gaming jurisdiction.

A strategy that sought to shape the development of the law in this area, in pursuit of a court-recognized First Nations jurisdiction over gaming, would require patience and years of struggle in litigation. The litigants in Tsilquotin Nation and Grassy Narrows demonstrated such determination, and in the result the courts demonstrated an ability to see old issues through a new lens. With self-government negotiations moving at a glacial pace across Canada, the courts may be open to revisiting the principles applied in assessing self-government claims in order to move matters forward. First Nations' determination to achieve economic development through gaming could well be the test case that brings those principles to the fore. **CGL**

Michael D. Lipton Q.C. is a Senior Partner at Dickinson Wright LLP and Head of the Canadian Gaming Law Group and can be reached at 416.866.2929 or MDLiptonQC@dickinsonwright.com

Kevin J. Weber is a Partner in the Canadian Gaming Law Group at Dickinson Wright LLP and can be reached at 416.367.0899 or KWeber@dickinsonwright.com.

BY JACK I. TADMAN AND MATTHIAS SPITZ

Possible New Directions in Canadian iGaming

Regulation & Lessons from Across the Atlantic

Internet gaming and betting ("iGaming") may only be lawfully provided to persons located in a Canadian province if such iGaming is conducted and managed by the government of that province or by a government of a different province through an interprovincial agreement ("Authorized iGaming"). Nonetheless, there are numerous iGaming operators providing iGaming to persons located in Canada which is not conducted and managed by the government of a province ("Unauthorized iGaming"). Revenue generated by Unauthorized iGaming exceeds revenue generated by Authorized iGaming.

In December 2014 the Working Group on Online Gambling (the "Working Group") released its report on iGaming in Quebec (the "Quebec Report"). The Working Group's mandate was to (i) analyze the social impact of the development of iGaming in Quebec; (ii) analyze the regulatory, technical, economic, and legal measures in order to counter illegal gambling; and (iii) consult with national and international experts.

The Working Group made five recommendations in the Quebec Report. One of the recommendations included taking the necessary steps to amend the Criminal Code (the "Code") to enable Canadian provinces to issue iGaming licenses to private operators.

The Quebec Report also acknowledged the difficulties associated with amending the Code and proposed an alternative solution whereby the Quebec government would conduct and manage a portal through which it would offer the games to players located in Quebec under contractual agreement with private operators, effectively creating a quasi-licensing system.

The Quebec Report noted that in the United Kingdom, Italy, Denmark, France, Australia, and Nevada, "the issuing of licences and the adoption of subsidiary measures overseen by a regulatory body enables these jurisdictions to control nearly 95% of the iGaming market where their citizens play."

In fact, iGaming regulation and licensing requirements vary considerably within the EU. The UK licensing system applies to land-based gaming and iGaming. Licenses are available for categories such as casino, bingo, bookmaker, pool betting or arcades. In Denmark, iGaming is licensable, however internet lotteries and particular types of betting (i.e., on dog and horse racing) are subject to a monopoly.

Italy has issued a number of iGaming licenses in several rounds, including for internet poker, pool betting, sports and horse race betting, casino games, internet slots, bingo and lotteries. France only allows the licensing of internet sports betting, pari-mutuel horse race betting and poker; other internet casino games are excluded from licensing. Further, internet sports betting is restricted to a list of permitted events and bet types as published by the French internet gambling regulator (the "ARJEL"[1]).[2] France's direct neighbor Germany has taken a similar regulatory approach by partly opening internet betting but excluding internet gaming from licensing.

While the UK, Italy and Denmark are considered to be examples of functioning licensing systems within the EU, the French model has widely received criticism for not providing a viable environment for licensed iGaming operations. As an example, the French internet sports betting market is estimated to yield approx. 227 million EUR (approx. 299 million CAD at the time of writing) in gross gaming revenue ("GGR"[3]) in 2014[4]. The French list of approved operators only shows 17 companies[5], including the state operator "La Française des Jeux". The Danish regulated betting market by comparison yielded 1,780 million DKK (approx. 314 million CAD at the time of writing) in 2014 with 30 licensed betting operators as at the end of 2014.[6] These numbers clearly indicate that the French licensing system did not succeed in converting the existing unregulated market into a well regulated market. As a consequence, ARJEL is conducting a review of its internet gambling regulations which is expected to conclude in 2015.

According to the Quebec Report, a licensing model allows private operators to offer a diversified and innovative product that is at the avant-garde of what consumers want, while being secure. The Quebec Report also noted the benefits of revenues generated from licensing fees and taxes; and the importance of an effective regulatory authority.

Experience within European jurisdictions confirms that a balanced system of fees and taxing gambling is vital for creating a successful licensing system. For example, Germany imposed a 5% sports betting tax on stakes (wagers) and not on GGR, which consumes the average margin of an online bookmaker. In effect, the betting operator is obliged to pay sports betting taxes even if the player wins. France, also opted for taxation of stakes in sports betting, however in 2011, then-ARJEL boss Jean-François Vilotte conceded in an interview with French national newspaper Le Monde that "regarding taxes, we have now realized that the taxation model where a percentage of stakes is levied does not work". By comparison, Denmark imposes a 20% tax on GGR and the UK imposes a 15% tax on GGR from internet gambling.

The Report further states that "the international experience clearly reveals that the issuing of licences alone is insufficient to ensure the efficacy and long-term survival of such a system," and recommended certain subsidiary measures to be implemented concurrently with a system of licensing.

The recommended subsidiary measures are: (i) the transmission of formal notice to illegal operators; (ii) filtering of illegal sites through ISP blocking; (iii) the prohibition of certain public contracts (e.g., with suppliers linked to operators whose Unauthorized iGaming is offered to players located in Quebec); (iv) providing necessary resources to the police to enable it to investigate criminal activities linked to iGaming offered to players located in Quebec (regardless of the origin of such activities); and (v) heightening public awareness through social prevention.

The Report notes the positive experiences in the United Kingdom, Italy, Denmark, France, Australia, and Nevada. However, not all jurisdictions have been able to seamlessly transition from state monopoly to licensing system. Germany is currently transitioning from a monopoly to an open licensing system with respect to internet sports betting and internet lotteries. However, challenges that Germany is having may provide important lessons for Canada should Canada implement a licensing system or should any province implement a quasi-licensing system.

1. Autorité de regulation des jeux en ligne.
2. e.g. http://www.arjel.fr/-Football-.html.
3. In Europe, GGR (or gross gaming yield or gross profits) is commonly understood to be the amount of stakes (wagers) less the winnings/payouts to the players.
4. Numbers according to GamblingCompliance.
5. http://www.arjel.fr/-Liste-des-operateurs-agrees-.html
6. https://spillemyndigheden.dk/e-book/aarsberetning/2014/
7. Court of Justice of the EU, judgment of 3 June 2010 in case C-203/08, Sporting Exchange, para. 41.
8. Administrative Court of Wiesbaden, Germany, decision of 16 April 2015, file no. 5 L 1448/14.WI.

Under the Interstate Treaty on Gambling (the "Interstate Treaty"), the Federal States of Germany were supposed to issue an amount of 20 licenses for operating land-based and online sports betting across Germany under a so-called "experimental clause". The experimental period and license term was set for 7 years from the effective enforcement date of the Interstate Treaty in July 2014 for the purpose of evaluating the regulatory concept. The initial tendering notice required license applicants to submit an initial application at a first stage, with full disclosure of all licensing criteria at the second stage. Regulators were inexperienced with licensing procedures in the area of sports betting and numerous mistakes were made in the licensing process. As a result, German regulators were forced to re-adjust the process and the licensing criteria.

However, the Court of Justice of the EU has clarified that the obligation of transparency, which applies to licensing procedures across the EU, requires the licensing authority to ensure for the benefit of any potential tenderer a degree of publicity sufficient to enable the licence to be opened to competition and the impartiality of the procurement procedures to be reviewed.[7] Due to the limitation to 20 licenses, the regulator could not award the licenses based on qualitative criteria (i.e. grant licenses to all applicants fulfilling the criteria), but had to make a quantitative decision based on a ranking of all applicants fulfilling the criteria. Surprisingly, some major betting operators were not among the prospective licensees, and the licensing process was challenged before the courts. This brought the whole licensing process to a standstill and no licenses have been issued after more than 2½ years. In mid-April 2015, an Administrative Court held the process to be non-transparent and it seems unclear if it can be resumed.[8] The court reasoned that the experimental period is for the licensees to operate and not for the regulators to experiment how a licensing process should be organized.

Jurisdictions vary widely in terms of how iGaming is regulated, including which games are permitted, how operators are taxed, the criteria for licensure, and whether there is a limit on the number of licenses to be issued. If Canada amends the Code to allow for the licensing of iGaming, or if a province elects to conduct and manage an iGaming portal, policymakers have the benefit of looking to several jurisdictions which have already implemented iGaming regimes and will hopefully implement a considered, thoughtfully designed, licensing regime. CGL

Jack I. Tadman is a Lawyer in the Canadian Gaming Law Group at Dickinson Wright LLP and can be reached at JTadman@dickinsonwright.com.

Matthias Spitz is a partner with MELCHERS law firm, Germany, where he advises internet gambling operators on regulation and licensing in Germany as well as on European law and can be reached by email: m.spitz@melchers-law.com

BY JUDITH GLYNN AND DR. KAREN CHOI

Advertising standards
for gambling

"So, the holidays have passed, and those credit card bills just keep piling up, and there seems to be no relief in sight. How will you pay those huge bills?" a narrator asks in a television ad that runs some weeks after Christmas. "Well— [local] Casino comes to your rescue!" The ad ends with a fade out – a smiling woman's outstretched hand receiving a seemingly endless pile of dollar bills from an unseen source.

The ad aired for several weeks in a U.S. state and drew numerous complaints, one describing the ad as potentially lethal to a recovering problem gambler.

Advertising is often self-regulated or co-regulated whereby government sets overarching legislation and an advertising standards authority (ASA) that is arms-length from industry establishes and monitors compliance with specific standards. ASAs ensure advertising is legal, decent, honest and truthful. Vulnerable groups (e.g., children and youth) receive special attention, as do higher risk products, such as alcohol and tobacco. While standards that target alcohol and tobacco advertisements are ubiquitous and mature, standards for the gambling sector are rare but emerging.

EVIDENCE AND BEST PRACTICE

When the Canadian Province of Manitoba merged alcohol and gambling under one operator, they sought guidance on a set of evidence-based advertising standards that could be applied to both products. The authors reviewed the scientific literature on alcohol and gambling to identify areas of risk and to assess the impact of advertising on excessive or risky consumption. Sixteen advertising standards (seven alcohol, nine gambling) from Canada, Australia, New Zealand, and the United Kingdom were analysed to identify risk themes that were addressed. Risk themes in the scientific literature and the advertising standards were then cross-referenced to identify a set of 27 risk themes for alcohol and 25 for gambling.

Each risk theme was then analysed across the sample of standards to determine the extent to which it was addressed, and to identify theme language with the greatest clarity.

Alcohol standards predominantly seek to protect minors through restrictions on content and placement. For example, it is common practice to restrict placement, including sponsorship, during prime

time, near schools or during events likely to attract children. Other themes include restrictions to address such themes as: drinking and tasks requiring mental alertness or physical skill such as driving, operating machinery or sports; suggestions of relaxation or health benefit from drinking; and linking drinking to aggression, toughness, violence, drug use or illegal acts.

The gambling advertising standards include content and placement restrictions to protect minors. However, they also focus more strongly on addressing the risky cognitions and behaviours that can lead to problems. These themes are addressed by restricting some messages. For example, advertising must not portray:

- Social pressure: verbal/peer pressure, success (personal, social, sexual, sporting, business), toughness/resilience/recklessness
- Appeals to financially vulnerable people: solve financial problems / replacement for employment/way to pay routine expenses,
- Association with alcohol.

Some themes specifically target at-risk/problem gamblers. For example, advertisers must not:

- Market to self-excluded players,
- Offer inducements/promotions that can exacerbate problem gambling,
- Imply intrinsic luck,
- Suggest gambling as means of escape/indispensable/taking priority,
- Encourage solitary gambling,
- Associate gambling with irresponsible or criminal behaviour,
- Encourage playing beyond one's means.

Other themes state that advertisers must include responsible gambling messaging, and information to ensure informed consent (odds of winning, size and number of prizes, typical not best prize, and the role of chance rather than skill).

Compared to alcohol standards, there is less consistency between the themes identified in the scientific literature and those addressed in gambling standards. Of note, countries are more likely to have national standards for alcohol, while for gambling the approach is more often a state or provincial effort.

INTERNATIONAL TRENDS

There is much to be learned from the emergence of gambling advertising standards internationally. The issue is high on the public policy agenda of many jurisdictions.

United States – In 1999, the National Gambling Impact Study Commission recommended enforceable gambling advertising guidelines, particularly as they relate to youth and low income neighbourhoods. National standards have yet to be developed, leaving action to the States. Minnesota is currently grappling with this issue. A proposed requirement that the state lottery post social responsibility warnings on billboards was sidetracked by questions and amendments to extend the requirement to other, more risky, forms of gambling. The issue is expected to resurface this year.

Australia and New Zealand – While New Zealand has national standards for gambling advertising; Australia has state-level standards that vary in breadth and depth.

Europe – In 2014, the European Union established common principles for responsible commercial communication of online gambling services. The European Gaming and Betting Association was quick to adopt these principles, applauding the move to consistent standards for industry.

The United Kingdom and many other European countries have well-established gambling advertising standards of their own, often managing high profile cases such as the Paddy Power decision to offer odds on the Oscar Pistorius murder trial. The series of ads with the tagline "Your money back if he walks," received a UK record of 5,525 complaints, and led the ASA to the rare step of demanding the ad be removed pending investigation. The ad was banned for trivializing the issues surrounding a murder trial, the death of a woman, and disability.

In Germany the Inter-State Treaty on Gambling, with its general state monopoly on games of chance and general ban on online gambling, is now before the European Court of Justice (ECJ) to determine whether it is contrary to EU rules. Germany's Guidelines for Gambling Advertising have become part of the power struggle, with suggestions they represent unconstitutional censorship. Complaints and cross-complaints about such alleged infractions as the inclusion of the Shamrock luck symbol are adding to the general confusion that the ECJ may resolve.

Spain recently used its gambling advertising guidelines to add a regulatory requirement that online operators use predictive data analytics to identify players at risk – an extraordinary extension of this policy tool.

In Canada, where national guidelines specific to alcohol are longstanding, there is no national or provincial leadership from government or regulators on gambling advertising standards. In this space, operators are left to develop guidelines on their own. Manitoba Liquor and Lotteries, the operator for both alcohol and gambling in the province of Manitoba, has decided to stay ahead of the public policy curve by integrating evidence-based standards for alcohol and gambling, developed through review of the scientific literature and experiences of other jurisdictions, before implementing a rigorous review, monitoring and compliance process of its own. CGL

Judith Glynn and Dr. Karen Choi are Co-Principals, Strategic Science, offering social responsibility research and consulting in gambling, alcohol, tobacco and obesity. They can be reached at karen@strategicscience.ca and judith@strategicscience.ca

BY DONALD J. BOURGEOIS

The Role of the Lawyer in Enterprise Risk Management and Risk Assessments

The identification and mitigation of risks have become, in the last several years, critical functions for boards of directors, executives and the professionals advising them. "Risk" has, of course, always existed and is not necessarily a "bad thing". The mitigation of risk is also not new. The identification of risk in a systemic manner and its mitigation is something, though, that has developed substantially as a basic management and governance tool in recent years.

The use of an enterprise risk management approach has become mandatory in a number of sectors in the 21st century. The financial services sector in Canada has become accustomed to risk management, including enterprise risk management. The ability of the Canadian banking sector to withstand the economic difficulties post-2008 has been attributed in large measure to (i) a comprehensive risk management approach adopted by the sector in the late 20th century in response to its regulators, and (ii) a comprehensive risk assessment by federal regulators that resulted in measures that were to be taken by the sector in response to the financial situation.

The use of a risk-based approach to regulation is becoming much more common in gaming – whether it involves FINTRAC's guidance for anti-money laundering purposes, the recommendations of the British Columbia auditor in its review of the British Columbia Lottery Corporation and the BC Gaming Policy and Enforcement Branch, or the more comprehensive approach in Ontario's Registrar's Standards and Requirements. Gaming operators and gaming suppliers are being pulled towards a risk-based approach, including enterprise risk management, by regulators and pushed in a complementary direction through modern governance measures and securities law obligations, institutional investors, internal and external auditors and others.

Lawyers are, of course, professionals who provide advice on risk and are recognized as having skills, training and experience that are relevant to risk assessments. But this experience is very often transactional in nature, such as the risks of litigation arising from a potential breach of contract. Nevertheless, lawyers have a potentially strong role to play in risk identification and mitigation, including in an enterprise risk management model.

The Committee of Sponsoring Organizations of the Treadway Commission (COSO) has had a substantial influence in highlighting the importance of risk management.[1] The COSO framework, which is used not only in the United States but also in Canada and elsewhere, involves five components – a control environment, risk assessment, control activities, information and communication, and monitoring. An integrated framework for Enterprise Risk Management (ERM) is a foundational function to allow management to evaluate and improve risk management. The underlying purpose of the ERM framework is to achieve the strategic, operational, reporting, and compliance objectives of the entity.

Risk assessment, in this context, has been described as:

> … a systematic process for identifying and evaluating events (i.e., possible risks and opportunities) that could affect the achievement of objectives,
> positively or negatively. Such events can be identified in the external environment

(e.g., economic trends, regulatory landscape, and competition) and within an organization's internal environment (e.g., people, process, and infrastructure). When these events intersect with an organization's objectives—or can be predicted to do so—they become risks. Risk is therefore defined as "the possibility that an event will occur and adversely affect the achievement of objectives." [2]

ERM is an initial and essential step in risk management. COSO describes ERM as "a process, effected by an entity's board of directors, management and other personnel, applied in strategy setting and across the enterprise, designed to identify potential events that may affect the entity, and manage risk to be within its risk appetite, to provide reasonable assurance regarding achievement of entity objectives". [3] This standard of "reasonable assurance", though, is one that sometimes is inconsistent with a traditional legal approach of zero or remote risk as the basis for providing legal advice and opinions.

The ERM framework itself has eight components:

- Internal environment – the existing environment, including "tone at the top", risk appetite, integrity and ethical values,
- Objective setting – the processes in place to set objectives of the business to support the mission of the entity,
- Event identification – events, both internal and external, that affect an entity's objectives, which may be either a risk or an opportunity,
- Risk assessment – the analysis of the risks, including likelihood and impact, and whether the risk is inherent or residual,
- Risk response – management's responses to the risks, through avoidance, acceptance, reduction or sharing of the risk, such as through insurance policies,
- Control activities – the policies and procedures used implement the risk response,
- Information and communication – identification, capture and communication of relevant information for use by people to carry out their responsibilities, and
- Monitoring – the monitoring of the ERM and the making of necessary modifications.

A key intention of the ERM Integrated Framework is to achieve the business objectives of the entity – including those related to compliance with the law, regulation and standards. A role for the lawyer is perhaps obvious in this context – the identification of what those legal and regulatory requirements are for which the entity must be able to demonstrate compliance. Legal advice on the standards that may be applicable to compliance are also well within the bailiwick of lawyers, whether those standards are industry-developed ones or are more legal in nature, such as mens rea or strict liability from an offence perspective.

But this traditional and limited role does not make full use of the skills, training and experience of lawyers. Compliance with the law is, of course, essential. It is a strategic objective of most entities and it is certainly the objective of all regulators that all of the regulated entities comply with the law. What is missing from this limited role, though, are the strategic and operational advisory roles that lawyers can carry out within the context of reasonable assurance.

No enterprise risk management is complete without strategic and operational risk assessments and mitigation measures. For lawyers to participate more fully and to provide an enhanced level of services, it is important that lawyers understand the strategic objectives of the entity and how those objectives will be achieved at the operational level. Even in the traditional role of lawyers to advise and opine on compliance with the law, it is useful and important for the lawyer to know and understand the strategic objectives and how the entity operates to achieve legal compliance in an efficient and effective manner. And, as noted in the COSO materials, those objectives are within a "risk appetite" that may not be and usually is not zero or remote level of risk.

This approach to compliance risk assessment moves the lawyer from a more traditional and transactional approach to risk assessment into the strategic and operational life of the entity. It will also add value to the client through ensuring alignment of management's response to the risk environment will be lawful and that the control activities, information and communication, monitoring are both ensuring legal compliance and achieving business objectives. But to do so in an effective way, the lawyer needs to understand enterprise risk management and the integrated framework, which will build on the lawyer's existing skills, training and experiences.

A lawyer, in the context of an enterprise risk management approach, is able to articulate for the client what is a reasonable and defensible mitigation strategy in light of the possible in the sector or sectors in which the entity operates. Clients in highly-regulated sectors, such as gaming, will have a lower risk appetite – in particular with compliance with gaming laws – than in other sectors. The approach, though, recognizes that the client has defined through a rigorous process its risk appetite and that it recognizes the business and legal consequences of its decisions. **CGL**

Donald Bourgeois is a lawyer practising in gaming law and a principal of Gaming & Regulation Group Inc. He was General Counsel for the Alcohol and Gaming Commission of Ontario for 10 years and can now be reached at DonBourgeois@gmail.com.

1. *Committee of Sponsoring Organizations, Enterprise Risk Management – Integrated Framework, 2004. COSO announced in 2014 that it would review the Integrated Framework, with an advisory panel established in February 2015.*
2. *PriceWaterhouseCoopers, A Practical Guide to Risk Assessment: How Principles-Based Risk Assessment Enables Organizations to Take the Right Risks, December 2008 at page 5.*
3. *COSO, Enterprise Risk Management – Integrated Framework, Executive Summary Framework, September 2014.*

INTERNATIONAL MASTERS OF GAMING LAW

MARK YOUR CALENDARS

global gaming expo G2E ASIA

IMGL Member Reception at G2E Asia

May 20, 2015
Venetian Macau
Macau, China

G2E

IMGL Member Reception at G2E

September 29, 2015
Wynn Las Vegas
Las Vegas, Nevada

IMGL

Autumn Conference with the International Association of Gaming Regulators (IAGR)

October 14—16, 2015
JW Marriott Lima
Lima, Peru

IMGL Masterclasses

iGAMING SUPER SHOW

Masterclass Amsterdam at the iGaming Supershow

June 25, 2015
RAI Amsterdam
Amsterdam, The Netherlands

G2E

Masterclass at G2E

September 28, 2015
Sands Expo and Convention Center
Las Vegas, Nevada

MiGS 15

Masterclass at MiGS-Malta iGaming Seminar

November 17-19, 2015
St Julians, Malta

For more information, visit **GamingLawMasters.com** or contact **IMGLDirector@GamingLawMasters.com**