INDIGENOUS GAMING IN CANADA:
ISSUES AND NEGOTIATIONS

Charitable Gaming:
Creating Opportunities for Charities & Technology Providers

Potential Changes Coming To AML Rules

Sports Betting South of the Border
I am writing to you as IMGL is preparing for a very active 18 months ahead.

Our 2018 Autumn conference in Prague, which is taking place from 5-7 September 2018, is in the final stage of planning with Stephen Ketteley of Wiggin LLP and the Prague conference committee putting the final touches to the programme.

Please feel free to contact Stephen.Ketteley@wiggin.co.uk directly if you are interested in participating or assisting in organising a conference panel.

We are pleased to be having our conference in a city like Prague which is full of attractions like the Lobkowicz Palace, where we are having our Gala Dinner. Please visit imgl.org/conferences/autumn/register/2018 to register now – accommodation bookings can also be made at the historic Boscolo Hotel at a preferred rate from our website.

The Prague conference follows a very successful spring 2018 conference in Las Vegas, which was held last month. Co-chaired by Bob Stocker and John Maloney and co-hosted with the American Bar Association, the UNLV Boyd School of Law, the UNLV International Institute of Gambling Research and the National Indian Gaming Association, the conference included a number of panel discussions concerning issues of relevance to industry participants. Among the topics covered were the possible legalisation of sports betting in the United States in anticipation of the decision of the Supreme Court in Murphy v. National Collegiate Athletic Association (now handed down), which included a panel involving three leading US State regulators, compulsive gambling (and the greater controls that can be exercised through the removal of cash in connection with the conduct of gambling) and Nelson Rose’s vision for the gaming sector in 2023. There was also a very popular separate track dealing with tribal gambling issues, in which many of the leading lawyers and other industry participants in tribal gambling were involved. Thanks to all of those who participated. Indeed, a standard was set that we will be looking to follow at future IMGL Spring conferences in the United States.

Since the Las Vegas conference, the Executive Committee, comprising Mike McBride, Marie Jones, Marc Ellinger, Marc Dunbar, Justin Franssen, Quirino Mancini and Mike Zatezalo, have been busy making plans for future conferences. We are pleased to announce that the 2019 IMGL Spring conference will take place in New Orleans from 27-29 March 2019, while plans are well advanced for the 2019 Autumn conference to take place in Munich, Germany.

We appreciate the efforts of the organising committees of both those conferences.

Also, Morten Ronde has been busy developing an IMGL Masterclass programme in Europe, with IMGL Masterclasses being planned to be held in Riga, Amsterdam, and Copenhagen in the next few months. Of specific note are the IMGL Masterclasses to be held at IGB Live Amsterdam from 17-20 July and at the IAGR conference in Copenhagen from 17-20 September. These are likely to be of global interest. Any IMGL member interested in participating should contact Morten Ronde (morten@imgl.org).

We trust that you are able to join us at one or more of the events referred to above. Also, I trust that you continue to enjoy our publications (American Gaming Lawyer, Indian Gaming Lawyer, Canadian Gaming Lawyer, Asian Gaming Lawyer, and The European Gaming Lawyer) which are being co-ordinated by our Executive Director, Sue McNabb. We will be circulating soon a mailing list to confirm that you would like to receive these publications.

Finally, I would like to welcome Brien van Dyke (brien@imgl.org) as IMGL’s Assistant Executive Director. She will be assisting Sue McNabb in co-ordinating our conferences and enhancing our social media presence.

Best Wishes
Jamie Nettleton
PRESIDENT
Indigenous Gaming
Issues In Canada

The current division of jurisdiction over gaming in Canada came about as a result of a Federal-Provincial Agreement that was entered into in 1985, intended to address differences that had arisen between those governments since the introduction of a liberalized regime for gaming and betting in 1967. The legacy of this 1985 Federal-Provincial Agreement is that the Canadian Criminal Code provides that only provincial governments have the full authority to govern (“conduct and manage”) gaming in Canada. Charitable and religious organizations can also conduct and manage gaming, but the right of any charitable or religious entity to do so exists at the whim of the provincial governments.
During the negotiations over this 1985 Federal-Provincial Agreement, gaming was being carried out on the reserves of Indigenous people throughout Canada, but this fact did not earn them a seat at the negotiating table. The new division of powers was dictated to Indigenous people without consultation.

Section 35(1) of the Constitution Act, 1982 extends protections over what it refers to as “Aboriginal rights,” which is generally understood to include a right to self-government. However, this has been of little assistance to Indigenous governments seeking to regulate gaming on their territories. 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, self-government rights associated with gaming were not protected by section 35(1). The Court did not state that such a constitutional right could never be recognized in the case of any First Nation; however, the test the Court set for the establishment of such a right presents overwhelming obstacles to the recognition of a constitutionally protected right to self-government over gaming-related economic activity.

However, the law relating to Indigenous constitutional rights moves quickly. In the summer of 2014, the Supreme Court rendered two landmark decisions that set out principles that would likely have been unthinkable to the Court that decided Pamajewon 18 years earlier. The judgments in Tsilhqot’in Nation v. British Columbia and Grassy Narrows First Nation v. Ontario (Natural Resources) 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 the acknowledged right of the provinces 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 Indigenous interests. In Tsilhqot’in Nation, the Supreme Court expanded upon the requirement for governments to consult and accommodate Indigenous interests before proceeding with natural resources projects, stopping just short of requiring prior Indigenous consent to such projects. This advance in the jurisprudence took place a mere 10 years after the Supreme Court first imposed the duties of consultation and accommodation upon governments.
These decisions forced governments to reassess the strategies and processes they had put in place to address their duty to consult with Indigenous people over resources projects. Such decisions validate efforts by Indigenous people 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 an Indigenous sovereignty that predated the European arrival, in which Indigenous people lived in organized societies and exercised political authority as independent nations. This recognition gives rise to the core component of the inherent "Aboriginal" right 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 Indigenous people prior to European contact formed self-governing nations engaged in a form of communal living involving rights and responsibilities that were effectively administered within bands. These self-government rights were integral to Indigenous culture, providing the foundation for the survival of Indigenous people 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 Indigenous 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 they were incompatible with the Crown's assertion of sovereignty.

Under this analysis, the right of Indigenous people to use their 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, governed by standards comparable to those provided by a provincial gaming commission.

To date, courts interpreting section 35(1) have looked at the self-government rights of Indigenous people on a basis described by some commentators as the "Empty Box". Indigenous people 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, a right to fish there. This much-criticized approach resulted in the Pamajewon decision.

The "Empty Box" approach fails to take a realistic approach to reconciling the existence of pre-existing Indigenous rights with the assertion of Crown sovereignty. The courts have acknowledged the existence of prior Indigenous sovereignty, and it necessarily follows that before the assertion of Crown sovereignty, Indigenous people had a "Full Box" of jurisdictional powers, since they formed independent nations that had complete authority over their own territories and citizens.

Under an analysis consistent with the "Full Box" approach, unless it can be established that an Indigenous right of self-government was surrendered voluntarily by treaty or extinguished by explicit government action, the test should focus on whether that Indigenous right can be exercised in a manner compatible with Crown sovereignty. In that analysis, the onus of proving that an Indigenous right cannot be exercised because it offends Crown sovereignty should rest upon the Crown.

The recognition that Indigenous people had plenary jurisdiction at the time of European colonization leads to an analysis whereby Crown and Indigenous jurisdiction in the modern era would be reconciled using the doctrine of sovereign incompatibility. If an Indigenous right of self-governance is incompatible with Crown sovereignty, Crown sovereignty must prevail. If such a self-governance right is not incompatible with Crown sovereignty, it continues to be available to the Indigenous people in question.

This plenary jurisdiction was acknowledged by the Crown in the Royal Proclamation of 1763. The historical record demonstrates that before European contact, Indigenous people were organized into societies, with intricate political and commercial alliances among themselves and regulation of land use. The arrival of Europeans drew the Indigenous people into European-based intrigues, conflicts and commercial activity. The Crown eventually attempted to stabilize relations between Indigenous people and colonists by way of the Royal Proclamation of 1763, which refers to Indigenous people living under Crown protection on lands within the Crown's dominion and territories, while acknowledging that the Crown did not own unceded Indigenous 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 Indigenous people simultaneously held sovereign rights to the same land, resulting in shared sovereignty. The only way the Crown could obtain plenary jurisdiction over Indigenous lands was to purchase those lands. By necessary implication, this means that plenary jurisdiction over the lands occupied by Indigenous people throughout North America belonged to them prior to the arrival of Europeans, when the "shared sovereignty" regime began to be established.

In order to diminish an inherent right of Indigenous people, 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 that 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 Indigenous people 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 the Indigenous 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 Indigenous rights.

The failure of the provincial and federal governments to consult with Indigenous people 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 Indigenous people 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 Indigenous jurisdiction over gaming, would require patience and years of struggle in litigation. The litigants in Tsilhqot’i In 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. The determination of Indigenous people to achieve economic development through gaming could well be the test case that brings those principles to the fore. CGL

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Charitable Gaming: Creating Opportunities for Charities & Technology Providers

BY TROY ROSS

In December 2014, the federal government passed omnibus Bill C-43 (Budget Implementation Act), which amended Section 207 of the Criminal Code to permit charitable organizations to carry out, with the use of a computer, certain operations relating to provincially-licensed lottery schemes.

While the amendment may not have generated any controversy or even much public interest upon its passing, its impact on the charitable gaming sector will be significant. As and the legendary recording artist Sam Cooke once crooned, “It’s been a long time coming.”

The amendment is momentous because it will allow for the sale of raffle tickets, the selection of winners and the distribution of prizes in charitably licensed events on or through a computer.

When Section 207 was originally drafted in 1985, it codified a landmark agreement between the federal and provincial governments that delegated the provinces the legal right to conduct and manage lottery schemes. Specifically, Section 207(1)(a) read together with Section 207(4) (c) gave exclusive rights to the provincial governments to operate lottery schemes on or through a computer.

At the time, this section was meant to ensure that the provinces had sole jurisdiction to engage in electronic gaming (i.e., slot machines or lottery schemes), and that the federal government would no longer offer games of chance.

Unfortunately, the inclusion of the word “computer” in Section 207(4)(c), had the unintended consequence of prohibiting charities from using technology in any fashion to improve their fundraising operations for the next 30 years. It was arguably never the intent of the federal government to prevent charitable organizations from using modern technologies to assist in the operation of cost-efficient lotteries.

When this section of the Code was originally written in 1985, about 8% of the population had access to home computers and the state of the art in personal computing was the 8-bit Commodore 64. Today over 80% of Canadians carry a computer in their pocket. No rational person would consider 1980s technology relevant in our modern world.

This modernization of charitable gaming was long overdue. The Bill C-43 amendment effectively leveled the playing field for charitable and religious organizations.

Specifically, the newly added Section 207(4.1) allows for the sale of a raffle ticket, the selection of a winner, and the awarding of a prize in a raffle on or through a computer by a licensed charitable or religious organization. It has been estimated that this simple change will save charitable organizations tens of millions per year in cost efficiencies. It also provides for new partnerships with technology providers.

For example, charitable organizations can now access electronic raffle solutions like Bump 50:50, currently used by NHL, MLB, NFL, and NBA foundations to raise money through their 50/50 raffles at sporting events. Not only do these partnerships reduce costs, they also improve the integrity of the raffle event.

As Bump 50:50 President Dan Tanenbaum notes, “adding a layer of technology adds accountability, credibility and security to the raffle program. The real-time updated jackpot can be displayed online, on mobile and throughout the event, and adds excitement and generates more tickets sales. The up-to-the-minute reporting tools for both internal and external recording purposes gives the charitable organization the data they need to analyze their performance and submit any necessary information to local gaming regulators for any audit purposes.”

Interestingly, while the amendment specifically permits the use of computers for charitable raffles, the Code remains silent on the definition of a raffle versus other types of lottery schemes. It is quite possible that new electronic charitable gaming options will be created as a result of the change contained in C-43.

Over the past three years, a number of provincial regulators have been reviewing their charitable licensing frameworks in response to the federal amendment, including Manitoba, British Columbia, Saskatchewan, and Ontario.

I will expand on the new forms or charitable gaming and new distribution networks to advertise, sell and distribute raffle products now made possible as a result of this amendment in the second part of this series, to be published in the upcoming Canadian Gaming Business magazine.

Troy Ross is the founder of TRM Public Affairs. For 20 years Troy has been involved in the complex political, public policy and regulatory environment of gaming in Canada and internationally. TRM works with casino operators, equipment manufacturers, technology vendors, online gaming providers, lottery and charitable gaming interests, and provincial gaming agencies across the country. He can be reached at troy@trmpublicaffairs.com
Potential Changes
Coming To AML Rules

Earlier this year, the Department of Finance Canada released a consultation paper on proposed enhancements to Canada’s anti-money laundering and anti-terrorist financing (“AML”) regime. A close read of the paper reveals a number of initiatives that could have far-reaching implications for gaming compliance.

Horse Racing And Pari-Mutuel Betting
The paper proposes to apply federal AML requirements to a number of new business sectors, including pari-mutuel betting and the horse racing industry. Like casinos, horse racing is generally a cash-intensive business and therefore has inherent risks for the placement stage of money laundering. The paper cites the use of currency refining and online betting through player accounts as potential concerns.

A number of factors would have to be considered with this proposal, including which organization would be responsible for compliance when it comes to on-track or teletheatre (off-track) betting. The involvement of the Canadian Pari-Mutuel Agency and provincial gaming regulators would also have to be taken into account, since both organizations already have licensing regimes and measures in place to ensure the integrity of the industry.

Automated Teller Machines And Armoured Cars
Several studies have flagged concerns over the use of privately-owned automated teller machines (“white-label ATMs”) in money laundering schemes. The consultation paper proposes to include white-label ATMs as well as armoured car companies in Canada’s AML regime. The paper links the two businesses by stating that “a key source of concern is that funds are collected and pooled into accounts controlled by the armoured car company, and are then transferred electronically into the accounts of their customers, ultimately obscuring the true origin of the cash. This anonymity can be leveraged by other businesses, such as white-label ATMs, at a high-risk for money laundering.”

The use of privately-owned ATMs and armoured cars in gaming establishments is widespread and background checks and licensing are performed by the casino operator or regulator, respectively. Clarity would be needed on the roles of each organization with regard to compliance and reporting.

Structuring
Criminals will often arrange their financial transactions to avoid triggering reporting thresholds. This is known as “structuring”. The Department of Finance Canada is “considering the creation of a criminal offence for an entity or individual to structure transactions and to specifically prohibit reporting entities from conducting transactions in such a way as to avoid transaction reporting.”

It is unclear from the consultation paper as to how this prohibition would affect a casino’s internal risk mitigation measures, such as establishing limits on cash transactions. For example, if a casino’s policy was to refuse cash transactions over a certain amount, and that threshold prevented the casino from filing a statutory AML report, would the casino operator be guilty of structuring?

Cash Restrictions
The consultation paper also recommends that consideration should be given to “whether there should be a limit on the amount of cash a business in Canada could accept and/or report on.”

While bulk cash is certainly an issue when it comes to combatting crime, casinos would obviously take interest in any proposal that puts limits on the acceptance of cash. A similar proposal in the European Union last year was met with resistance from the European Casino Association, which argued that putting hard limits on cash transactions would exacerbate issues such as problem and illegal gambling.

Also noteworthy, the federal government announced in its 2018 budget that the $1,000 banknote, along with several other more obscure denominations such as the $500 and $25 notes, will have their legal tender status revoked. There is still close to $700-million in $1,000 banknotes in circulation.

Conclusion
As money laundering continues to grab headlines, the gaming industry should continue to play its role in preventing criminal activity and engage with government and other stakeholders to ensure the appropriate frameworks are in place to combat financial crime.

These are just some of the highlights from the consultation paper. A copy of the full document can be found online at: https://www.fin.gc.ca/activty/consult/amlatfr-rpcfat-eng.asp

Derek Ramm is the Director of the Intelligence and Investigative Support Branch at the Alcohol and Gaming Commission of Ontario. He has an extensive background in the AML and gaming fields, having previously worked at FINTRAC and served as a Commissioner on the Bermuda Casino Gaming Commission.
Government control over gambling in Canada is exerted at the federal and provincial levels through legislation and enforcement of legislation. Offshore remote gambling presents jurisdictional and enforcement challenges to government control over gambling. These jurisdictional and enforcement challenges have led to offshore remote gambling operators accepting players located in Canada without fear of repercussion from Canadian authorities. As an alternative to criminal and quasi-criminal control over offshore remote gambling, which has not been an effective deterrent, the Quebec government is attempting to control offshore remote gambling by blacklisting and blocking unauthorized remote gambling websites. This exercise of network sovereignty is unprecedented in Canada.

Government Control over Remote Gambling
The primary source of legislative control over gambling in Canada is federal, in the form of the Criminal Code (the “Code”). All commercial gambling is illegal in Canada, unless the activity falls into one of the permitted exemptions contained in the Code.

The secondary source of legislative control over gambling in Canada is provincial, in the form of the legislation created by the provinces. The provinces are able to create legislation dealing with most aspects of gambling but are subject to a number of limitations in the Code.

Commercial gambling not authorized by the Code or by provincial gambling legislation presents a challenge to government control over gambling. Remote gambling, which is usually provided by entities whose only connection to Canada is the location of the players (referred to in this article as an “offshore operator” or “offshore remote gambling operator”), presents unique challenges related to jurisdiction and enforcement as compared to land-based gambling. To date, no offshore remote gambling operator has been charged with any gambling offences under the Code.

Provincially Offered Remote Gambling
At the time of writing, eight provinces offer
some type of remote gambling through provincial or interprovincial lottery corporations.\(^4\) Prior to provincial and inter-provincial lottery corporations providing remote gambling to players located in their respective provinces, offshore remote gambling operators were not directly competing with provincial lottery corporations. At present, provincial and inter-provincial lottery corporations must compete with offshore operators which have numerous advantages including: (i) a head-start attracting players; (ii) offering more favorable odds and payouts; and (iii) being able to offer types of remote gambling that provincial and inter-provincial lottery corporations are prohibited from offering (e.g., single-game sports betting). Accordingly, provincial and inter-provincial lottery corporations are motivated to find effective alternative means to restrict the activities of offshore remote gambling operators.

### “Illegal Website Filtering Measure”

Quebec is trying a novel approach (in Canada, at least) to increase its control over offshore remote gambling. In Quebec’s 2015-2016 budget, it unveiled three measures to control offshore remote gambling. The first, and most controversial measure, is to introduce an “illegal website filtering measure.”\(^5\)

According to the Quebec government, the primary reasoning for this measure is that offshore remote gambling operators “do not apply the same responsible gambling rules as Espacejeux.”\(^6\) They thus pose a risk to the population, especially young people.” The next paragraph begins by stating that “…the measures announced will enable the government to recover revenues that are escaping it…”\(^6\)

In accordance with the first measure, in May 2016 the Quebec legislature approved a bill (Bill 74) which would require internet service providers (ISPs) to block remote gambling websites not approved by Loto-Quebec. ISPs which fail to block websites on Loto-Quebec’s list could be fined up to CAD $100,000 for a first time offence.

Bill 74 has been heavily criticized by numerous stakeholders, including net neutrality proponents, Canada’s telecommunications regulator, ISPs, net neutrality proponents, and legal experts.

Net neutrality is the principle that ISPs should enable access to all content and applications regardless of the source, and without favoring or blocking particular products or websites. Legislated blocking of websites violates this principle. The Canadian federal government, including Prime Minister Justin Trudeau, supports net neutrality.\(^7\)

Canada’s telecommunications regulator is the Canadian Radio-Television and Telecommunications Commission (the “CRTC”). The CRTC’s position is that (i) any blocking of the delivery of content (such as a remote gambling website) to an end-user would require approval of the CRTC and (ii) compliance with legal or juridical requirements – whether municipal, provincial, or foreign – does not in and of itself justify the blocking of specific websites by Canadian carriers, in the absence of Commission approval under the [Telecommunications] Act. The [Telecommunications] Act.

The Canadian Wireless Telecommunications Association (the “CWTA”) is an industry group representing Canada’s telecom providers. The CWTA has challenged the constitutionality of Bill 74 because it (a) usurps the federal government’s authority over telecom matters and (b) forces CWTA members to pay for the cost of policing Loto-Quebec’s blacklist.

As Canadian internet law expert Michael Geist points out, if someone is successful legalizing website blocking for one specific purpose (e.g., blocking offshore remote gambling operators or websites providing pirated materials):

…it is easier to envision governments requiring the blocking of sites that are alleged to infringe copyright or blocking e-commerce sites that are not bilingual or do not pay provincial taxes. If that happens, the open Internet in Canada would be placed at risk of unprecedented government intervention into how Internet providers manage their networks and what sites Canadians are able to access.\(^10\)

It is likely that both parties are prepared to take this matter to the Supreme Court of Canada, meaning that it could be years before this matter is resolved.

If the Quebec government is successful, this would be the first example of government-mandated website blocking in Canada. Loto-Quebec and provincial and interprovincial lottery corporations would have a powerful tool available to control offshore remote gambling. Legislating website blocking also sends a message to other jurisdictions that remote gambling is not lawful in Canada unless provided by provincially or inter-provincially authorized organizations. Unfortunately for the Quebec government, it appears that it has an uphill battle, and, even if successful, it will be years before the matter is actually decided. \(\text{CG}L\)

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2. One of the exemptions in the Code grants the authority to conduct and manage most forms of commercial gambling to the provinces.
3. Examples of gambling which the provinces are permitted to legislate are personal sports betting, pari-mutuel wagering (which is federally regulated), gambling on international cruise ships, and certain types of private bets.
4. The eight provinces are: British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, and Quebec.
6. The website conducted and managed by Loto-Quebec (the provincial lottery corporation responsible for conducting and managing gambling in Quebec).
7. Supra note 4.
8. Ibid.
A new chapter has recently been opened in the seemingly never-ending story of the regulation of igaming in Germany by the judges of the Federal Administrative Court (the ‘Court’). In the litigation of companies linked to 888 against interdiction letters of a local regulator, the Court confirmed that the ban on online casinos complies with EU law – a legal area that has been embattled before courts for more than a decade. The applicability of national restrictions to igaming vs. the scope of EU internal market freedoms are at the core of that legal struggle.

Since the Prime Ministers of the German states are currently negotiating on a proposal to reform the Interstate Treaty on Gambling, the overarching restrictive framework for the regulation of gambling in Germany, the timing of the judgment certainly was unfortunate – or maybe intentional. The proponents of the Interstate Treaty, including a number of executives of the state lotteries, have hailed the judgment as a landmark victory. For years, the state lottery companies of Germany have been agitating against the licensing of igaming as they perceive it to be a threat for the legal justification of the state monopoly in lotteries.

The judgment in case “888”
Two EU-based entities linked to 888
were litigating against an interdiction letter which ordered them to cease operating online casinos, online sports betting and scratch cards in the territory of the German state issuing that letter.

For more than a decade Operators of online casinos have justified operating lawfully in the German market by invoking the freedom to provide services under Article 56 of the Treaty on the Functioning of the EU. Since the regulation igaming is not harmonized and broadly exempt from EU e-commerce rules, the regulatory approach to igaming is for each EU Member State to decide – which has also been recognized by the Court of Justice of the EU (the ‘CJEU’). However, it has also been clarified in constant jurisprudence of the CJEU that restrictions to the freedom of service are only justified if they are implemented in a consistent and systematic manner and that they must comply with the principle of proportionality. The latter requires that any national restriction must be suitable for ensuring that the objectives pursued by setting up a restrictive regulatory system will be achieved and must not go beyond what is necessary for that purpose. In 2010, the German state monopoly on sports betting has been considered to breach those requirements in a series of judgments of the CJEU.

In the judgment of 26 October 2017, in contrast, the Court considered the German ban on online casinos to satisfy these requirements, arguing more generally that a ban in principle is suitable to protect players from the dangers of gambling and that the level of protection is at the discretion of each EU Member State.

However, evidence on the developments in the igaming market over the past years has been ignored. Constant growth in the unregulated online casino sector in Germany suggests that the ban has failed to be implemented since 2012 and that the protection of players and minors has not been achieved under the German regulations. Instead, the grey market has grown considerably - as an example, gross gaming revenue in online casinos has grown from 201 mn EUR in 2011 to 1,165 mn EUR in 2015 according to official statistics.

In practice, the judgment is likely to increase the appetite of regulators for enforcement against online casino operations, though it is clearly outdated with regard to the relevant facts. At the political level, it is likely to be used as an argument by some state governments to keep online casinos banned, thereby preserving the monopolistic approach of the present regulation.

Inter-state gambling politics

Since the legislative competence to regulate gambling is vested in the 16 German states (and not in the federal government) with many of them pursuing very different agendas in gambling policy, inter-state negotiations on a reform of the regulation of igaming are complicated – which may be reminiscent of the political struggles in other federally organized countries like the US.

On the political map, the states governed by the German Conservative Party generally tend to be more open to a market friendly approach, whereas states led by the German Labor Party tend to follow a more restrictive approach. At this stage, a north-south axis of three of German states is pushing for a broader reform including a licensing system for online casinos. At this stage, three scenarios for the future of igaming regulation seem plausible:

(1) No reform: Although the current regulation is dysfunctional, its supporters among the state governments and state lotteries might try to preserve the status quo by stalling the inter-state negotiations until the Interstate Treaty ultimately expires in June 2021.

(2) Comprehensive reform: This scenario would require an inter-state consensus on the implementation of a licensing system for online casinos which, however, is more unlikely as a result of the Court’s judgment.

(3) Regulatory patchwork: This appears the more likely scenario at this stage with each state being allowed to decide whether to license online casinos or not, assuming that some states will insist on regulating online casinos. Although the regulation of online casinos on a state-by-state basis would seem impractical, it would allow the online casino industry to gain a regulated foothold in the German market which again is an overall positive perspective as compared to the present situation.

It is expected that a proposal will be presented at the Prime Ministers’ conference in fall 2018 which might bring more clarity. From then, it is likely to take at least 1 ½ years until any new Interstate Treaty is implemented into state law – accordingly, the never-ending story around the regulation of igaming may be expected to continue …

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1. E.g. CJEU, judgment of 8 September 2009 in case C-42/07, Santa Casa.
2. E.g. CJEU, judgment of 15 September 2011 in case C-347/09, Dickinger Ömer.
3. E.g. CJEU, judgment of 8 September 2009 in case C-468/08, German Media.
4. Federal Administrative Court, judgment of 26 October 2017, file no. 8 C 18.16, “888”.
5. A comprehensive overview is provided in the “Fact-based evaluation of the Interstate Treaty on Gambling”, p. 106 at https://gluecksspielstudie.de/download/193/
Almost a million Canadians visit Las Vegas every year. Like other visitors, they enjoy the great restaurants, shopping, casino games and sports wagering that Las Vegas has to offer. Many Canadians visit other cities and states in the United States where they can enjoy many of the same activities offered in Las Vegas, except for sports wagering. This is because of a strange quirk in U.S. federal law that is currently under review by the U.S. Supreme Court.

In 1931, Nevada was the first state in the United States to offer legal “wide open” gambling. At that time, gambling was stereotypically viewed as a criminal activity, conducted by the unscrupulous to prey on the unfortunate. Regrettably, some of that stereotype was accurate, in particular the stereotype that many casino operators were refugee criminals from other jurisdictions. Through a series of state laws, Nevada shaped its modern gaming system to address the character of those in the gaming industry. This culminated in the Gaming Control Act of 1959 championed by Governor Grant Sawyer. This law created the two-agency system that we enjoy today, and it is that system that served as a catalyst that transformed a pariah industry in a desert state into a legitimate global industry.

As part of Nevada’s “wide open” gambling, Nevada embraced sports wagering. Initially, sports wagering was operated by bookmakers in stand alone locations as the activity was viewed as less glamorous and attractive than casino wagering. Also, bookmaking was a high-risk business and, despite outward appearances, the casino industry is fairly conservative. Table games and slot machines will provide a mathematical theoretical return to the house that always bears profit for the house over the long term. For a sportsbook, it is the bookmaker’s guess versus a patron’s guess as to the outcome of a sporting event or other event.

Even though Nevada embraced sports betting, the rest of the U.S. did not. Prior to 1919, sports betting laws were...
sparse in the U.S. and sports betting was popular. However, the Black Sox scandal changed popular opinion regarding sports betting and most states outlawed bookmaking, stake holding, and sports betting. This didn’t make the popular activity disappear, it just pushed it underground where it became a common source of revenue for organized crime.

In the post-war 1950s, the U.S. public was captivated by the image of the gangster and organized crime. Estes Kefauver, a Senator from Tennessee, held nationally televised hearings on organized crime that led to hearings on sports wagering. It became a hot issue for many politicians. In 1961, when John Kennedy became president, he appointed his brother Robert as Attorney General. Robert took up the challenge of addressing organized crime in America and pushed for legislation aimed at depriving organized crime of its money-making activities, including sports wagering. The resulting law was the Federal Wire Act of 1961.

The Federal Wire Act, essentially prohibits the transmission of bets, wagers, and information assisting in the placement of bets or wagers on across state and U.S. international borders. While there has been debate over the reach of the federal wire act, the current federal interpretation is that it applies directly to sports wagering.

Throughout the 1960s and 1970s, the U.S. Congress passed other laws to assist states in enforcing state gambling prohibitions, including sports wagering. However, there were no federal laws passed that were solely focused on sports wagering until the Professional and Amateur Sports Protection Act (“PASPA”) was enacted in 1992.

While Nevada remained the only state with “wide open” sports betting, a few other states engaged in some forms of legal sports betting. Delaware’s state lottery ran a three team NFL parlay product for a short time in the 1970s, Oregon’s state lottery also ran a sports betting product on NBA games from 1989 to 1991 and NFL games from 1989 until 2007. Finally, Montana offered legal low stakes charitable gambling on sporting events.

In response the success of the Oregon lottery product, the U.S. Congress introduced the intent of PASPA was to stop the spread of sports wagering in the U.S. PASPA essentially prohibits states or tribes from authorizing wagering on any sporting event or the athletic performances of athletes in sporting events and it prohibits anyone from relying on such laws to promote or conduct a sports wagering business. PASPA also contained exemptions for states that had sports wagering, and contained an exemption for New Jersey to offer sports wagering if it enacted laws to do so within one year of the enactment of PASPA.

However, this may be changing. As mentioned, New Jersey ultimately did pass laws and enacted regulations to address legal sports wagering in New Jersey, but it was 18 years too late to qualify for the PASPA exemption. In response, professional and amateur sports leagues filed suit to prevent New Jersey from acting on such laws. In a series of court opinions, PASPA was held to be constitutional by the Federal District Court in New Jersey and the Third Circuit Court of Appeals. After denying to hear the matter once, the U.S. Supreme Court decided to take up the matter and held hearings in December 2017 regarding the constitutionality of PASPA.

In the U.S. the federal government, while supreme, shares sovereignty with state governments. A doctrine was established by the U.S. Supreme Court decades ago that essentially prohibits the federal government from commandeering a state government to compel state government to act. The issue before the U.S. Supreme Court is whether PASPA violates that anti-commandeering principle.

The Court is likely to decide the matter in one of three ways:

1. PASPA is constitutional because it doesn’t compel state government to act, but rather limits state governments in acting.
2. PASPA violates the anti-commandeering principles inherent in the U.S. constitution and is therefore unconstitutional in whole.
3. PASPA, as it applies to state legislatures, violates the anti-commandeering principles inherent in the U.S. constitution, and states can enact sports wagering regulations; however, PASPA as it applies to operators is constitutional and nobody can rely on state laws in non-exempted states to conduct sports wagering.

Even if PASPA is found to be unconstitutional, it will be some time before states enact legislation to regulate sports wagering. Some states have state constitutional issues, others have tribal-state compact issues, and still others will be slow to react or decide that sports wagering should remain illegal in their jurisdiction.

Currently, PASPA works to prevent states from authorizing legal sports betting, and the Federal Wire Act prohibits interstate and foreign sports betting, thus resulting in a sports betting market in the U.S. where Nevada is the only state with broad-based sports wagering, but its activities are contained within the borders of the state. If PASPA falls, then other states may seek to offer sports wagering, but without changes to the Federal Wire Act, all such activities will be contained within each authorizing state.

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Editor’s note: On May 14, 2018, the U.S. Supreme Court rendered its decision voting 6 to 3 to strike down PASPA as being unconstitutional. Each U.S. state is now free to enact legislation authorizing or permitting sports betting within the state subject to the constitution in each state.
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