



BY DON BOURGEOIS

Criminal Law and the 21st Century

Legal research in the 20th century started with standard tools, such as the Canadian Abridgement or the Canadian Encyclopedic Digest – Ontario or Western edition, depending upon your geographic location and (perhaps) views of Confederation. Now, of course, a google search reveals the record of humanity, including about the law.

What does a google search reveal about the purpose of criminal law? Superpages describes the main purposes of criminal law as “to keep order in society and lessen the harm individuals may cause to one another.” Reference notes that it is “to protect society by facilitating the detection and prosecution of criminal actions while protecting the rights of the accused.” Perhaps not too surprisingly, Wikipedia in its article on Canadian criminal law opens with a discussion on the distinction between federal and provincial constitutional authority. The *Canadian Encyclopedia*, at least brings us back to a purpose – “the prohibitions contained in criminal offences are concerned with protecting the public at large and maintaining the accepted values of society.”

Gambling or gaming law has primarily been – or has been perceived through the lens of – criminal law in Canada and many other jurisdictions. Historically, this approach was likely used because gaming has not been considered a legitimate form of business or of entertainment. The degree to which it is considered a vice varies – the closer the gaming

activities are to a “charity” (worthwhile) or to “agriculture” and horses (also worthwhile), the less “vicey” it was. But the underlying theme remained that the criminal law is there to protect the public and the public interest from “the business of organized gaming ... because it invites cheating and attracts other forms of criminal activity.”¹

The focus on cheating is, of course, an important one. Regulators and regulated operators invest substantial time, effort and money to ensure the integrity of games and to prevent cheating. But how well does the *Criminal Code* in Canada ensure integrity and prevent cheating or other forms of criminal activity? Arguably, not very well.

First, the tools to do so under the *Criminal Code* are blunt, expensive and ham-fisted. It is a law enforcement approach that requires investigations and prosecutions, which are also time-consuming and resource intensive. To a large extent, law enforcement is also stymied by the technology of today, with an increasing proportion of gaming being conducted outside of the investigatory authority of law enforcement – or at least making it

that much more difficult. The lack of any significant prosecution in Canada of internet gaming is probably a telling piece of evidence to support this point.

The second point is two points and arises from the wording of the *Criminal Code*. The scope of what is or is not “illegal” is not clear. For example, when does a contest become a lottery scheme? What is needed to turn a “game of mixed chance and skill” into a “game of skill”? When is “roll’up the rim” legal and when is it illegal? What games are or are not “illegal” on the internet? Does it matter if the operator is licensed by a credible regulator outside Canada? And how should Canadians know what they can or cannot do? What does 204(1) (b) – “a private bet between individuals not engaged in any way in the business of betting” – mean? What is “cheat at play”? How far does the section 209 prohibition against cheating at play extend in the gaming transaction? While a recent case in horse racing was successful against a trainer who tried to rig a race by doping his horse to gain an illegal advantage, implicit in that case was the fact that the horse ran the race under the influence of the drugs,

1. *R. v. Andriopoulos*, [1994] O.J. No. 2314 at para. 4 (Ont.C.A.). The Court continued “There is no evidence that public perceptions of commercial gaming have changed or that it is any less criminal in nature than it ever has been.”
2. See *R. v. Riesberry*, [2015] 3 SCR 1167, 2015 SCC 65.

which had been administered prior to the race.² Why this case had to go to the Ontario Court of Appeal and ultimately to the Supreme Court of Canada after the provision being in place for decades is also telling as to the lack of clarity.

And this comment gets to the second point – this lack of clarity creates uncertainty which makes it more difficult to protect the public and the public interest. If law enforcement has a high degree of uncertainty in a potential prosecution, it is less likely to invest the resources necessary to carry out the investigation and to prepare for a prosecution given other priorities. And while the public may still consider “gaming” to have a criminal aspect to it as noted in *Andriopoulos*, the public have also spoken through feet in casinos and fingers on keyboards.

The criminal law in Canada does not protect the public and the public interest to the extent that it should. The fact

arises both from the limitations implicit in criminal law and in the lack of clarity. Regulatory responses have been much more successful in protecting both the public and the public interest. For example, the testing, approval and inspection of gaming equipment is a more robust and successful approach to ensure integrity of the game than is an investigation and prosecution against a gaming operator who “rigs” its gaming equipment. Furthermore, it also prevents cheating rather than attempt to close the barn door after the (race) horse has left the barn.

The criminal law in Canada needs to be clarified as to what is legal and what is illegal. Law enforcement remains an important tool to ensure compliance with the criminal law. It is one that ought to be used where it can obtain the optimal results. To do so, the scope of law enforcement’s authority also needs to be clarified – to what extent can it

investigate, say, “cheat at play” during unregulated internet gaming? Can it do so only if a Canadian is doing the cheating? If so, how does that protect Canadians who are cheated by those outside of Canada? If the criminal law’s purpose is to protect the public from cheating, is it meeting its purposes if it cannot prosecute those who cheat Canadians? **CGL**

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Pictured here, clockwise from top left:
Robert W. Stocker II, Michael D. Lipton,
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Robert W. Stocker II and Michael D. Lipton are Tier I gaming attorneys in Chambers Global and all four lawyers pictured here are listed in Best Lawyers.

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