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 racing betting, casino games, internet slots, bingo and lotteries. France only allows the licensing of internet sports betting, pari-mutuel horse racing 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”). France’s direct neighbor, Germany has taken a similar regulatory approach by partly opening the sports betting market is estimated to yield approx. 227 million DKK (approx. 314 million CAD) at the time of writing) in 2014 with 30 licensed betting operators as at the end of 2014. 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 régulation 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.
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 Z. 1488/14 W.
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. 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. 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.

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