



BY TROY ROSS

Queen's Park Explores Online Gaming Regulation

In its first budget released this past spring, the Ontario government did not mince words in signaling its intent to modernize its approach to gaming: "It is time to usher Ontario out of the gambling prohibition era and treat the people of Ontario as adults by allowing them to bet on the outcome of a single sporting event." Section 86-B of the budget further committed the province to "establish a competitive market for online legal gambling that will reflect consumer choice while protecting consumers who play on [grey market] websites."

This is an encouraging shift in direction and makes for sound public policy in line with the approaches taken in other western jurisdictions and supported by major academic studies. The upshot will be to provide Ontarians with much more choice in a regulated, but competitive market, and to "ensure access to safe and legal gambling options."

One of the most significant aspects of the announcement from a legal perspective is that when implemented, Ontario would become the first province in Canada to satisfy the "conduct and manage" requirement of the Criminal Code (the Code) by establishing a regulated private marketplace.

By way of background, the Code provides several exemptions to the general prohibition against gambling. One major exemption in section 207(1)(a) allows the government of a province to "conduct and manage" a lottery scheme in that province, in accordance with any law enacted by the legislature of that province.

At present, every province interprets the requirement to conduct and manage gaming a bit differently. While none has yet interpreted it the way Ontario is intending, there is nothing in the Code that would preclude the establishment of a regulatory regime for online gaming from fulfilling this requirement.

While perhaps novel for Canada, many other jurisdictions have successfully established regulatory regimes to meet multiple public policy objectives. These include the United Kingdom, Spain, France, Belgium, Denmark, Portugal, Italy, Sweden, Austria, Ireland, Poland, Romania and Bulgaria. A growing list of U.S. states including New Jersey, Nevada and Delaware have moved to regulate online gaming as well.

The fact is many Ontarians are already gaming online in the private marketplace on websites that are regulated in other jurisdictions, or more worryingly, those that are not regulated at all. The Province itself acknowledges that Ontarians wager \$500 million online annually, with most of that spent on grey market websites. While it is difficult to say for sure, consensus estimates are that the government's own online gaming destinations sites capture approximately 10-20 per cent of the market.

Interestingly, several of the regulatory regimes in these other markets successfully provide for both state-owned, and licensed private operators to co-exist in the same competitive online marketplace. This provides consumers with varied gaming choices, while ensuring the required

protections are in place vis a vis preventing underage access, promoting responsible gaming, and mandating that appropriate privacy and security measures are in place.

One such jurisdiction is Denmark, which established a regulated market in 2012. A key component of the Danish model is levying a reasonable tax rate on gross gaming revenues earned by licensees, initially established at 20 per cent. Danish authorities have estimated that the share of online gaming revenues captured by grey market operators shrank to less than 5 per cent after implementation. The Danish experience clearly suggests that a regulated system with multiple licensees is a better framework for creating a legal, viable, consumer-friendly online gaming market than legacy monopoly models.

Moreover, two in-depth academic studies of the online gaming market in Canada have drawn similar conclusions. The findings of the Working Group on Online Gambling (established by the government of Quebec) amounted to the most comprehensive analysis of the regulatory and socio-economic context of online gaming hitherto undertaken. The 2014 Nadeau Report argued that "in order to control the online gambling market, protect consumers and generate revenues for the government, the best solution is to establish clear rules and open up the online gambling market to private operators. In fact, the best solution is to establish an online gambling licensing system."

Similarly, a 2016 study by a team at Simon Fraser University recommended

that policymakers adopt “a system of licensing grey market online gambling providers — thereby legitimizing private sector online gambling providers in a given jurisdiction.” The SFU team argued that “licensing schemes have the potential to regulate responsible gambling activity while collecting government revenue through taxation.”

All of which is to say that the Ontario government’s intention to introduce a regulated market for online gaming has many credible antecedents. While it is early in this process, in June of this year the Ministry of Finance held consultations with a wide variety of stakeholders including online gaming operators, land-based operators and the Responsible Gaming Council (RGC). The Ministry heard that the European experience indicates there needs to be a sufficient number of licensed operators to ensure a competitive marketplace, there should be no major restrictions on the choice of products (poker, casino, sports and bingo), and that a reasonable tax rate be

levied to ensure that most online operators choose to be regulated. It also heard that a major challenge at present is the current prohibition on single sports wagering in Canada, as between 40 – 50 per cent of all online gaming is sports betting. It would appear given the excerpt from the 2019 budget quoted above that the government is preparing to address this.

Following this feedback, the Province directed the Alcohol and Gaming Commission of Ontario (AGCO) to conduct technical consultations with the sector. This process involved more detailed discussions with the industry to review potential player registration processes, data sharing, privacy and data storage issues; consumer protection concerns such as responsible gaming, anti-money laundering, fraud and collusion prevention; as well as financial considerations like the management of funds, customer wallets, and reconciliation. A more detailed technical, IT consultation process is expected to follow.

The AGCO will report to the government shortly. It is anticipated that the regulator will recommend proceeding with a regulatory regime for online gaming. Enabling legislation is expected to be introduced over the next several months. Ultimately, the Province aims to be in a position to regulate the online gaming industry at some point in 2020.

To some observers this timeline may appear ambitious, in fact it has been a long time coming. **CGL**

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