BY MICHAEL D. LIPTON, Q.C. AND KEVIN J. WEBER

Host Server Location and Jurisdiction over Extraterritorial iGaming in Canada

The legal status of online gaming and betting operations based outside of Canada ("iGaming") that accept customers from Canada has never been definitively set forth by any court. The Canadian Criminal Code (the "Code")[1] sets out a number of prohibitions that apply to unlicensed gaming and betting generally,[2] and further provides that only provincial governments may conduct and manage gaming and betting that is operated on or through a computer or video device.[3]

However, the Code also provides that no one may be convicted of "an offence committed outside Canada." In the past, many iGaming operators outside Canada took the position the location of the servers which host the software and other information use to provide their games to the world at large (the "host server") was determinative of the location of their activities. From this perspective, an iGaming operator whose enterprise is licensed by a foreign jurisdiction, and whose server is located in that same jurisdiction, did not need to concern itself with Canadian criminal law, because its activities represented "an offence committed outside Canada."

This position is particularly persuasive to persons with a familiarity with the law of the United Kingdom. The emphasis placed by UK law upon the location of the host server in determining jurisdictional questions was recently highlighted in the decision of the High Court of Chanceryin Football Dataco Limited et. al v. Sportradar GmbH et. al. ("Football Dataco").[4] Football Dataco involved, among other claims, a claim of database right infringement, whereby the defendants were alleged to be infringing the claimants' rights by "re-utilizing" the live scores and statistics produced by the claimants. The defendants' content was stored on host servers in Germany and Austria, but was provided from those servers to persons in the UK.

In order to have the Chancery Court take jurisdiction over the claim for infringement of their database rights, the claimants had to establish the existence of "a good arguable case of an act in the UK" which infringed those rights.[5] Under the provisions of the relevant European and UK statutes relating to database rights, the infringing act in question was "making the contents of a database available to the public," and accordingly, the jurisdictional question turned upon whether the act of "making available" as alleged by the claimants had occurred in the UK. The Court asked:

"Where does 'making available to the public all or a substantial part of the contents of a database by on-line transmission' occur? Does it occur where the server is situated? Or where the public are? Or in both locations?"[6]
Applying UK law, the Court construed the provisions of the statute to provide that the act of "making available to the public" occurs solely in the state where the host server transmitting the information was located:

"…the act of making available to the public by online transmission is committed and committed only where the transmission takes place. It is true that the placing of data on a server in one state can make the data available to the public of another state but that does not mean that the party who has made the data available has committed the act of making available by transmission in the State of reception. I consider that the better construction of the provisions is that the act only occurs in the state of transmission." [7]

As a result, the Chancery Court concluded the claimants had not made out a good arguable case of primary infringement of database right, and would not extend jurisdiction over that part of the claim. [8]

In light of UK decisions such as these, it is important to realize how very differently the law has developed in Canada in relation to jurisdiction over online transmissions. In the absence of explicit statutory language that provides for how a particular offence is intended to apply offence

10289_Canadian-Lawyer magazine_Spring2011.indd 14 11-04-08 4:57 PM

extra-territorially, the question of whether an offence was committed "outside Canada" is answered by reference to the "real and substantial connection" test. This test was established by the Supreme Court of Canada in the case of R. v. Libman ("Libman"), [9] in which it is stated:

"...all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting the offence took place in Canada. As it is put by modern academics, it is sufficient that there be a 'real and substantial link' between an offence and this country…"

"Just what may constitute a real and substantial link in a particular case, I need not explore. There were ample links here." [10]

Libman dealt with circumstances in which actions taken by persons physically inside Canada create unlawful consequences and victims outside Canada: a fraudulent telephone sales solicitation scheme was operated from Canada and Central America, with the victims of the scheme being U.S. Residents. The "real and substantial connections" test is also applied where Canadians receive communications from persons who are physically outside Canada, and those communications are deemed criminal under the Code. The "real and substantial connection" test has never been applied in any decided case involving iGaming, where persons outside Canada accepted customers from within Canada, but it has been applied in other cases involving online transmissions originating from outside Canada that were received within Canada.

In Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers ("SOCAN")[11], the Supreme Court of Canada applied the "real and substantial connection" test in considering whether the jurisdiction of the federal Copyright Act extended to communications received in Canada from outside of Canada. The Court stated that the factors which should be taken into account in determining whether online activity has a real and substantial link to Canada, "…would include the situs of the content provider, the host server, the intermediaries and the end user. The weight to be given to any particular factor will vary with the circumstances and the nature of the dispute."[12] This formulation of the test, in which the location of the host server is listed as merely one of many factors, is to be compared with the decisions of the Federal Court of Appeal below, which had allowed that the location of the host server would often be a factor of particular importance.[13] The decision of the Supreme Court made no such concession to the importance of the location of the host server.

More recently, in a case decided under the Income Tax Act, the Federal Court of Appeal held the location of the host server to be "irrelevant" for its purposes. The Minister of National Revenue sought to require eBay to produce information identifying certain eBay sellers in Canada in order to determine whether they had properly reported their income from eBay sales. The information was stored as electronic records on servers in the U.S. and was compiled and maintained by a Swiss corporation. eBay argued the information was subject to a particular procedure set out in the Income Tax Act for "foreign-based" information, which procedure does not impose a requirement to produce foreign-based information relating to unnamed persons. The Federal Court gave no weight to the location of the server as a factor in whether the information was "foreign-based" for these purposes:

"…with the click of a mouse, the appellants make the information appear on the screens on their desks in Toronto and Vancouver, or anywhere else in Canada. It is as easily accessible as documents in their filing cabinets in their Canadian offices. Hence, it makes no sense in my view to insist that information stored on servers outside Canada is as a matter of law located outside Canada… because it has not been downloaded. Who, after all, goes to the site of servers in order to read the information stored on them?"

It is important to recognize that should a case ever come before a Canadian court that addresses the status of extraterritorial iGaming under the Code, the principles that will be applied will likely deviate considerably from those which would be applied by a court in the UK. Canadian law increasingly views the location of the host server as an artificial jurisdictional connecting factor in determining the proper jurisdiction over online activity. **CGL**

Michael D. Lipton, Q.C and Kevin J. Weber are with Dickinson Wright LLP. Michael is a founding member and past president of the IMGL. He has been recognized by his peers in "Chambers Global" for excellence in Gaming Law, and recently received the 2011 Industry Leadership and Outstanding Contribution Award

1. R.S.C. 1985, c. C-46, as amended.
2. Supra note 1, in particular ss. 201, 202 and 206.
3. Supra note 1, s-s. 207(4)(c)
4. [2010] EWHC 2911, 2010 WL 4602332 (Ch.)
5. Supra note 4, paragraph 7.
6. Supra note 4, paragraph 63.
7. Supra note 4, paragraph 74.
8. Supra note 4, paragraph 83.
9. R. v. Libman, [1985] 2 S.C.R. 178, 21 D.L.R. (4th) 174, 1985 CarswellOnt 951 (S.C.C.)
10. Supra note 8 at 200.
11.(2004), 240 D.L.R. (4th) 193 (S.C.C.)
12.Supra note 10 at 218
13. Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers (Fed. C.A.), 2002 FCA 166, [2002] 4 F.C. 3 at paragraph 191.

10289_Canadian-Lawyer magazine_Spring2011.indd 15 11-04-08 4:57 PM