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C. Ian Kyer

Danielle Hough

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Is Internet Gaming Legal in Canada: A Look at Starnet

C. Ian Kyer* and Danielle Hough**

Introduction

The development of the Internet has kindled many new business opportunities in the online environment. Despite the recent slump in online business growth and popularity, one line of online business is generating profit and growing at a rapid rate: the business of online gaming.

The legality of such businesses is questionable in Canada and there are few gaming cases to assist Canadian lawyers. The following analysis must be considered in light of the dearth of jurisprudence in this area and should not be considered legal advice. This area of the law is in flux and developments may be unpredictable.

When you are feeling in the dark, even a flickering candle is welcome. Therefore, a recent British Columbia online gaming prosecution, in which the accused pled guilty, is worthy of study. Though resolved by a guilty plea with little judicial reasoning, the case provides some guidance in this largely unmapped area. It confirms that in certain circumstances, there can be criminal liability in Canada for running an online gaming operation. Online gaming ventures will have to consider several factors and be mindful of how their ventures are structured in order to avoid prosecution in Canada and conform to Canadian laws.

The Software Mechanisms Behind Online Gaming

To begin with, some technical background is required: we need to know something of how Internet gaming is carried out. An online gaming operation has to connect and communicate with its users through software and the Internet. A user visits an Internet site and downloads graphics and communications software onto his or her PC. The graphics software generates the images on the user's PC. The communications software links the PC via the Internet with servers maintained by the gaming site. The servers use random number generators and other software to tell the graphics software what images to generate to create the gaming experience. The servers interact with the user's PC, receiving information and generating responses. The servers also host a database that tracks bets made and wins and losses.

The flow of money is separate from the gaming itself. The user is referred to one or more e-cash providers where credits can be purchased via credit card or other electronic funds transfer (EFT) for use at the casinos. If the user wins, the e-cash provider credits their credit card or EFT provider up to the amount of their "purchase". Any excess is paid by cheque or electronic funds transfer.

Online Gaming in Canada

The development of any online business raises several similar legal issues. These include taxation, security and privacy, intellectual property infringement and protection, transborder data flow

regulation, the enforcement of online contracts, online licensing, product liability, and the overriding jurisdictional question as to which laws apply. When dealing with the development of an online gambling operation, there is the added issue of potential criminal liability.

In Canada, the only guidance we have at this time is the law that applies to traditional gaming. Part VII of the Canadian *Criminal Code*¹, entitled *Disorderly Houses, Gaming and Betting*, governs all forms of gambling and betting in Canada, including on-line gambling.² To conduct legal gambling and betting in Canada, a valid license must be obtained from the provincial government and one must operate within government regulations.³ Presently, only the provincial governments can run online gaming operations. They are not permitted under the *Code* to issue licenses to run such operations. None are doing so, although PEI has proposed an online lottery.⁴ Thus, other than the licenses being granted by the Kahnawake Indian band, which are of doubtful validity⁵, no online licenses are being granted in Canada.

The operation of an unlicensed or unlawful gambling is an indictable offence.⁶ It is easier, however, to apply Part VII of the *Code* to traditional gaming operations that have a physical location or gaming house in Canada than it is to online gaming. Traditional "land based" operations are squarely within Canada's territorial jurisdiction. The facilities are tangible and whether a license is required can be easily determined. In the case of online gaming, the "gaming house" is a virtual one. No aspect of an online operation need be located in Canada for Canadians to access the gaming action over the Internet, other than the public communications systems and the user's PC. The question with any particular online gaming operation is whether there is a sufficient connection between the gaming operation and the Canadian jurisdiction. Without this connection, it would be difficult to apply the *Code* and enforce a ban on an online gaming operation. Even if there is a sufficient connection to Canada, the manner in which the *Code* will apply to online gaming is far from clear. Canadian lawyers and advisers will still have difficulty providing Canadian legal advice to their clients who want to set up and operate this type of business. Nevertheless, the following case from British Columbia does provide some limited guidance.

Starnet

a) The Facts

The *R. v. Starnet Communications International Inc.*⁷ decision came down in British Columbia. Even though it involved a guilty plea with little judicial reasoning, it is helpful in that it sheds some light on how Canadian criminal law may apply to an online gambling operation.

Starnet Communications International Inc. ("SCI") was incorporated in Delaware. Through a number of wholly-owned subsidiaries, it conducted its operations from a location in Vancouver, B.C. One of these subsidiaries was incorporated in British Columbia. The other subsidiaries were incorporated in Antigua, where online gaming is legal and where SCI had an online gaming license.

SCI had developed software in Canada to facilitate online gaming and had issued several licenses to third parties that provided online gaming to Canadians. The police, using false identities and credit cards, engaged in online gaming offered by SCI's licensees. Their winnings were received in the form of credits to their credit cards and also by cheques. SCI officers, located in Vancouver, signed some of these cheques and mailed them from their Vancouver offices.

SCI's Vancouver operation consisted of computer servers and computer applications, which enabled persons to engage in gambling or betting via the Internet. Users wanting to wager had to access these B.C. based servers first before being redirected to offshore servers. Many of the gaming websites developed by SCI's employees were hosted in British Columbia. Users downloaded software to their PCs from these BC sites. The server side software was also located in Vancouver. The registration and control of the domain name servers for many of the licensee pages were also

controlled and physically located in Vancouver.

As the police investigation revealed, the role of the Canadian subsidiary and its operations in Vancouver was pivotal in this enterprise. Approximately 100 people were employed by the Canadian subsidiary and were located in offices in Vancouver. Only about four employees were working offshore. The Canadian subsidiary developed the server and client software packages, which enabled users to engage in online gambling. Further, they were responsible for the ongoing administration of the services, applications and computer systems.

Canadians were relatively unimportant for the profitability of the operation, representing only four per cent of online gamblers in 1999.⁸ Nevertheless, and significantly, SCI allowed Canadians to gamble on its site.

SCI had several Canadian residents who held multiple positions in the various companies. These people were determined to be the corporation's controlling mind in the various aspects of the enterprise. This enabled the Crown to allocate corporate criminal liability under the alter ego theory.

Charges were laid in 1999. A deal was struck at some point between SCI and the Crown and SCI pled guilty to a charge under Section 202(1)(b) of the *Code*.⁹

b) Section 202(1)(b) of the Code

Section 202(1)(b) of the *Code* makes it an offence to

keep or knowingly allow to be kept in any place under his control any device for the purpose of recording or registering bets or selling a pool, or any machine or device for gambling or betting.¹⁰

The required elements of this offence are: "keeping", and the presence of a "device" for gambling or betting.

A "device" must be one for the purpose of gambling or betting. *Starnet* interpreted "device" to include all the computer servers, applications and systems that clients would have to access to begin any gambling.¹¹ SCI's "devices" were kept in Vancouver.

To "keep" does not simply mean to possess. It means possession that results in making the gambling machine available for use by the public.¹² The device must be somehow useable by the public for the purposes of gaming and this can be direct or indirect.¹³ In *Starnet*, the servers and applications in question were kept in Vancouver. These same servers and websites made the gambling activities available to Canadian users. This qualified as "keeping".

Although not explicit in the *Code*, it is implied that the gaming has to be available to the public in Canada. If the police investigation had not been able to show that Canadians could gamble with SCI, there probably would not have been a case. The *Code* provisions, taken as a whole, prohibit the provision of unlicensed gambling in Canada. It is questionable whether the keeping of gaming devices in Canada would have been an offence if these devices had not been used to make gaming available to the Canadian public.

c) Changes to the Canadian Operations

Subsequent to being charged but prior to the hearing, SCI purportedly changed the structure of its operations in order to comply with the *Code*. SCI was placed under the umbrella of a British holding

company. The new company, as of May 2001, was named World Gaming, with its headquarters in London, England. Completely new management was put in place.¹⁴ A new management committee was established in Antigua, and a new company called Starnet Systems was created to operate all the gambling activity from Antigua. Starnet Systems handled all the day-to-day gambling and financial activities. The devices that allowed customers to engage in gambling were moved out of Canada.

Only one element was said to remain in Canada. This was a company called Inphinity Interactive, which developed software for lawfully operated offshore gambling operations. Defence counsel submitted to the Court that there was nothing illegal with respect to Inphinity's operation. The Court and the Crown gave no indication they disagreed.¹⁵

To comply with the *Code*, all "devices" and the controlling mind of the corporation were moved offshore. Links to Canada were significantly reduced. The company also ceased offering access to Canadians. These changes seemed to satisfy the Crown and the Court and no action has been initiated against World Gaming.¹⁶

In essence, *Starnet* indicates that an online gaming operation that is unlicensed in Canada but has sufficient connections to Canada may be successfully prosecuted under the *Code*. Before the restructuring, SCI's connections to Canada were indeed substantial. The devices, the controlling mind, the majority of the staff and services were located in Vancouver and gaming services were available to Canadians. To relieve itself of criminal liability, SCI had to restructure itself in a way that reduced its connections to Canada significantly.

Application of other Provisions of the *Code*

SCI pled guilty to a charge under Section 202(1)(b) of the *Code*. There are several other Sections in this Part of the *Code* that they could have been charged with but were not. This is probably the result of the deal SCI struck with the Crown. It does not mean that other provisions in the *Code* were not applicable. These other Sections of the *Code* that require analysis with respect to online gambling operations include Sections 202(1)(a), (c), (d), (e), (f), (i) and (j), and 207(1).¹⁷

a) Section 202(1)(a)

Section 202(1)(a) of the *Code* makes it an offence to use or knowingly allow a place under one's control to be used to record or register bets or sell a pool.¹⁸ If an online gaming operation has an office or place in Canada where the recording and registering of the gaming bets goes on, this operation may violate this Section of the *Code*. This might include locating a database server in Canada. SCI kept its gaming servers offshore to begin with and was not in contravention of this Section.

b) Section 202(1)(c)

Section 202(1)(c) of the *Code* makes it an offence to have "control of any money or other property relating to a transaction that is an offence under this section".¹⁹ For there to be an offence, there must be control of money or property that relates to a transaction that is an offence under this Section.

This section has been applied to bookmaking charges²⁰ or those of keeping gaming houses or devices.²¹ The element of control, however, is not well defined in case law. In these types of cases, the control of money or property would be direct. The bookie or gaming house owner would have control over the profits made from the gamblers. It would be in their possession and theirs to deal with as they saw fit.

This section could similarly apply to an on-line gambling situation, where the Crown could prove that money is in the control of an unlicensed on-line gambling operation in Canada. SCI was likely in control of money that was related to illicit gambling transactions with Canadians. However, no specific charge was made under this Section. Instead, the Crown used Sections 462.3 and 462.37 of the *Code*, which enabled them to get an order for SCI to forfeit its proceeds of crime. This effectively allowed the government to seize the profits that SCI made and had control of through illegal gambling transactions as prohibited by Section 202(1)(c).

Another possible application is against a third party company that provides the "chips" or online "casino cash" to gamblers. It is customary for e-cash providers, a form of financial intermediary between the online casino and a credit card company to provide an e-commerce solution to the gamblers. This third party essentially sells chips to gamblers so that they can then gamble on the gaming operator's site. The third party does not provide the gambling activity.

Two issues arise as to this section's applicability to the "chip" provider. First, it is not clear whether the "chip" provider would have the requisite "control" over money from an illegal gambling transaction. Second, the gambling transaction that the service supports must be illegal under Section 202 of the *Code*. Support services of this sort in Canada for a lawfully conducted offshore casino would not qualify

c) Section 202(1)(d)

Section 202(1)(d) of the *Code* makes it an offence to record or register bets or sell a pool.²² If an online gaming operation has its database servers that record and register the bets located in Canada, this could contravene this Section of the *Code*. In the case of SCI, the database servers were offshore. These offshore servers recorded and registered bets. Therefore, it is not likely that this Section would have applied to SCI.

d) Section 202(1)(e)

Section 202(1)(e) of the *Code* makes it an offence to make "any agreement for the purchase or sale of betting or gambling privileges".²³ This section also usually applies to bookmaking²⁴ or the selling of a pool. It could also apply to selling the right to play in a lottery.²⁵ There must be an agreement, oral or written, in Canada to purchase or sell the right to gamble.

All the cases interpreting this section involve a direct purchase of a gambling privilege.²⁶ They involve phoning in a bet to a bookmaker or purchasing a lottery ticket or a share of a lottery ticket. It has not been applied to online gambling. However, it is possible. The Crown will have to prove beyond a reasonable doubt that an online gambling operation made such an agreement with Canadians. Most online gambling sites have a registration page. The gambler must enter information about him or herself and agree to certain terms and conditions in order to be granted access to gamble. This registration in itself could provide the evidence of an agreement that contravenes this Section of the *Code*.

If this type of registration equates an agreement contrary to this Section of the *Code*, this Section could have applied to SCI as all of the servers and staff that serviced the registration were in Vancouver.

If the registration site is offshore it may be more difficult to apply this section. An argument can be made that the agreement itself is made offshore. However, it can and has been argued in the United States that the agreement is made in the location of the gambler's computer. This debate has not been determined as of yet in Canada.

e) Sections 202(1)(f) and (i)

Sections 202 (1)(f) and (i) of the *Code* could have the effect of making advertising efforts for an unlicensed gaming operation an offence. Subsection (f) makes it an offence to print, provide or offer to print or provide information intended for use in connection with any game, whether or not it takes place in or outside of Canada.²⁷ Subsection (i) makes it an offence to willfully and knowingly send any message that conveys any information relating to betting or wagering or is intended to assist in it.²⁸

These two Sections address various forms of conveying information relating to unlicensed gaming and betting within Canada. The law as it relates to these offences is not well developed and it is difficult to predict with any certainty what would be considered an offence. However, if the gambling activity were viewed as illegal, the provision of information relating to it would also likely be an offence. Thus, any communication of information in Canada relating to an unlicensed online gambling operation could be an offence under this Section. This could include information on a website or communicated online.

SCI created and maintained certain websites in Vancouver. To register to gamble, a gambler had to access one of these sites. If these sites provided information about SCI's gaming, it could have contravened this section. Any other form of SCI advertising directed at Canadians could also be problematic under this Section. However, this Section has yet to be applied to an online casino, so the extent of its application is still uncertain.

f) Section 202(1)(j)

Section 202(1)(j) of the *Code* makes it an offence to aid or assist "in any manner in anything that is an offence under this section".²⁹ There is no jurisprudence applying this section of the *Code*. Most activities that surround illegal gambling and betting are covered in the previous sections. This section is broad and is most likely intended to catch activities surrounding unlicensed gambling and betting that are not specifically covered in the preceding sections. Without jurisprudence to guide us, it is impossible to say what activities are caught in this section.

It is likely, however, that online activity could be caught under this Section. The Crown could have charged SCI under this Section to cover it. However, because SCI was charged under one of the other Sections, a Section 202(1)(j) charge was likely thought to be redundant. In the absence of proof of the necessary elements, it is unlikely that the Crown could establish the necessary elements of aiding and abetting under this Section.

g) A Telling Exemption: Section 207(1)(h) of the Code

Some guidance in the application of these various prohibitions can be gained by a study of Section 207(1)(h) of the *Code*.³⁰ This Section states:

Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful

(h) for any person to make or print anywhere in Canada or to cause to be made or printed anywhere in Canada anything relating to gaming and betting that is to be used in a place where it is or would, if certain conditions provided by law are met, be lawful to use such a thing, or to send, transmit, mail, ship, deliver or allow to be sent, transmitted, mailed, shipped or delivered or to accept for carriage or transport or convey any such thing where the destination thereof is such a place.³¹

Section 207(1)(h) creates an exemption for the printing of information in Canada relating to gaming and betting that is to be exported and used in a place where it is legal to do so.³²

The exemption, although narrow in scope, suggests that it is not considered to be contrary to public policy to carry on certain activities in Canada in support of lawful offshore gaming operation.

As the *World Media* decision³³ suggests, the exemption is subject to an important caveat. This potential caveat is that the place or places to which the information is being exported must also view the importing of the information as legal.³⁴ In this case, the accused corporation was selling shares of tickets in a Spanish lottery. They sent promotional material regarding this sale of shares from Canada to people in the United States. This promotional material was intended to promote participation in the share purchase, which was seen to be gambling. Because the information was created in Canada and exported to the United States, it was then asked whether the Section 207(1)(h) exemption would apply. The Crown brought forth evidence that American law did not consider the importing of this information into the United States legal. Therefore, the court found that Section 207(1)(h) did not apply.³⁵

Conclusion: How to Avoid Criminal Liability

Due to the projected growth and profitability of online gaming, many Canadian entrepreneurs may be interested in participating in this industry. Licenses are less expensive offshore than in Canada, where it is often easier to qualify for such a license. This will make it more attractive to obtain a license offshore but try to capture the Canadian market over the Internet. Though this business is proving to be profitable, the potential sanctions under the *Code*, as demonstrated in *Starnet*, make this venture much less attractive. If an unlicensed company still wishes to pursue this venture, it must structure itself in a way that complies with the *Code* or risk such sanctions.

From the facts of the *Starnet* case, the resulting changes SCI made to its corporate structure and through our analysis of the *Code*, perhaps we now have some idea as to how such a company should structure itself to comply with the *Code*.

In short, the prudent approach is to minimize or eliminate all connections with Canada. All download, database and gaming servers should be located in a jurisdiction where online gaming is lawful.

If all connections cannot be severed with Canada, then an online gaming operation should bar all Canadians from access to the gaming activity. If no Canadians can gamble or bet, there is likely no offence under the *Code*. There would be no control of illicit funds and no unlawful agreements to purchase or sell gaming privilege in support of an illegal gambling operation in Canada. The *Code* serves to protect Canadians and without any harm to them, there would not likely be any prosecution under the *Code*. (If the activities constitute an offence in another jurisdiction, the possibility of extradition remains.)

Care should also be taken as to where management resides and decisions are made. If management resides in Canada and decisions are made here, it may be argued that the controlling mind of the operation is in Canada.

The exemption in Section 207 and the SCI restructuring suggest that certain aspects of such an operation, such as software development and perhaps advertising can remain in Canada with some degree of legitimacy. A company that merely develops the software for lawful offshore online gaming operation is not likely in violation of the *Code*.

An advertising group or the branch of the parent company that develops information intended to promote lawful offshore online gaming is also not likely in violation of the *Code*, especially if they

merely create this information for the gaming operation. In this situation, an arms length agreement with the gaming operation similar to the one for the software developer is advisable. If, however, they distribute such information as well, they must ensure that they do not distribute it directly into Canada. To be completely sure that they are not in violation of the *Code*, such a group should ensure they do not distribute this information into other jurisdictions that consider the online gaming operation to be unlawful.³⁶

* [Back](#) Ian Kyer is co-director of the Computer and IT Law Group in the Toronto office of Fasken Martineau and is a member of the Steering Committee for the National Technology and IP Group. He is a founder and former President of the Canadian IT Law Association and a former President and Life member of the Computer Law Association.

** [Back](#) Danielle Hough is an articling student at Fasken Martineau.

¹ [Back](#) R.S.C., 1985 c. C-46 [hereinafter *Code*].

² [Back](#) *Code, Ibid.*

³ [Back](#) *Ibid.* ss. 201 to 204, 206, 207 and 209.

⁴ [Back](#) R. Kelley et al., "Gambling@Home: Internet Gambling in Canada" (2001) CWF Doc. #200111, online: Canada West Foundation http://www.cwf.ca/pubs/200111.cfm?pub_id=200111 (date accessed: 5 November, 2001) at 3-4 [hereafter "Gambling@Home"].

⁵ [Back](#) Gambling@Home *Ibid.* at 7; Kahnawake Gaming Commission, online: Kahnawake Gaming Commission Homepage <http://www.kahnawake.com/gamingcommission/> (date accessed: 9 November 2001).

⁶ [Back](#) *Code, supra* note 1, s. 201.

⁷ [Back](#) (August 17, 2001), Vancouver 125795-1(B.C.S.C.) [hereinafter *Starnet*]. A copy of this transcript was received from Interactive Gaming Council Canada.

⁸ [Back](#) *Starnet, Ibid.* at 13.

⁹ [Back](#) The individuals were probably not prosecuted personally most likely as a result of the deal.

¹⁰ [Back](#) *Code, supra* note 1.

¹¹ [Back](#) It was only after contacting the Vancouver based servers that clients could be forwarded to the offshore gaming servers.

¹² [Back](#) *R. v. Volante* (1993), 14 O.R. (3d) 682 (Ont.C.A.) [hereinafter *Volante*].

¹³ [Back](#) *Volante, Ibid.*

¹⁴ [Back](#) In May 2001, SCI announced the appointment of Michael Aymong as its President and CEO. See, "Starnet Communications appoints new CEO" (25 May, 2001), online: World Gaming homepage <http://www.worldgaming.com/news/may25-2001.html> (last accessed 16 October, 2001).

¹⁵ [Back](#) Since this decision, World Gaming has also established a sales and marketing office in Toronto. See, "Interview with Michael Aymong" (6 July, 2001), *Wall Street Reporter*, online: Wall Street Reporter <http://www.wallstreetreporter.com/v2/asp/profile/default.asp?content=99&id=1794&s=1> (last accessed 16 October, 2001).

¹⁶ [Back](#) This is to the authors' knowledge.

¹⁷ [Back](#) *Code, supra* note 1. Section 209 could also apply, but the authors are addressing this paper to online gambling operations that are not intending to defraud clients.

¹⁸ [Back](#) *Code, Ibid.*

¹⁹ [Back](#) *Ibid.*

²⁰ [Back](#) *R. v. Solomon* (1996), 110 C.C.C. (3d) 354 (C.A. Que.) [hereinafter *Solomon*].

²¹ [Back](#) *R. v. Bear Claw Casino Ltd.*, [1994] 4 C.N.L.R. 81 (Sask. Prov. Ct.).

²² [Back](#) *Code, supra* note 1.

²³ [Back](#) *Ibid.*

²⁴ [Back](#) *Solomon, supra* note 20.

²⁵ [Back](#) *Regina v. World Media Brokers Inc. et al.* (1998), 132 C.C.C. (3d) 180 (Ont. Ct. Prov. Div.) [hereinafter *World Media*].

²⁶ [Back](#) *Solomon, supra* note 20; *World Media, Ibid.*

²⁷ [Back](#) *Code, supra* note 1.

²⁸ [Back](#) *Ibid.*

²⁹ [Back](#) *Ibid.*

³⁰ [Back](#) *Ibid.*

31 [Back](#) *Ibid.*

32 [Back](#) *World Media, supra note 25.*

33 [Back](#) *Ibid.*

34 [Back](#) *Ibid.*

35 [Back](#) *Ibid.*

36 [Back](#) This concern will be heightened if the countries in question are ones with which Canada has close relations, such as the US.