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# A SAFE BET: REGULATING ONLINE GAMBLING AND LOTTERIES THROUGH THE CRIMINAL CODE

Ian Wilenius\*

## ABSTRACT

This paper examines the links between gambling, moral regulation, and politics in Canada. The proliferation of online gaming platforms has resulted in a new wave of gaming expansion, with online casinos and sports betting growing in market share over traditional land-based betting. Does Canada's *Criminal Code* and supporting regulatory scheme effectively address the problems posed by online gambling? This paper examines the origins and history of the gambling provisions in the *Criminal Code* and reviews their development over time through amendments and judicial interpretation. The paper then establishes how the *Criminal Code* provisions are applied to bets made over the internet. Next, it analyzes the legal issues around the Kahnawake Gaming Commission, an extension of a First Nation's claim to sovereignty and the most prolific online gambling regulator in the world. The paper concludes with ideas about the next steps in gaming regulation in Canada, suggesting the federal government is better suited than the provinces to provide and regulate gaming done over the internet.

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## INTRODUCTION: NO GAMBLING LIKE POLITICS, NO POLITICS LIKE GAMBLING

Benjamin Disraeli's fictional character Lord Roehampton had a saying that "there is no gambling like politics."<sup>1</sup> Lord Roehampton's curious idiom touches on an intimate connection between government and vice. In Canada, that connection remains stronger than ever. Gambling is part of everyday life and at its core, is innocent enough – two people disagree about the likely outcome of a future event, each of whom will profit if the other is wrong. In the episode "Hurricane Neddy", The Simpsons character Ned Flanders famously said that insurance was like gambling: in a nutshell, the insured bets that their car will break down and require repairs before they've paid that value in premiums. In addition to this tongue-in-cheek and innocent association, gambling is also associated with alcohol, drugs, and prostitution as a related 'vice'. At best, gambling is tolerated as a necessary evil, but many societies take steps to restrict or ban gambling altogether. In Canada, the *Criminal Code* has had anti-gambling prohibitions since it first came into force in 1892, but gambling is now regarded as inevitable, and as a regulatory rather than criminal problem.

Despite restrictions on gambling in Canada and around the world, global gambling revenue is expected to surpass \$600 billion USD by 2022.<sup>2</sup> Online gaming accounts for a significant portion of that growing pie. In 2014, the market for online gaming was estimated at \$35.97 billion USD and is expected to climb to \$66.59 billion USD by 2020.<sup>3</sup> The *Criminal Code* provisions on gambling haven't changed since 1985 but are expected to respond to a phenomenon that didn't

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<sup>1</sup> Benjamin Disraeli, *Endymion*, (Project Gutenberg, 2006), Chapter LXXXII, online: <<http://www.gutenberg.org/files/7926/7926-h/7926-h.htm>>.

<sup>2</sup> Brian Pempus, "Global Gambling Market To Reach \$635 Billion By 2022, New Research Says" (27 September 2016), online: <<http://www.cardplayer.com/poker-news/20865-global-gambling-market-to-reach-635-billion-by-2022>>.

<sup>3</sup> "Global Online Gambling Market Worth USD 66.59 Billion by 2020", *Business Wire* (6 October 2016), online: <<https://www.businesswire.com/news/home/20161006005678/en/Global-Online-Gambling-Market-Worth-USD-66.59>>.

even exist in the 1980s. The current gambling provisions do not sufficiently address the harms of online gambling; they are not tailored to the new and emerging problems that are caused by instant communication across the internet. This paper examines the origins and history of the gambling provisions in the *Criminal Code*<sup>4</sup>, and reviews their development over time and through case law. Next, the paper establishes how the *Criminal Code* applies to bets made over the internet. It analyzes the legal issues around the Kahnawake Gaming Commission, an extension of a First Nation's claim to sovereignty and the most prolific online gambling regulator in the world. The paper concludes with ideas about the next steps in gaming regulation in Canada, suggesting the federal government regain control over online gaming.

## GAMBLING PROVISIONS IN THE CRIMINAL CODE

Though the biggest new development in gambling law is the availability of online gaming, it is important to establish the framework under which the *Criminal Code* deals with gambling at large. Unlike the United States, who have the *Unlawful Internet Gambling Enforcement Act*,<sup>5</sup> Canada does not use a separate legal framework for addressing internet gambling specifically.<sup>6</sup> The *Criminal Code* sorts gambling provisions into the section on 'Disorderly Houses, Gaming and Betting', making clearer the original moral aspects of gambling laws.<sup>7</sup> Section 201 of the *Criminal Code* prohibits common gaming houses and common betting houses, as locations where for-profit gambling occurs.<sup>8</sup> Section 202 prohibits a number of activities related to for-profit gambling, including pool-selling, registering or recording bets, publishing odds or other betting information, or keeping any device used for gambling or betting.<sup>9</sup> None of these prohibitions apply to bets between private individuals who are "not engaged in any way in the business of betting",

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<sup>4</sup> *Criminal Code*, RSC 1985, c C-46 [Criminal Code].

<sup>5</sup> Unlawful Internet Gambling Enforcement Act, 31 USC §§ 5361-5366 (2006).

<sup>6</sup> Jamie Strashin, "Online sports betting ignored by Canadian government while US acts", *CBC Sports* (4 May 2016), online: <<http://www.cbc.ca/sports/sports-gambling-canada-united-states-regulation-1.3565832>>.

<sup>7</sup> *Criminal Code*, *supra* note 4 at Part VII, ss 197–213.

<sup>8</sup> *Ibid*, s 201.

<sup>9</sup> *Ibid*, s 202.

prohibiting for-profit betting only.<sup>10</sup> Section 204 contains other important exemptions that apply to horse racing, delegating significant regulatory powers to the Minister of Agriculture and Agri-Food in controlling gambling on horse races.<sup>11</sup>

A strange element to this framework is the separation between the ‘lottery schemes’ in section 206, and the prohibitions in section 202, which are aimed primarily at bookkeeping and sports betting. Section 206 prohibits a diverse range of gambling behaviour, all of which is labelled a ‘lottery scheme’. The broad scope of these provisions is demonstrated by the length and complexity of some of these provisions. For example, section 206(1)(e) prohibits any “scheme, contrivance or operation” where players stake current or future payment of money or other valuable security in exchange for the chance to win a greater sum, because other players have contributed (or will contribute) money or valuable security.<sup>12</sup> The nature of a wager or bet is difficult to identify, and the incredibly broad language in section 206 is a testament to that challenge. Section 207 allows lotteries operated or licensed by provincial governments, keeping in mind that the definition of ‘lottery’ includes almost everything prohibited by sections 206(1)(a) through 206(1)(g), and therefore allows the provinces to conduct and manage almost any gaming operation, or authorize another body to do so.<sup>13</sup> One of the few differences with online and electronic gaming is that provinces cannot license other organizations to conduct or manage lotteries conducted “on or through a computer, video device or slot machine”; these types of games must be operated by the province directly.<sup>14</sup>

## FROM REVULSION TO REVENUE: GAMBLING REGULATION IN CANADA

Compared to other jurisdictions, Canada’s criminal framework for gambling is relatively permissive. Betting is allowed so long as the players are the only ones

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<sup>10</sup> *Ibid*, s 204(1)(b).

<sup>11</sup> *Ibid*, ss 204(1)(c), 204(5–11).

<sup>12</sup> *Ibid*, s 206(1)(e).

<sup>13</sup> *Ibid*, ss 206(1)(a)–206(1)(g).

<sup>14</sup> *Ibid*, s 207(4)(c).

who win and lose, and the *Criminal Code* even makes specific exceptions to allow for horse racing and provincial lotteries.<sup>15</sup> Canadian criminal law was not always so tolerant of gambling. With the codification of Canadian criminal law in 1892, the *Criminal Code* adopted already-existing legislative bans on gambling.<sup>16</sup> Horse-race betting was the first licensed and regulated form of gambling in Canada, with a criminal code exemption in place since 1910. This exemption was suspended for a brief period between 1917 and 1920 because gambling was considered wasteful and “incommensurate with the war effort.”<sup>17</sup> Horse races are regulated by the federal Minister of Agriculture and Agri-Food, who licenses racetrack operators to run races and collect bets.<sup>18</sup> The gambling around horse tracks supports the husbandry and racing industries – racing and betting have always gone together. Critics of this early gaming exemption ran up against stiff opposition from courts and governments who saw gambling as a necessary evil to support “a pastime and business of much importance”.<sup>19</sup> As Chief Justice Meredith of the Ontario Court of Appeal so succinctly put it, “no betting no racing; a killing of two birds with one stone.”<sup>20</sup> For several decades, horse racing was the only legal betting allowed by the *Criminal Code*, but more ‘business of much importance’ was soon to follow.

Legalized lotteries are a much more recent development, occurring in the late 20<sup>th</sup> century. Their introduction came with the same *Criminal Code* reforms that legalized abortion and same-sex sexual activity, diminishing the influence of moral regulation on criminal law.<sup>21</sup> From 1969 onwards, the federal government used lotteries primarily for financing large national events such as the Olympics in Montreal (1976) and Calgary (1988).<sup>22</sup> The provinces resented federal involvement in the lottery business, and lobbied for exclusive control of gaming

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<sup>15</sup> *Ibid*, ss 204(1)(c), 207.

<sup>16</sup> Colin S Campbell, Timothy F Hartnagel & Garry J Smith, *The Legalization of Gambling in Canada* (July 2005) at 13, online: <[http://publications.gc.ca/collections/collection\\_2008/lcc-cdc/JL2-64-2005E.pdf](http://publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-64-2005E.pdf)>.

<sup>17</sup> *Ibid* at 14 (Table 1).

<sup>18</sup> *Criminal Code*, *supra* note 4, s 204(1)(c)(i).

<sup>19</sup> *Re Racetracks and Betting* (1921), 36 CCC 357 at para 5, 61 DLR 504.

<sup>20</sup> *Ibid* at para 2.

<sup>21</sup> Campbell, Hartnagel & Smith, *supra* note 16 at 14.

<sup>22</sup> *Ibid* at 15–17.

and the revenues that it brought to governments.<sup>23</sup> In 1985, the federal government agreed to amend the *Criminal Code* to allow only the provincial governments to conduct and manage lotteries. This concession was made in exchange for a cash payment of \$100 million towards the Calgary Olympics, and annual payments of \$24 million (indexed to inflation) from provincial lottery revenues.<sup>24</sup> Gambling had now become a significant revenue generator for both federal and provincial governments. The lottery deal was netting the federal government \$60 million annually by 2003.<sup>25</sup> Critics and cynics pointed out the “dubious morality of elected representatives decriminalizing otherwise criminal behaviour for cash payments.”<sup>26</sup> They saw the federal government abandoning the morality-based approach to gambling regulation, appearing to replace it with nothing but bare pragmatism.

These criticisms were compounded by the fact that the deal was approved by Parliament with minimal public consultation, and a debate that lasted less than 3 hours. From second reading on November 6, 1985 to royal assent on December 20 of the same year, no amendments were made, and many felt that it had been “rubber-stamped” by Parliament.<sup>27</sup> Debates around the bill were led not by the Minister of Justice and Justice critics, but by Ministers and critics for fitness and sport.<sup>28</sup> The Progressive-Conservative government heralded the bill as a way to lock in provincial support for the Olympics (in the form of an immediate \$100 million payment). The Honourable Otto Jelinek said that Bill C-81 “gives a clear legislative recognition to past and present provincial activities” and “sets some realistic and clear standards on what is permissible.” The key for the government was the elimination of an irritant in federal-provincial relations, and defining the scope of what gaming activities the provinces could undertake.<sup>29</sup> The Opposition

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<sup>23</sup> *Ibid* at 16-17.

<sup>24</sup> *Ibid* at 17.

<sup>25</sup> *Ibid*.

<sup>26</sup> Timothy IW Patrick, “No Dice: Violations of the *Criminal Code*’s Gaming Exemptions by Provincial Governments” (2000) 44:1 *Crim LQ* 108 at 11.

<sup>27</sup> Campbell, Hartnagel & Smith, *supra* note 16 at 17–18.

<sup>28</sup> “Bill C-81, An Act to amend the Criminal Code (lotteries)”, 2nd reading, *House of Commons Debates*, 33rd Parl, 1st Sess, Vol 6 (6 November 1985) at 8416-8417 (Hon Otto Jelinek) [“Bill C-81”].

<sup>29</sup> *Ibid*.

criticized the Bill for removing funding for Canada's national sports teams (which were previously funded by federal sports pools and lotteries).<sup>30</sup> The NDP critic was adamant that gambling should not be supported or condoned by the government, because of the "social and moral consequences" that go along with it. Mr. Epps called Bill C-81 "a Bill that is only to be supported because of its half-way nature", and called on the government to eventually remove the government-operated lottery exemptions from the *Criminal Code*.<sup>31</sup> The NDP critic seemed to be the only one who maintained a moral opposition to gambling, whereas the members of the government and official opposition were much more concerned about improving the relationship with the provinces and using gambling revenues to fund other federal activities.

Despite Minister Jelinek's assurance that Bill C-81 would "not promote an expansion of gambling", the 1985 amendments led to a significant growth in both lottery ticket sales and casino gambling. By 2003, government-operated lotteries, bingo, electronic gaming machines (EGMs or, more commonly "video lottery terminals" – VLTs), and casinos brought in \$12 billion of revenue across Canada.<sup>32</sup> By clarifying the boundaries of acceptable conduct for the provinces, Bill C-81 facilitated this expansion. In addition, the *Criminal Code* continued to prohibit any for-profit gambling conducted by non-provincial entities. This political deal gave the provinces a monopoly on gaming, supported by criminal sanctions. In a paper presented to the Law Commission of Canada, Campbell, Hartnagel & Smith conclude that "Canadian criminal law has been used to consolidate provincial authority over gambling as a revenue raising instrument and to expand its availability rather than restrict it in any meaningful sense."<sup>33</sup> Patrick agrees, calling the creation of a provincial monopoly "a peculiar use of the criminal law power."<sup>34</sup> This peculiar use remains the status quo to this day, as the provinces continue to be the only authorized managers and conductors of lottery and gaming operations in Canada.

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<sup>30</sup> *Ibid* at 8417-8418 (Hon Sergio Marchi).

<sup>31</sup> *Ibid* at 8420 (Hon Ernie Epps).

<sup>32</sup> Campbell, Hartnagel & Smith, *supra* note 16 at 20.

<sup>33</sup> *Ibid* at 7-8.

<sup>34</sup> Patrick, *supra* note 26 at 108.



## FURTNEY, HAIR, AND THE PURPOSE OF GAMING LAWS

This delegation of gambling regulation to the provinces has been challenged unsuccessfully in the courts. In *R v Furtney*,<sup>35</sup> the accused were managers of a charity lottery who were alleged to have breached conditions of their provincial license, and therefore liable under the *Criminal Code* section 207(3).<sup>36</sup> They argued that the parts of section 207, under which they were charged, were an improper delegation of the federal criminal power to the provinces, and that the law was therefore *ultra vires*. The Supreme Court agreed that delegation of authority from one level of government to another is “constitutionally impermissible”<sup>37</sup>, but the court found that the delegation in section 207 was not improper. The court held that section 207 delegated authority to the provincial Lieutenant Governor in Council, separate from the provincial legislature.<sup>38</sup> In addition, section 207 allows provincial legislation to dictate its scope by referring to provincial laws relating to the terms and conditions of lottery licenses.<sup>39</sup> The Supreme Court held that gambling could be regulated jointly by the federal and provincial governments, acting under different heads of power.

The accused in *R v Hair*<sup>40</sup> made similar constitutional arguments that the criminal elements of gambling had disappeared from the law. They argued – with evidence from Dr. Garry Smith – that the criminal law was intended to give effect to the political deal with the provinces and was no longer directed at the prevention of gambling. If the *Criminal Code* was not concerned with the moral and social consequences of gambling, intending instead to protect a provincial monopoly on gambling, it could be argued that it now lacked a valid criminal law purpose for legislating on the subject. The applicants in *Hair* made the argument that the 1985 amendments demonstrated not only a public shift in morals, but a shift in Parliament’s intention as well.<sup>41</sup> *Hair* is the most recent case to address

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<sup>35</sup> *R v Furtney*, [1991] 3 SCR 89, 129 NR 241, 14 WCB (2d) 35 [*Furtney*].

<sup>36</sup> *Criminal Code*, *supra* note 4, s 207(3).

<sup>37</sup> *Furtney*, *supra* note 35 at para 33.

<sup>38</sup> *Ibid* at para 34.

<sup>39</sup> *Ibid* at para 35.

<sup>40</sup> *R v Hair*, 2016 ONSC 900, 349 CRR (2d) 256 [*Hair*].

<sup>41</sup> *Ibid* at paras 34–35.

the constitutionality of the gambling provisions.<sup>42</sup> Relying on *Furtney* and other appellate-level decisions<sup>43</sup>, the court held that the criminal provisions relating to gambling are still valid exercises of federal power. Justice Brown of the Ontario Superior Court held that there were still significant harms related to unlicensed gambling and that there had not been a material change in the circumstances or evidence that would allow the court to revisit this issue already addressed by appellate courts.<sup>44</sup> Justice Brown declined to distinguish the case from *Furtney*<sup>45</sup>, and maintained that the criminal law still validly applied to gambling.

The court in *Hair* had to address another new development in gambling law which had arisen since *Furtney*. In 2001, Parliament passed legislation to stiffen penalties for organized criminal activity. Bill C-24<sup>46</sup> redefined criminal organizations as any group of three or more people, who have as one of their main purposes or main activities the commission of one or more serious offences which will result in a material benefit for the group. The definition of a serious offence was amended to include any offence with a maximum sentence of five years or greater, plus any other offences prescribed by regulation.<sup>47</sup> In 2010, Regulation SOR/2010-161 made the crimes in sections 202 and 206 “serious offences”, opening up bettors and gambling providers to prosecution for organized crime offences.<sup>48</sup> The accused in *Hair*<sup>49</sup> argued that this additional jeopardy for conduct which was not morally or socially harmful violated their section 7 *Charter* rights.<sup>50</sup> Justice Brown found that Parliament did not only intend to target “major players in traditional criminal organizations”<sup>51</sup>, and that the

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<sup>42</sup> *Ibid.*

<sup>43</sup> *R v Andriopoulos*, 1994 CanLII 147 (ONCA), 1994 CarswellOnt 3947; *R v Jourdain* (2001), 150 OAC 314 (CA), 51 WCB (2d) 283; *Siemens v Manitoba*, 2003 SCC 3, [2003] 1 SCR 6.

<sup>44</sup> *Hair*, *supra* note 40 at para 48.

<sup>45</sup> *Furtney*, *supra* note 35.

<sup>46</sup> *An Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Acts*, 1st Sess, 37th Parl, 2001 (assented to 18 December 2001), SC 2001, c 32.

<sup>47</sup> *Criminal Code*, *supra* note 4, s 467.1(1).

<sup>48</sup> *Regulations Prescribing Certain Offences to be Serious Offences*, SOR/2010-161, s 1 [Regulations].

<sup>49</sup> *Hair*, *supra* note 40.

<sup>50</sup> *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].

<sup>51</sup> *Hair*, *supra* note 40 at para 93.

inclusion of gambling offences as serious offences captures exactly the kind of harmful conduct that Parliament intended to be covered by the gambling laws.

While Justice Brown's decisions on these two issues – the scope of the criminal law power, and whether tying gambling to organized crime breaches section 7 of the *Charter*<sup>52</sup> – seem consistent with one another, they do still raise the question: If for-profit gambling is so harmful to society, why does Parliament allow provinces to conduct and license gambling operations at all? One major reason is that publicly-operated lotteries and gaming fund the public purse rather than organized crime. The evidence supports the connection that Justice Brown saw between unlicensed gambling and criminal organizations. Detective Inspector Moodie, as head of Ontario's Illegal Gaming Enforcement Unit, found that illegal gambling was a major funding source for traditional organized crime, and that despite the criminal prohibitions, there were “no significant deterrents” for criminal organizations to operate illegal gambling rings.<sup>53</sup> He called gambling revenues the “foundation upon which most other illicit activities are supported.”<sup>54</sup> Clearly, a policy change was necessary to ensure that criminal organizations could not profit off of gambling.

Writing as he was before the coming into force of Regulation SOR/2010-161<sup>55</sup>, Detective Inspector Moodie likely would have approved of the additional deterrents to gambling offences flowing from their inclusion in section 467.<sup>56</sup> However, the availability of legal gambling is not enough by itself to prevent criminal organizations from running gaming rings for profit. In a study of illegal gambling in Western Canada, the most common forms of illegal gaming were found to be “ironically, ... versions of government-offered gambling formats” such as unlicensed VLTs, offshore lotteries, and underground card rooms.<sup>57</sup> The authors of the study noted that “illegal gambling formats compete well with their

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<sup>52</sup> *Charter*, *supra* note 50.

<sup>53</sup> LD Moodie, *Ontario's organized crime section—Illegal gambling unit: Its evolution and accomplishments* (Paper presented at the Gambling, Law Enforcement and Justice System Issues conference, University of Alberta, Edmonton, AB, March 2002) at 7.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Regulations*, *supra* note 48.

<sup>56</sup> *Criminal Code*, *supra* note 4, s 467.

<sup>57</sup> Campbell, Hartnagel & Smith, *supra* note 16 at 41.

legal counterparts because they offer more attractive wagering propositions and services such as credit, better odds, higher stakes, and telephone betting.”<sup>58</sup> This is perhaps the most persuasive reason to maintain criminal prohibitions on gambling activity. Provinces certainly need to restrict gambling to some extent to avoid the potential social harms of excess gambling, but overly bureaucratic or restrictive regulatory frameworks allow organized crime to thrive despite the existence of legal alternatives. Criminal sanctions may still be necessary to deter and dismantle criminal organizations who engage in illegal gambling to fund themselves. Seen in this light, the criminal law does indeed help support the provincial monopoly over gambling, but it does so at the expense of criminal enterprise.

If the dismantling of organized crime favours a less restrictive regulatory framework, the pressure in the other direction is the need to prevent problem gambling and other related social ills. Provinces may be ‘competing’ with criminal organizations for revenue, but they are still obligated to prevent harms to their residents. Coming back to the criticisms raised by Mr. Epps in debates around Bill C-81<sup>59</sup>, provinces are effectively condoning gambling behaviour while benefiting from the revenues. Nova Scotia’s Addictions Services Office notes that “the very significant revenue derived from gambling activity sets up the potential for a conflict of interest for governments who must also address the associated health and social problems.”<sup>60</sup> On average, Canadian provinces rely on gambling income for 3.8% of their own-source revenue.<sup>61</sup> In response to this dilemma, provinces have set up an array of prevention and harm reduction programs for gambling. Most of these programs have been focused at reducing demand for gambling. Demand-side efforts are less threatening to the ‘gambling industry’ of licensees and gaming facilities, and so are politically easy to put in place. Unlike supply-side restrictions which would directly limit the ability to offer gambling

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<sup>58</sup> *Ibid.*

<sup>59</sup> “Bill C-81”, *supra* note 28.

<sup>60</sup> Nova Scotia Department of Health Promotion and Protection, *Best Advice for Preventing Problem Gambling in Nova Scotia*, by Gary Roberts and Associates (November 2008), online: <<https://novascotia.ca/dhw/addictions/documents/Best-Advice-for-Preventing-Gambling-Problems-in-Nova-Scotia.pdf>> at 26 [*Best Advice*].

<sup>61</sup> *Ibid* at 4.

services in and of themselves, demand-based reduction approaches only hurt revenues if they are effective. Private industry is also benefitting from the expansion of gambling. VLT operators in Alberta retain 15% of the profits from each machine, giving the gambling industry a substantial incentive to promote risky gambling behaviour. The rationale of keeping gambling revenue public “may be compromised since sizable portions” of the profits that accrue from gaming are directed to private operators.<sup>62</sup> In regulating and restricting gambling, provinces must not only fight through their own conflict of interest but also the private incentives to expand gambling revenues.

Though favoured by the gambling industry, demand reduction measures are less effective at reducing problem gambling than programs aimed at restricting the availability of gaming or reducing the harms caused by gambling.<sup>63</sup> VLTs are particularly prone to problem gambling, because of the increased pace of play and the addition of visual and auditory stimuli.<sup>64</sup> 64% of problem gamblers in Nova Scotia listed VLTs as the top concern for their gambling behaviour.<sup>65</sup> Provinces have been hesitant to restrict the number of operating VLTs because they have been a significant revenue generator. Though online gambling may be less addictive than VLTs, its accessibility and convenience requires careful attention to prevent problem gambling.<sup>66</sup> The easy availability of electronic gambling is a serious problem for provinces to regulate, and the current state of the criminal law means the federal government is removed from that regulatory picture. These moral and social problems are rightly addressed by the criminal law.

## GOING DIGITAL: NEW FRONTIERS FOR GAMING ENFORCEMENT

Online and electronic gaming have reached their maturity in Canada. The first online casino opened its virtual doors in 1995. By 2001, there were 250

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<sup>62</sup> Campbell, Hartnagel & Smith, *supra* note 16 at 58.

<sup>63</sup> *Best Advice*, *supra* note 60 at 28.

<sup>64</sup> Andrew Nikiforuk, “Alberta’s Gamble with Gambling”, *The Walrus* (12 November 2006), online: <<https://thewalrus.ca/2006-11-society/>>.

<sup>65</sup> *Best Advice*, *supra* note 60 at 6.

<sup>66</sup> Kahlil S Philander & Terri-Lynn MacKay, “Online gambling participation and problem gambling severity: is there a causal relationship?” (2014) 14:2 *International Gambling Studies* 214 at 224.

websites offering gambling online. By 2009, that number had jumped to 2500 sites, operating from 50 different jurisdictions.<sup>67</sup> International accounting firm PwC concludes that while it is clear that the market is gradually “going digital”, “the pace and scale of the migration to online spending is clearly much more difficult to call”<sup>68</sup> simply because regulation of the market is so fragmented, and it is difficult to get accurate assessments of underground gambling. Players may prefer online gaming to land-based casino or VLT gaming for several reasons. The most common reasons relate to accessibility, convenience, and a preference for gaming in private rather than in public.<sup>69</sup> The development of new online technologies and the growing ease of financial transactions over the internet suggest that online gaming will continue to expand in popularity. Surprisingly, Canadian law has done little to respond to this trend.

A private members’ bill in the late ‘90s attempted to bring the *Criminal Code* up to date with respect to online gaming. Bill C-353 (*An Act to amend the Criminal Code (Internet Lotteries)*) was introduced in November of 1996 and passed second reading in February of 1997.<sup>70</sup> During the debate, members touted the strong economic benefits that regulated online gaming could have for Canada. One member, though opposed to gaming in principle, stated that “Canadians are already gambling on the Internet and money is leaving the country.”<sup>71</sup> The bill proposed that the federal government jump back into the field to regulate online gaming. The Bill’s main feature was an amendment to section 207 of the *Criminal Code*, which would have expanded the ability of governments (at both the provincial and federal level) to regulate and operate online gaming services. In addition to schemes conducted or managed by the provinces, the federal government would have been able to “conduct and manage a lottery scheme on the Internet”, “either alone or in conjunction with the government of one or

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<sup>67</sup> Nova Scotia, *Responsible Gaming Strategy 2011*, (strategic report), at 6.

<sup>68</sup> PwC, *Gaming Outlook 2011-2012* at 38.

<sup>69</sup> Robert T Wood, Robert J Williams & Paul K Lawton, “Why do Internet gamblers prefer online versus land-based venues? Some preliminary findings and implications” (2007) 20 *Journal of Gambling Issues* 235 at 239.

<sup>70</sup> Bill C-353, *An Act to amend the Criminal Code (Internet lotteries)*, 2<sup>nd</sup> Sess, 35<sup>th</sup> Parl, 1997 [Bill C-353].

<sup>71</sup> “Bill C-353, An Act to amend the Criminal Code (Internet lotteries)”, *House of Commons Debates*, 35<sup>th</sup> Parl, 2<sup>nd</sup> Sess, No 129 (13 February 1997) at 8115 (Hon Werner Schmidt).

more provinces”.<sup>72</sup> The sponsor of the bill, the Honourable Dennis Mills, addressed the issue of the 1985 lottery deal, and its inability to respond to the internet age: “When the whole use of the Internet is exploding in front of our very faces, there was never ever any discussion back in 1979 or 1985 whether or not this was going to be a serious issue.”<sup>73</sup> Mr. Mills urged the federal government to be proactive in regulating online gaming, rather than waiting for the provinces to act on their own. The Parliamentary Secretary for International Trade opined that it was high time for the federal government to debate and decide “whether it wants to be in the business [of online gambling] and if it is in the business how it relates to the provincial governments and the previous agreements on lotteries that were made a few years ago.”<sup>74</sup> Despite these efforts to modernize Canada’s gaming legislation, the bill died on the order paper when Parliament was dissolved in April of 1997, and online gaming continued to be prohibited except where conducted and managed by the provinces under section 207.

As we’ve already seen, the *Criminal Code* provisions on gambling prevent Canadian companies from operating online gaming services.<sup>75</sup> The *Starnet* case is one of the only prosecutions in Canada that applies these prohibitions to online gambling.<sup>76</sup> Starnet Communications Inc. was a company headquartered in Delaware, which operated pornographic websites and online casinos. This latter business attracted the attention of Canadian organized crime investigators. Starnet kept servers in Vancouver through which gamblers would download software for playing online games. This software would route the gambler’s connection through the Vancouver servers to other systems in Antigua.<sup>77</sup> In 2001, Starnet was charged under section 202(1)(b) of the *Criminal Code*<sup>78</sup> for keeping a device used for gambling – the device being the computers and computer networks located at their Vancouver offices. Starnet pleaded guilty, receiving a

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<sup>72</sup> Bill C-353, *supra* note 70, s 1.

<sup>73</sup> Bill C-353 Debates, *supra* note 71 at 8112 (Hon Dennis J Mills).

<sup>74</sup> *Ibid* at 8116 (Hon Ron MacDonald).

<sup>75</sup> *Re Earth Future Lottery*, 2002 PESCAD 8, aff’d 2003 SCC 10, 215 DLR (4th) 656 [*Earth Future*]. This case is discussed further at pp 2-3 and 17.

<sup>76</sup> *R v Starnet Communications International Inc*, 2001 CarswellBC 3525 (BC Prov Court) [*Starnet*].

<sup>77</sup> *Ibid* at para 15.

<sup>78</sup> *Criminal Code*, *supra* note 4, s 202(1)(b).

fine of \$100,000, and forfeiting \$3.925 million US in profits.<sup>79</sup> For this charge, it was irrelevant that only a small portion of the gamblers who accessed Starnet's gaming services were Canadians – though it warranted mention by Starnet's defense attorney, who likely wanted to diminish the impact that Starnet's activities might have had in Canada. What's clear though is that the elements of section 202(1)(b)<sup>80</sup> would have been met even without participation by Canadian gamblers. The keeping of the device is the crime, regardless of the location from which bets are placed.

Territoriality poses an interesting problem for online gaming, as for other offences committed over the internet. Would Starnet still have been prosecuted in Canada had their servers been located offshore? Most online gaming would violate section 206(1)(e), which is broad enough to cover any situation where a player stakes money in exchange for the chance to be owed a greater sum of money.<sup>81</sup> Online casinos may fall afoul of section 202(1)(d), which prohibits recording or registering bets.<sup>82</sup> Even if the server is located outside of Canada, the Ontario Court of Appeal (upheld by the Supreme Court) has held that bets are agreements between two people, requiring both offer and acceptance, each of which may occur in a different location.<sup>83</sup> Certainly foreign operators pose problems for enforcement, particularly where the companies have no assets or physical presence in Canada. Courts will likely not entertain a criminal charge against a person not present in Canada. However, the Supreme Court's decision in *SOCAN* opens the door to prosecution based solely on the *reception* of an internet transmission in Canada.<sup>84</sup> The question remains unanswered, but prosecution is certainly possible. Canadians and Canadian companies could be subject to several charges for facilitating this criminal activity. These foreign gambling operators could easily fall into the definition of a criminal organization in section 467.1(1), which specifically includes persons inside or outside of

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<sup>79</sup> *Starnet*, *supra* note 76 at para 40.

<sup>80</sup> *Criminal Code*, *supra* note 4, s 202(1)(b).

<sup>81</sup> *Ibid*, s 206(1)(e).

<sup>82</sup> *Ibid*, s 202(1)(d).

<sup>83</sup> *R v Bennell*, [1973] 10 CCC (2d) 503n, affg [1972] 3 OR 906.

<sup>84</sup> *Society of Composers, Authors & Music Publishers of Canada v Canadian Assn. of Internet Providers*, 2004 SCC 45 at para 63, [2004] 2 SCR 427 [*SOCAN*].



Canada committing serious offences.<sup>85</sup> Recalling that SOR/2010-161 made section 202 a serious offense, facilitating or receiving a gaming transaction could result in criminal liability. Financial institutions and server hosts are among those most at risk of being hit with these charges.<sup>86</sup> Companies that host gaming servers are critical to the transmission of data itself, while financial institutions could be violating section 202(1)(c), which prohibits holding money or property relating to any transaction prohibited by section 202.<sup>87</sup> Though no Canadian company has ever been charged for facilitating online gaming, the provisions could easily and reasonably be interpreted to include foreign operators offering bets to Canadians.

The Supreme Court's ruling in *Earth Future* supports the interpretation that a lottery may take place in more than one place at once using telecommunications, opening the operator to criminal liability.<sup>88</sup> The court was asked to determine the validity of a license granted to a charity lottery that proposed selling lottery tickets by telephone and over the internet on a global scale. The Supreme Court upheld the decision of the PEI Supreme Court Appeal Division that the lottery license was invalid and in breach of the *Criminal Code*. The Attorney General of Prince Edward Island argued that since the servers and infrastructure were all located on the island, the lottery was conducted and managed there. In addition, the rules and regulations of the lottery included a provision that deemed any transactions to have taken place in PEI. The court drew a distinction between a lottery conducted *from* a province and lotteries conducted *in* the province.<sup>89</sup> They also found that the deeming provision – while it may be determinative for private contract disputes – had no effect on changing the location of the *actus reus* of a criminal offence.<sup>90</sup> By attempting to conduct the lottery partially outside the province, the Earth Fund would have contravened the offence in section 207(3) of conducting a lottery scheme outside of the scope of provincial authorization.<sup>91</sup>

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<sup>85</sup> *Criminal Code*, *supra* note 4, s 467.1(1).

<sup>86</sup> John Tuzyk, "Internet Gaming in Canada" (2006) 10:5 J Internet L 3 at 7.

<sup>87</sup> *Criminal Code*, *supra* note 4, s 202(1)(c).

<sup>88</sup> *Earth Future*, *supra* note 75.

<sup>89</sup> *Ibid* at para 15.

<sup>90</sup> *Ibid* at para 19.

<sup>91</sup> *Criminal Code*, *supra* note 4, s 207(3).

The Court added that even if it had found that the lottery was conducted entirely in PEI, the types of scheme that provinces can license are restricted by section 207(4)(c).<sup>92</sup> Provinces cannot license other bodies to conduct and manage lotteries “operated on or through a computer”.<sup>93</sup> This means that online gaming and online lottery sales are the exclusive domain of the provinces. Charitable lotteries and casinos cannot offer digital or online gaming without breaching section 207(3).<sup>94</sup> Section 207(4)(c)<sup>95</sup> permits only lotteries that comply with section 207(1)(a) (schemes conducted and managed by the province, or by several provinces, only operating in those provinces).<sup>96</sup>

## **SMALL MARKETS AND BIG BETS: PROVINCIAL RESPONSES TO *EARTH FUTURE***

Interprovincial agreements for online lotteries are still possible but are made more difficult because they cannot license another body to manage the lottery (the process allowed by section 207(1)(f) of the *Criminal Code*).<sup>97</sup> The Western Canada Lottery Corporation (WCLC) and Atlantic Lottery Corporation (ALC) are creatures of interprovincial agreement and are owned by their constituting governments<sup>98</sup>. These crown corporations are part of government and meet the requirements of section 207(1)(a) of the *Criminal Code*,<sup>99</sup> at least according to the provinces that make them up.<sup>100</sup> Their validity has not been challenged in court. The Interprovincial Lottery Corporation (ILC), on the other hand, is owned by each of the provincial and interprovincial lottery corporations (BC Lottery

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<sup>92</sup> *Ibid*, s 207(4)(c); *Earth Future*, *supra* note 75 at paras 14-15.

<sup>93</sup> *Criminal Code*, *supra* note 4 s 207(4)(c).

<sup>94</sup> *Ibid*, s 207(3).

<sup>95</sup> *Ibid*, 207(4)(c).

<sup>96</sup> *Ibid*, s 207(1)(a).

<sup>97</sup> *Ibid*, s 207(1)(f).

<sup>98</sup> The WCLC is owned by Alberta, Saskatchewan, and Manitoba (with the territories as associate members), and the ALC is owned by New Brunswick, Newfoundland and Labrador, Nova Scotia, and PEI.

<sup>99</sup> *Criminal Code*, *supra* note 4, s 207(1)(a).

<sup>100</sup> See e.g. the Nova Scotia government's claim of legitimacy: “Gaming”, online: *Access Nova Scotia* <<https://novascotia.ca/sns/access/alcohol-gaming/gaming.asp>>. For an opposing view, see Patrick, *supra* note 26.

Corporation, WCLC, Ontario Lottery and Gaming Corporation, Loto-Québec, and ALC). Lotteries operated by the ILC are marketed and sold online as well as in brick-and-mortar stores.<sup>101</sup> Revenue from ILC lotteries is returned to the member organizations in proportion to ticket sales in those regions.

After *Earth Future*,<sup>102</sup> PEI made another attempt to create a lottery that would have extra-provincial reach. The government of PEI was concerned that unregulated online gambling was undermining their gaming revenues, but the government couldn't compete by offering their own e-gaming platform. PEI is too small to make online gaming viable in that province alone, so the province went looking for other opportunities to reach a larger market.<sup>103</sup> In 2008, the provincial government pursued two options for making PEI an online gaming hub: Plan A was an interprovincial agreement that would provide other provinces a share of the revenue from the gaming site in exchange for access to their markets, and Plan B was to host the servers for the gaming platform on the Abegweit First Nation reserve, to make prosecution under the *Criminal Code* less likely. The province loaned \$950,000 to the Mi'kmaq Confederacy of PEI (MCPEI) to research Plan B and began work to bring other provinces aboard.<sup>104</sup> To operate the gaming hub, the province linked up with Capital Markets Technologies (CMT), a tech company with access to a platform for secure and rapid financial transactions. CMT's expertise and its ability to create financial infrastructure was critical to the plan. A gaming website that cannot securely take deposits from players or transfer winnings is failing in its primary product. This partnership between the provincial government, MCPEI, and CMT was supposed to be a Plan B to deal with the uncertainty of an interprovincial agreement. In the end, the partnership would not long outlast Plan A.

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<sup>101</sup> OLG sells Lotto Max and Lotto 6/49 tickets on the same website as their online casino games: see *PlayOLG* <<https://www.playolg.ca/content/olg/en/lottery.html>>.

<sup>102</sup> *Earth Future*, *supra* note 75.

<sup>103</sup> Robyn Doolittle & Jane Taber, "Small island, big bet: How PEI lost its online gambling gamble" *Globe and Mail* (27 February 2015), online: <<http://www.theglobeandmail.com/news/national/small-island-big-bet-how-pe-i-lost-its-online-gambling-gamble/article23237214/>>.

<sup>104</sup> Teresa Wright, "Unpaid loan to Mi'kmaq Confederacy for E-gaming raises questions", *The Guardian* (1 December 2014), online: <<http://www.theguardian.pe.ca/news/local/2014/12/1/unpaid-loan-to-mikmaq-confederacy-for-e-3957918.html>>.

Four years later, the province pulled out of their partnerships with MCPEI and with CMT. They decided that an interprovincial agreement on e-gaming was “unrealistic”, and the MCPEI plan was “too legally thorny to proceed.”<sup>105</sup> Among the investors for CMT were government officials, including some officials involved in the project. CMT was later investigated by the PEI securities commission, and negative rumours whipped through the province, prompting many investors to pull out. PEI’s brief and unsuccessful foray into online gambling ended in political disaster, with taxpayers left on the hook for the \$950,000 spent on the e-gaming report, and with no financial or gaming hub to show for it.

## “WIRING THE REZ”: THE KAHNAWAKE GAMING COMMISSION

On its face, it seems like the idea of avoiding criminal liability by operating out of a First Nations reserve should have taken far less than four years to be dismissed as “legally thorny”, but the provincial government and MCPEI were drawing inspiration from the pre-existing success of the Mohawk Territory of Kahnawake, an Indian reserve located just south of Montreal. Kahnawake has a strong tradition of independence and autonomy. They employ their own police force of ‘Peacekeepers’, and as part of the Haudenosaunee Confederacy (also known as the Iroquois League of Nations), issue their own passports and identification documents to their members. Kahnawake is governed by a band council, recognized and regulated under the *Indian Act*.<sup>106</sup> In the late 1990s, the band council devised a plan to both promote economic development on their territory, and to protect their community from gaming activity that took place there.<sup>107</sup> In allowing (and regulating) gambling, Kahnawake claims an exemption from the criminal gambling prohibitions based on their inherent right to self-government, and a more specific Aboriginal right that stems from the centrality of gaming and wagers to Mohawk culture.

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<sup>105</sup> Doolittle & Taber, *supra* note 103.

<sup>106</sup> *Indian Act*, RSC 1985, c I-5.

<sup>107</sup> Murray Marshall, “Kahnawake” in Mark Balestra & Anthony Cabot, eds, *The Internet gambling report V: an evolving conflict between technology, policy & law* (St Charles: The River City Group, 2002) 321 at 322.

Many First Nations in Canada and the United States have entered into agreements with provincial and state authorities to gain access to gambling revenues and to regulate gambling on their territories. Kahnawake took a different approach, forming its own gambling regulator – the Kahnawake Gaming Commission (KGC) – which is unconnected to the Quebec government’s licensing body. The KGC was created by the *Kahnawake Gaming Law*<sup>108</sup>, a by-law passed by the band council. In addition to traditional land-based gaming, the KGC licenses two types of interactive gambling activity. The first license type is an “interactive gaming license” or IGL. This license allows the holder to develop and maintain infrastructure which is used by service providers to host gaming content. To date, the only holder of an IGL is Mohawk Internet Technologies (MIT) – a band-owned corporation that remits its profits to the Mohawk Council of Kahnawake. The service providers must secure a “client provider authorization” from the gaming commission (a “CPA” – the second type of gambling license) and can then contract with MIT to host their content online. As of 2008, 65 different license-holders were operating 470 websites regulated by the KGC.<sup>109</sup> This amounted to more than 60% of internet gaming traffic across the entire globe.<sup>110</sup> Kahnawake bills itself as a globally-recognized regulator of online gaming and has a substantial foothold in the online gaming industry.

The licensing scheme under the *Kahnawake Gaming Law* was challenged in court in *Horne v Kahnawake Gaming Commission*.<sup>111</sup> Horne applied to the KGC for an IGL license but was denied. Section 28 of the *Kahnawake Gaming Law* allows the KGC to deny applications “on purely policy grounds” even when the other criteria for licensing are met.<sup>112</sup> The applicant challenged the validity of section 28 and claimed that the KGC should have granted him a license. He also asserted

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<sup>108</sup> Kahnawake Mohawk Territory, by-law KRL c G-1, *Kahnawake Gaming Law* (08 July 1999).

<sup>109</sup> Lisa Wright, “Mohawk territory gambling on a risky business”, *Toronto Star* (19 April 2008), online: <[https://www.thestar.com/business/2008/04/19/mohawk\\_territory\\_gambling\\_on\\_a\\_risky\\_business.html](https://www.thestar.com/business/2008/04/19/mohawk_territory_gambling_on_a_risky_business.html)>.

<sup>110</sup> “Kahnawake’s resident cybercasino giant fined for illegal gaming”, *CBC News* (29 November 2007), online: <http://www.cbc.ca/news/canada/montreal/kahnawake-s-resident-cybercasino-giant-fined-for-illegal-gaming-1.659636> [“Cybercasino”].

<sup>111</sup> *Horne v Kahnawake Gaming Commission (KGC)*, 2007 QCCS 4897, [2007] QJ No 12366 [*Horne*].

<sup>112</sup> *Ibid* at para 8.

that the KGC was under inappropriate political pressure from the Council to deny his application. The KGC argued that they had concerns from the beginning about issuing a second IGL in addition to that issued to MIT – a band-owned corporation. They had made the decision to deny the license, and only then did they seek direction from Council on future IGL applications. The court upheld the commission's decision, finding that "the community's interest prevailed as required by [the gaming commission's] constituting law."<sup>113</sup> Neither side argued that the law was *ultra vires* the band council, and the Court appeared content to decide the case based on the provisions of the statute itself. Though this was not a decision in a criminal context, the court recognized the validity of the gaming law as a whole.

The biggest question about the *Kahnawake Gaming Law* remains unanswered: does Kahnawake maintain an Aboriginal right to gamble under section 35(1) of the *Constitution Act, 1982*?<sup>114</sup> If they do, the criminal laws relating to gambling would not apply to the Kahnawake Mohawks, significantly changing the nature of the conversation around gambling regulation in Canada. Of all the license-holders under the KGC, only one has ever been prosecuted on gambling charges. Cyber World Group – the owner of worldwide cyber-casino GoldenPalace.com – pleaded guilty in a Quebec court in 2007. The terms of that guilty plea are not publicly available, but it was reported that Cyber World Group paid a \$2 million fine and relocated their business out of the Montreal area.<sup>115</sup> It is also unclear which gambling offence Cyber World Group was charged with. Though they had offices in Montreal, they were merely leasing servers from Mohawk Internet Technologies, so it is unlikely they were charged under section 202 of the *Criminal Code*<sup>116</sup> for keeping a gaming device (as they weren't 'keeping' the device themselves). At any rate, both Cyber World Group and the Crown prosecutors must have felt the uncertainty of their respective positions, agreeing to a hefty fine rather than risking jail time or an acquittal. The trial would have been massive, requiring not only proof of the offence beyond a reasonable doubt, but there also

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<sup>113</sup> *Ibid* at para 16.

<sup>114</sup> *Constitution Act, 1982*, s 35(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act*].

<sup>115</sup> "Cybercasino", *supra* note 110.

<sup>116</sup> *Criminal Code*, *supra* note 4, s 202.

would have been a significant sub-trial about Kahnawake's right to regulate gambling on their territory. If the *Kahnawake Gaming Law* stems from an Aboriginal right, Cyber World Group and other licensees are protected from prosecution through the by-law's authorization. Commentators at the time said that this guilty plea raised doubts about the Mohawks' legal authority for licensing gambling,<sup>117</sup> but no other prosecutions have occurred since 2007. The question therefore remains unanswered, but the Kahnawake Mohawk continue to regulate gambling on their territory without interference or protest from the Federal government.

If Kahnawake were to claim in court that they have an Aboriginal right to control gambling, the biggest hurdle for them to overcome is the Supreme Court of Canada case of *R v Pamajewon*.<sup>118</sup> In applying the framework from *Van der Peet*,<sup>119</sup> the court found that gambling was not central to the Anishinaabe of Northern Ontario prior to contact with Europeans.<sup>120</sup> However, this case is not determinative of the Mohawks' Aboriginal rights claim. Section 35(1)<sup>121</sup> claims are highly contextual and fact-specific, and there are huge differences in culture and history between the Anishinaabe and the Mohawk, which could result in a different factual finding. To be designated as an Aboriginal right, it would have to be proven that gambling is an "integral part" of the Mohawks' "distinctive culture".

The court in *Pamajewon* highlighted the ruling of the Ontario Court of Appeal, which held that "there is no evidence that gambling on the reserve lands generally was ever the subject matter of Aboriginal regulation. Moreover, there is no evidence of an historic involvement in anything resembling the high-stake gambling in issue in these cases."<sup>122</sup> Among the Iroquois peoples, including the Mohawk, there was a strong tradition of high stakes betting, particularly on

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<sup>117</sup> Plus, some concerns that content providers would shy away on a purely pragmatic basis. See e.g. Wright, *supra* note 110.

<sup>118</sup> *R v Pamajewon*, [1996] 2 SCR 821, [1996] 4 CNLR 164, 109 CCC (3d) 275 [*Pamajewon*].

<sup>119</sup> *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*].

<sup>120</sup> *Pamajewon*, *supra* note 119 at para 28.

<sup>121</sup> *Constitution Act*, *supra* note 114.

<sup>122</sup> *Pamajewon*, *supra* note 119 at para 43, citing (1994), 21 OR (3d) 385, 120 DLR (4th) 475 (CA).

lacrosse games. One historian recounted how an Iroquois lacrosse spectator would stake “almost every valuable article which he possessed” on the outcome of a game.<sup>123</sup> Betting was not only integral to pre-contact Mohawk culture, but was the subject of formalized regulation and governance by the Iroquois. Complex rituals and codes of conduct were enforced on the games and the betting, and wagers were woven into the structures of governance themselves. The use of lacrosse in conflict resolution stems from the Great Law of Peace – the constitution of the Iroquois Confederacy. The Great Law of Peace mandates that conflicts between nations are resolved non-violently, with each side ‘betting’ that they will win.<sup>124</sup> It is quite likely that these factors would support the Kahnawake’s exercise of sovereignty over gaming regulation on their territory.

The Kahnawake believe that the KGL falls within their Aboriginal rights. Murray Marshall, legal counsel for the KGC and the Mohawk Council of Kahnawake, argues that:

Kahnawake’s jurisdiction to conduct, facilitate and regulate gaming and gaming related activities is a facet of the right it has as a community of indigenous peoples to regulate and control economic development activities that take place within or from its territory and, more fundamentally, to govern its own affairs.<sup>125</sup>

The Mohawk Territory of Kahnawake is taking a proactive approach to gaming regulation, but are still coordinating with federal, provincial, and foreign authorities when necessary. In fact, the Kahnawake view this type of coordination as supportive of their claims to sovereignty. Interwoven in a federal structure, Kahnawake is one among several constitutional actors. Murray Marshall describes the efforts undertaken by Kahnawake with the goal of “harmonizing the legislative provisions of each of the affected jurisdictions”.<sup>126</sup> In the wake of the

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<sup>123</sup> Marshall, *supra* note 107 at 329.

<sup>124</sup> Morden C Lazarus, Edwin D Monzon & Richard B Wodnicki, “The Mohawks of Kahnawake and the Case for an Aboriginal Right to Gaming Under the Constitution Act, 1982” in Yale D Belanger, ed, *First Nations Gaming in Canada* (Winnipeg: University of Manitoba Press, 2002) at 37.

<sup>125</sup> Marshall, *supra* note 107 at 325.

<sup>126</sup> *Ibid.*



2007 Cyber World Group prosecution, one member of the Mohawk Council of Kahnawake said, of their attitude towards federal and provincial governments: “We don’t ask for anything... We tell them that this is our right to do this. And we’re doing it properly, we’re administering it properly—the world seems to think that we’re doing a good job, and we’re confident we’ll continue to do a good job.”<sup>127</sup> Regarding the jurisdiction and authority of the KGC, that council member said “Kahnawake is well-respected. Its jurisdiction is unquestioned. The only place where there is a question is in [our] backyard.”<sup>128</sup> Recently, the KGC entered into an agreement with the New Jersey Division of Gaming Enforcement that any online casinos hosted or regulated by the KGC would refuse to serve US customers unless those content providers were properly licensed in the United States as well. The Chief of the Kahnawake Territory called the agreement “a recognition of [the KGC’s] status as a global online gaming regulator and the future opportunities that status could bring.”<sup>129</sup>

Whether or not Kahnawake has the authority to do what they are doing, there is *de facto* recognition both in Canada and around the world that even if the KGC is not a fully legitimate regulator<sup>130</sup>, they are an effective one. Hundreds of gaming websites are hosted from Kahnawake, and hundreds more are accessible from places like Malta, Antigua, and the Isle of Man. While provinces can create their own online casinos, Kahnawake has demonstrated that there is significant revenue to be made from privatized gambling, and free market access to gambling sites is now the norm in Canada.

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<sup>127</sup> “Cybercasino”, *supra* note 110.

<sup>128</sup> *Ibid.*

<sup>129</sup> Damon van der Linde, “How a Quebec First Nation gambling commission is playing the long game by turning away online U.S. customers” *Financial Post* (3 October 2016), online: <<http://business.financialpost.com/news/how-a-quebec-first-nation-gambling-commission-is-playing-the-long-game-by-turning-away-online-u-s-customers>>.

<sup>130</sup> I am arguing that their exercise of jurisdiction is legitimate and lawful under the *Pamajewon* test, but even if it is not, they have *de facto* authority and there have been no serious challenges to the legality of the *Gaming Law* or the KGC.

## CONCLUSION: NATIONAL SOLUTIONS TO TRANSNATIONAL PROBLEMS

There is evidence that organized crime groups were using servers in Kahnawake to host their own gambling content.<sup>131</sup> As a gray-market entity with limited resources, the KGC is not well-situated to do full background checks on all its content providers. The half-measure of delegating responsibility to the provinces has not been effective either. Harm reduction efforts funded by provincial revenues are undercut by the existence of non-provincial gaming sites. Demand reduction depends on gambling revenues to support gambling education and information, and these unlicensed sites—even those regulated by the KGC—are not required to incorporate provincial messaging on their websites. Supply reduction is ineffective when gamblers can easily access alternatives online. Reducing provincial gambling revenues is only worth doing if the result is a net loss to the gambling sector, not if the profits are funneled to private industry. The result of the current prohibitions and exemptions does not give governments the tools to effectively compete with the private sector (leaving profits on the table) but are still ineffective in curbing problem gambling.

A national regulatory framework is needed to create online casinos which are viable, entertaining, and safe for consumers. Whether that framework incorporates the Kahnawake Territory or allows it to continue to operate on its own, the federal government must choose either liberalization or prohibition: it can't have both without a unified regulatory regime. Individual provinces have not been willing to cooperate on online gaming to any great extent. Apart from the Atlantic Lottery Corporation's online offerings (which are accessible from any Atlantic province), each province that hosts online gambling does so on its own.<sup>132</sup> Each provincial government has different policy goals and different gaming infrastructure. Would-be bettors can only access government-sponsored online gaming in their own province because of the restrictive wording of section

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<sup>131</sup> Project Colisée, a police operation against Italian traditional organized crime operations in Montreal, discovered that those organizations had previously hosted content at Kahnawake. See Doolittle & Taber, *supra* note 103.

<sup>132</sup> ALC provides gaming services on behalf of Nova Scotia, New Brunswick, PEI, and Newfoundland & Labrador. British Columbia, Ontario, and Quebec host their own content, while Alberta and Saskatchewan do not have any online gaming services.

207(1)(a).<sup>133</sup> The result is a patchwork of content and, more importantly, a patchwork of regulatory structures and harm reduction efforts. If it's worth preventing Canadians from accessing gaming services from other provinces, it's worth preventing Canadians from accessing foreign products too. The current approach has too many internal conflicts and contradictions to be an effective framework for gambling regulation. The 1985 amendments<sup>134</sup>, while effective in increasing gambling revenue, also promoted an expansion in gambling which will not be possible to contain. Canadians accept that gambling is a legitimate source of entertainment, and that demand for gambling is not likely to subside, even with stricter regulations. What is needed is a national regulator like that proposed by Dennis Mills in 1996, with the introduction of Bill C-353.<sup>135</sup> Provinces can provide their input and contribute their significant gaming expertise, while Federal regulation will provide a unified and consistent framework across the country. This would achieve the best of both worlds: a casino run by the government, with revenues returned to the public, and a broad platform reaching a huge market for demand reduction and gambling control efforts. All the jurisdictional cards are already on the table. The federal government just needs to ante up and play the strong hand they've been dealt.

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<sup>133</sup> *Criminal Code*, *supra* note 4, s 207(1)(a).

<sup>134</sup> "Bill C-81", *supra* note 28.

<sup>135</sup> Bill C-353, *supra* note 70.