

Canadian GamingLawyer

SHAPING THE FUTURE OF CANADIAN GAMING LAW

VOLUME 12 NUMBER 2
FALL/WINTER 2019



ONTARIO'S ONLINE GAMING LIBERALIZATION

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MESSAGE FROM THE PRESIDENT



IMGL is looking forward to our reception during G2E to be held in Las Vegas on 15 October taking place at La Cave - Wynn Las Vegas. Also, as part of our arrangement with Clarion Events, IMGL will be hosting an IMGL Masterclass, to take place on October 14 at the Wynn. Details are available on our website.

The various IMGL regional committees have selected the IMGL Regulators of the Year. A number of highly qualified nominees have been proposed, and I am pleased to announce that the following awards have been made:

Regulator of the Year, Asia-Pacific — Paulo Martins Chan

Director, Gaming Inspection and Coordination Bureau of Macao SAR

Regulator of the Year Award, Indian Country — Jonodev Chaudhuri

Partner, Quarles and Brady LLP

Lifetime Achievement Award, North America — Larry B. Eliason

Executive Secretary, South Dakota Commission on Gaming

President's Award — Justin Franssen

Partner, Kalf Katz & Franssen

Please join me in congratulating each of the recipients. Each is extremely well deserved and IMGL is pleased to recognize the leadership that each of these regulators has given. These awards will be bestowed at various IMGL events, with the American recipients being awarded plaques to recognize their awards at our VIP reception in Las Vegas on October 15.

I would like to take the opportunity to thank Brien Van Dyke, for her tremendous efforts given to IMGL in her capacity as IMGL Interim Executive Director. Brien has supported and co-ordinated all IMGL matters in 2019 and I am pleased to announce that she will serve as our director going forward. Brien can be contacted on brien@imgl.org and will be at our Las Vegas events in October.

I should also mention that IMGL had a very successful conference in Munich in September, with a programme organised by Wulf Hambach, Joerg Hofmann, Frieder Backu and Marc Ellinger. The conference which was well attended by a considerable number of IMGL members and others, including stakeholders from both Americas, Europe and other geographical regions, discussing key topics of interest to the gambling sector.

I am pleased to announce the results of the elections for the IMGL Executive Committee for 2020 that took place at the IMGL General Meeting in Munich. The 2020 IMGL Executive Committee will be:

Congratulations to each member on their election.

President — Marc H. Ellinger (Ellinger and Associates, LLC, Jefferson City, Missouri)	Second Vice President — D. Michael McBride III (Crowe & Dunlevy, Oklahoma)	Assistant Secretary — Cosmina Simion (Simion & Baciu, Romania)	Vice President, Educator Members — Kathryn Rand (Dean & Co-Director, University of North Dakota School of Law)
Executive Vice President — Quirino Mancini (Tonucci & Partners, Italy)	Secretary — Marc Dunbar (Dean Mead, Florida)	Assistant Treasurer — Alfredo Lazcano Samane (Lazcano Samane, S.C., Mexico City)	
First Vice President — Marie Jones (Fox Rothschild LLP, New Jersey)	Treasurer — Peter Kulick (Dickinson Wright, Michigan)	Vice President, Affiliate Members — Tina Kilmer (GLI, Las Vegas)	

We look forward to seeing you soon at one of our IMGL events, including an IMGL Masterclass near you.

*Best Wishes,
Jamie Nettleton, President*

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Canadian Gaming Lawyer is published twice a year as a joint venture between Canadian Gaming Business Magazine and the International Masters of Gaming Law (IMGL).

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Canadian Gaming Business Magazine is owned and published by:

MediaEdge



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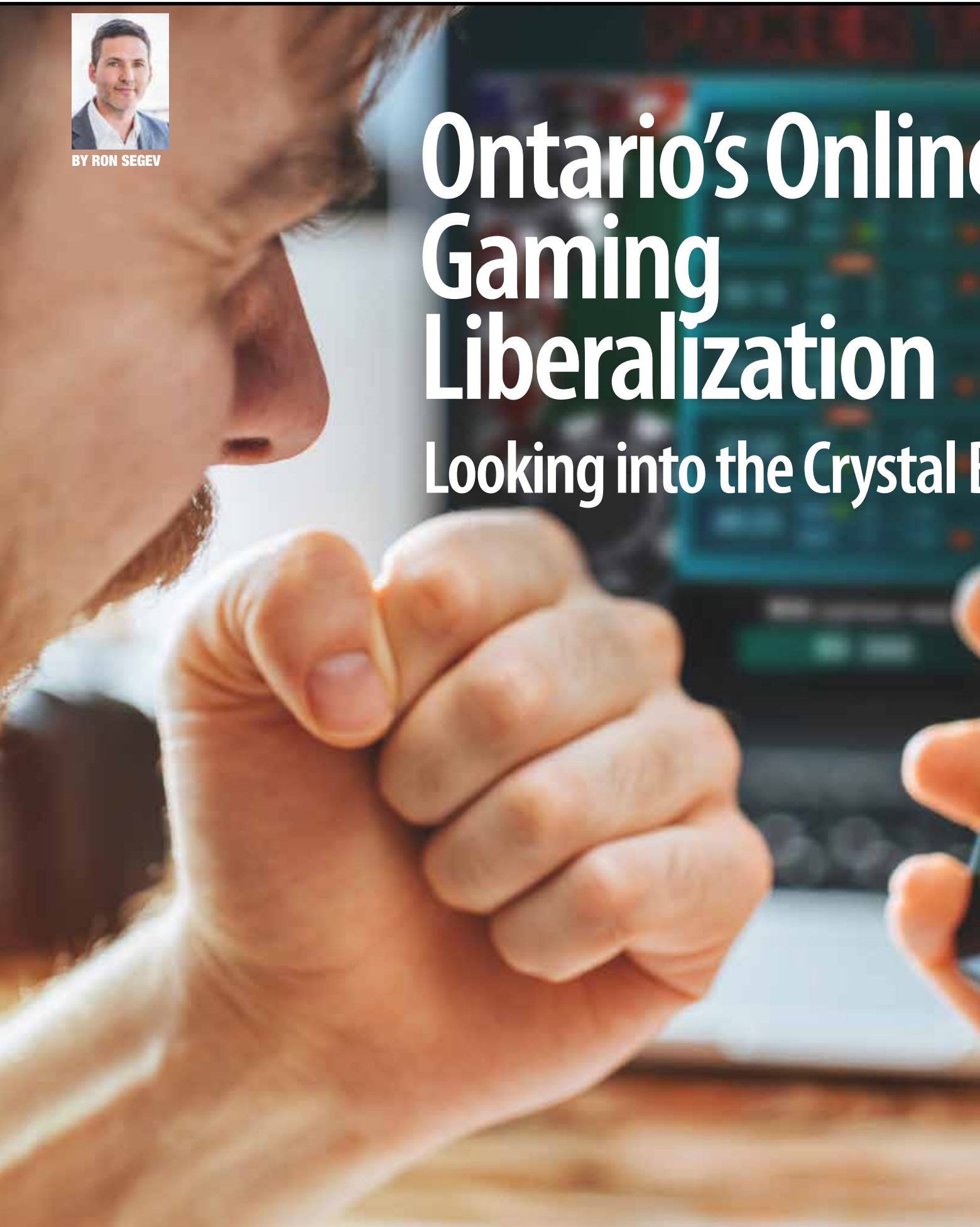
Brien Van Dyke
Interim Executive Director



BY RON SEGEV

Ontario's Online Gaming Liberalization

Looking into the Crystal Ball





The 2019 Ontario budget, released in April of 2019 by the Progressive Conservative government, was noteworthy for a variety of reasons. Those in the iGaming industry immediately zoned in on one segment which lamented the fact that Ontarians are currently spending \$500-million per year mostly on grey-market websites for online gaming.

Consequently, the budget states that the government wants to ensure that “the people of Ontario have access to safe and legal gambling options” and that they plan to do that by the establishment of a “competitive market for online gambling that will reflect consumer choice while protecting consumers who play on these websites”.¹

The Ontario Monopoly

The vow to create a competitive market for online gambling is a marked shift from the current iGaming regime in Ontario. Currently, the Ontario Lottery and Gaming Corporation (OLG) and the Alcohol and Gaming Commission of Ontario (AGCO) are tasked with the administration and regulation of iGaming in Ontario. The OLG is a Crown Corporation owned by the government of Ontario. Companies wishing to provide their iGaming solutions to Ontario register with the AGCO and enter into a commercial agreement with the OLG to become a provider through its PlayOLG.com platform. This can often be a slow and expensive process and companies navigating it are often frustrated that, despite making the good investment in obtaining appropriate registration with the AGCO and offering their solutions through PlayOLG.com, they face competition in the Ontario market against a sizeable, unregulated market.

New Models to Consider

A “competitive market for online gambling,” as mentioned in Ontario’s budget, suggests a shift to competition being allowed for new B2C market participants. A prominent model that Ontario may choose to emulate is the U.K. model. As we know, the U.K. iGaming regime is significantly more liberalized and nimbler than its counterparts in Canada. They allow for both B2B and B2C licenses, opening the UK market to private companies that develop, market and operate their own iGaming platforms in competition with one another and subject to a regulatory framework intended to protect the public interest.

Despite the greater flexibility and speed

with which companies in the U.K. can operate in this space, the government has a highly active enforcement body and a targeted regulatory framework to ensure safe gaming and intended to protect the public interest.² The U.K. has stringent advertising standards through the Advertising Standards Association (ASA) that limit where iGaming ads can be placed and to whom they can be targeted.

Ontario may also emulate the Danish hybrid iGaming model. In preparing this article, we spoke with Troy Ross, President of TRM Public Affairs, a leading Canadian public affairs consultancy in gaming and other regulated industries, who shared his belief that there are strong indicators that Ontario is leaning towards some version of Denmark’s model. Denmark’s online gambling regime is noteworthy because it has not capped the number of online licenses it allows. Denmark has allowed licensees to offer a wide range of gambling products while still tightly enforcing regulations, and still offering a state owned and operated iGaming platform.

Until 2012 the state-owned Danske Spil had a monopoly over gambling activities with local or international companies trying to access the Danish market were restricted from offering games and sports betting services. The 2012 Danish Gaming Act was passed with the purpose of liberalizing while still tightly regulating the gaming market in Denmark. These new regulations allowed for private operators to have access to the Danish iGaming market.

Additionally, the Danish Gaming Act has a focus on protecting underage individuals and other vulnerable people. The Danish Gambling authority, tasked with the role of licensing and regulating their iGaming market, has undertaken strict measures against illegal iGaming, including measures such as blocking payments and ISP disruptions. They also have banned advertisements that promote gambling.³ Consequently, the Denmark model is widely admired. Given the messaging of the Ontario Progressive Conservative Party, and for commercial reasons set out below, it seems as if this model, or some

variation of it, stands a strong chance of being adopted by the OLG.

Likelihood of a Liberalized Ontario iGaming Regime?

The U.K. and Denmark are just two possible models that Ontario can draw inspiration from and the industry is mature enough now so that the OLG and AGCO will not have to re-invent the wheel to get a liberalized framework rolling. But how will it drive this initiative forward?

Ontario’s iGaming offering is currently tied to some degree to those of other provinces. Quebec, Ontario, Manitoba and British Columbia share player liquidity for some games such as progressive slot games like IGT’s Mega Jackpots. While terminating the shared liquidity with those provinces is likely possible, it is also possible that the province is restricted from doing so by agreement or political reasons.

In addition, despite disappointing results commercially, Ontario’s iGaming portal PlayOLG.ca is responsible for a considerable number of jobs which the province may be reluctant to eliminate. Furthermore, PlayOLG.ca has directed approximately \$45 million to the Ministry of Health and Long-Term Care for problem gambling prevention, treatment and research;⁴ government revenue that the province likely will not want to jeopardize by terminating its iGaming offering while it waits for a new regime to take traction and generate replacement revenue for the province.

Of further note, the Ontario government has had a request for proposal (RFP) out for a sports betting platform since 2017 without having chosen a solution.

Taking all of these factors into consideration (the jobs and revenue at stake, the game liquidity ties to other provinces and the time it has taken the province to find certain solutions for its platform) it would make sense for Ontario to adopt a Danish hybrid style model. This would enable it to continue operating its platform and maintain jobs, revenue and ties to other provinces while moving forward with licensing other B2C providers and taxing their

revenue at point of consumption to increase government tax revenue.

What about the other Provinces?

Given the size of the Ontario market, this shift will undoubtedly impact the other Canadian provinces.

Will other provinces follow suit? PlayOLG revenue between May 2017 and May 2018 was \$73.1 million, well behind the revenue of \$180 million brought in by B.C.'s PlayNow, despite B.C. having a third of the population. The need to shift to an alternative model in B.C. may therefore not be as acute. Loto-Québec may similarly not feel an acute commercial need to shift to a new regime. However, if Ontario's new regime shows extraordinary return to the province, these won't be easily ignored.

As discussed above, should Ontario completely abandon its platform the immediate effect on other provinces would be the reduced liquidity in certain games and the possible negative impact on revenue that would result to other provinces. A more material repercussion could be that a liberalized Ontario iGaming framework could also attract more companies to Ontario eager to take advantage of the expanded opportunities, bringing with them jobs and investment dollars. Certainly, other provinces will take note of such positive economic spin-offs. Some may feel compelled to compete for jobs and consider liberalizing their markets for that reason alone.

Another question that arises in a possible opening up of the Ontario market is whether or not new Ontario market participants can take business directly away from other province's — BCLC's Playnow.com or Loto-Québec's EspaceJeux.com, for example. Will Ontario be pulling players away from other provincial platforms?

The April 2002 Supreme Court of Canada decision in *Reference re Earth*

Future Lottery, ruled that the Criminal Code prohibits internet lotteries directed or made available to purchasers outside the province.⁵ Prince Edward Island had proposed to license a charity to operate an online lottery that would have accepted customers internationally and throughout the rest of Canada. The Earth Future Lottery was intended to operate in all provinces of Canada despite not being licensed by any of those provinces except Prince Edward Island. Both the Court of Appeals in Prince Edward Island and the Supreme Court of Canada found this to be prohibited by the Criminal Code. This ruling could at least stem the tide of players eager to play in Ontario from other provinces. If Ontario does not require it on its own volition, other provinces could take legal action to attempt to compel the province of Ontario to require its iGaming licensees to implement geolocation and geo-fencing technology to ensure that Ontario restrict its licensees to only offer their solutions to players playing from inside Ontario.

OLG's ETA?

The process of iGaming liberalization in Ontario is still in its infancy, which has limited the amount of information available to predict exactly how the shift will occur. The Ontario government has said that as a first stage, they are focusing on speaking with industry stakeholders to develop and shape the market.⁶ It is possible that current gaming licences may transfer to the new regime. This would certainly be a concern for companies who have recently navigated through the process of obtaining registration with the province and negotiating a vendor agreement with the OLG. Those companies may argue that they should have preferential treatment over other companies as a result of having navigated through the process. For example, on May 24, 2019, after the Ontario Budget was released, Scientific

Games renewed its instant games partnership with the OLG through July 2022, which includes offerings on OLG's iGaming platforms.⁷ It would make sense for Scientific Games to request preferential treatment under a proposed new regime in light of this, and certainly preferential treatment over foreign operators who have been active in the Ontario market without having registered with the AGCO. The province will have to iron out these and countless other details prior to adopting the new regime; a time consuming undertaking to say the least.

The best bet at this point, based on all available information, is that the government will move towards a Danish inspired system that places an emphasis on consumer choice, responsible play and consumer protection. However, as of this writing they have published no expected timeline for rollout.

Ontarians spend an estimated \$500 million per year on offshore, grey market gaming websites.⁸ As the Ontario iGaming regime liberalizes, it is likely much of this spending will move back into the province.

These developments make Ontario an essential market to monitor. It has a population of 14.5 million, almost double that of New Jersey and almost equal in size to that of the Netherlands. The ability to reach out more effectively to a market of that size and value in a more unrestricted manner for the first time is a sea change in our Canadian iGaming industry and cannot be ignored. **CGL**

Ron Segev is the founding Partner of Segev LLP, a full-solutions business law firm recognized worldwide as a leading online gaming and betting law firm, and having an expertise in technology, commercial, regulatory, compliance, finance and securities law. He is a General Member of the International Masters of Gaming Law and recognized as a leading gaming lawyer by Chambers & Partners.

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BY MICHAEL D LIPTON AND KEVIN J. WEBER

Uncertainty of Prize and “Chance”

Play For Fun Studios Inc. v. Registrar of Alcohol, Gaming and Racing

Play For Fun Studios Inc. v. Registrar of Alcohol, Gaming and Racing involved an electronic skill game, called *GotSkill* that has been offered on terminals located in many bars and other licensed establishments throughout Ontario for some years. The Alcohol and Gaming Commission of Ontario (AGCO) sought a declaration that the game constitutes unlawful gambling, such that the regulations under the Liquor License Act of Ontario prohibit licensees from having the game played on their premises. *Play For Fun Studios Inc.* had represented to the establishments that *GotSkill* was a game of skill alone, which was not unlawful under the Criminal Code.

An electronic game of skill is lawful under the Criminal Code, even where players pay money to play and stand to win a greater amount of money than was paid. This accords with the common law definition of gambling, pursuant to which consideration, prize and chance must all exist in order for the activity to constitute gambling, and a game of skill alone lacks the element of chance. By contrast, electronic games of chance or games of mixed chance and skill played for real-money stakes in an attempt to win prizes are not lawful, unless carried out by a Crown agent. If the outcomes of a game are determined to any degree by a “systemic resort to chance,” it becomes a game of mixed chance and skill and is therefore unlawful gambling. A systemic resort to chance is differentiated by an “unpredictable that may occasionally defeat skill” — something that is not a built-in part of the game but which may

sometimes affect the outcome. Thus golf is a game of skill alone, despite the fact that an errant gust of wind during a game may affect the outcome — that gust of wind is not a systemic resort to chance. It does not matter that skill may be the dominant factor in determining the outcome of the game. If any systemic resort to chance is also involved, it is unlawful gambling. This is the ratio of the 1968 Supreme Court of Canada decision of *R. v. Ross*.

The game presents players with a touchscreen terminal. At the start of the game, the potential next win is displayed on the screen, displaying the maximum amount of money a player can win by playing the next game. If a player decides to play, she must purchase game tokens. The player chooses a game theme from options provided, chooses the amount to wager, and plays.

The game is a simple hand-eye coordination reflex game. A cursor is travelling left to right and back again across the screen, with values ranging from the far left and right at 55 per cent to dead-centre in the screen, where it is 110 per cent. The player hits a button that stops the cursor when it is at the highest possible value. The AGCO acknowledged that this discrete task was in itself one of skill alone.

When the player is done each round, the next potential next win is displayed on the screen. The player does not know what this value will be until he plays the game before it. The amount of each potential next win is not determined randomly; it is predetermined. Each theme on each terminal is pre-programmed with a set of “pools.” Each pool is composed of 1,000 tickets representing maximum win amounts, and these tickets come up in consecutive, pre-determined order.

The order of the tickets does not reset from player to player – when player one stops playing, player two picks up where player one left off in the order of tickets presented.

The judge on the initial application held that in determining whether there is an element of chance, it is the perspective of the player that must be considered. This meant that GotSkill had to be considered from the perspective of the player who plays multiple times, not from the perspective of a single play. Evidence showed that Ontario players played for approximately 25-30 minutes at a time when they first try the game. Neither the application judge nor the Court of Appeal accepted Play For Fun's argument that because a player knows what the maximum win amount is for each individual game, and can then decide to play or not to play. The courts agreed that the analysis must focus on how the typical player approaches the game.

The application judge nonetheless held the game to be one of skill alone, and therefore not a game to which the prohibitions in the Criminal Code applied. The Court of Appeal reversed that decision, on the basis that the application judge lost sight of the fact that the “predominance” test does not apply in Canada – his analysis strayed into seemingly finding that because skill was predominant over chance in determining the outcome of the game, the game was lawful.

Viewing the game from the perspective of the typical player, the application judge held that players spend their money “for the opportunity of being able to obtain something of greater value the next time. Whether or not [they have] that opportunity depends on chance.” He also said “[the] incentive in continuing to play is in order to gain an opportunity to win a greater prize which may or may not be available, depending on chance.” It is chance, because even though the tickets are not selected randomly, the fact is the player does not know the order of the potential wins that will be presented. From the player's perspective, the amount she can win from the next few plays is a matter

“The Court of Appeal [found] that the application judge lost sight of the fact that the “predominance” test does not apply in Canada – his analysis strayed into seemingly finding that because skill was predominant over chance in determining the outcome of the game, the game was lawful.”

of chance. The application judge accepted this, and once he accepted that it should have been the end of his analysis. Since there is no predominance test, once you acknowledge that the outcome is affected by an element of chance that is systemic to the game, what you have is an unlawful game of mixed chance and skill.

The Court of Appeal held that the applications judge had misapplied a line of cases that discuss the question of whether a player is “completely at the mercy of the machine.” The evidence before the court was that a player who achieved the maximum score of 110 per cent on the skill test each and every time she played would always come out ahead, regardless of randomness of prize outcomes, if she played long enough. The applications judge applied this evidence to statements made by Supreme Court of Canada in 1960 in its decision in *Topechka v. The Queen*:

“...the law forbids a machine that by electronic devices or other means, defeats the ability of the player to obtain favourable results.”

“To be within the law, the player must control the game, and not be at the mercy of a machine where skill is not the only element...”

As well, he referred to the decision of Court of Appeal for Ontario in 2002, *R. v. Balance Group International Trading Ltd.*, which stated:

A game of mixed skill and chance exists where “the average player [cannot] exercise sufficient skill to compensate for the other elements of the game that [are] wholly beyond the power of the

player to influence”.

When the application judge applied these cases to stand for the principle that GotSkill is a lawful “game of skill” because a very skilled player can “beat the machine,” he was displacing the clear statement in the Ross case that the “dominant element” or “predominance” test is not the law in Canada. If a systemic resort to chance exists with respect to the outcome of the game, it is a game of mixed chance and skill and therefore unlawful. Neither *Topechka* nor the *Balance Group* case applies a predominance test, and neither of them displaces Ross as the controlling authority in Canada for the proposition that the predominance test has been rejected in Canada.

The conclusion we draw from this decision is that regardless of the skill involved in playing a game, if players pay money to play and are not aware of what the available prize will be each time they play, that unknown factor will represent an element of chance that will render the game “unlawful gambling.” Games made available in Canada will need to be offered with this principle in mind. **CGL**

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BY DEREK RAMM, VICE PRESIDENT, MT>PLAY

Upping the Ante with AML Regulatory Changes

Canada's gaming industry is facing another round of anti-money laundering regulatory changes. After several years of consultation, parliamentary reviews and significant media attention on the issue of money laundering in Canada, the federal government has released the regulatory amendments under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act.

Suspicious Transactions

One of the most notable regulatory changes involves the filing deadline for Suspicious Transaction Reports (STR). Currently, casinos must file an STR with FINTRAC within 30 days after the day on which they detect a fact that constitutes reasonable grounds to suspect that the transaction or attempted transaction is related to the commission of a money laundering or terrorist financing offense. Effective June 1, 2021, casinos must report STRs “as soon as practicable after they have taken measures that enable them to establish that there are reasonable grounds to suspect” that the transaction or attempted transaction is related to the commission of a money laundering or terrorist financing offense (emphasis mine).

In practice, casinos generally turn around STRs quickly, not only because they have a vested interest in maintaining the integrity of the industry by keeping criminals out of their establishments, but many gaming regulators have additional requirements for reporting suspected criminal activity. Under the new timing provisions, casinos would be well-advised to clearly and carefully document their process for identifying potentially suspicious transactions, investigating, escalating and ultimately making the determination as to whether there are “reasonable grounds to suspect” a money laundering or terrorist

financing offence. The last stage in that process – how suspicion is determined – is critically important, as FINTRAC will likely use the casino’s own policies to assess whether they are filing reports in a timely manner.

Expanded Information

The regulatory amendments also greatly expand the amount of information that must be included in an STR, if the casino has the information available. Starting June 1, 2021, casinos will be required to report information such as the customer’s source of funds, email address, IP address and device details (for online transactions) and virtual currency particulars (if applicable). AML compliance personnel will need to coordinate closely with their casino’s marketing, player development, accounting and responsible gaming departments to ensure that the information on file is at their fingertips.

Customer Identification

Effective immediately, the customer identification regulations have been broadened to allow for casinos to accept identity documents that are “valid, authentic and current.” Practically, this may provide more flexibility for provincial gaming corporations that offer online and mobile gaming platforms, as they can accept copies (electronic or otherwise) of government-issued photo

identification. However, casinos will need to have clear policies in place to define their risk threshold for “valid” or “authentic” documents and the process for dealing with documents that do not meet those criteria.

24-Hour Rule

The 24-Hour Rule has been amended to allow casinos to aggregate multiple transactions that total \$10,000 or more in 24-hour period to be reported in a single Large Cash Transaction or Casino Disbursement Report. Currently, casinos must separate single transactions of \$10,000 or more and report them individually.

Reasonable Measures

In June 2016, the regulations were amended to include a provision that required casinos to keep detailed records of “reasonable measures” attempts to obtain customer information, even when those attempts were unsuccessful. After consultation with stakeholders, the government concluded that this requirement placed a “significant administrative burden” on business. The new regulatory amendments have repealed this provision.

Electronic Funds Transfers

Casinos that send or receive international electronic funds transfers (EFT) on behalf of customers should take particular heed of the changes to EFT regulations.

Casinos must take reasonable measures to ensure that incoming and outgoing EFTs include all prescribed information on the sender and receiver. They must also develop risk-based policies and procedures to deal with incoming EFTs that have incomplete information and whether they should “suspend or reject” such transfers.

Additionally, at present casinos are only required to report and keep records of EFTs that are initiated “at the request of a client.” As of June 1, 2021, the requirement will be changed to include those initiated “at the request of a person or entity.” Casinos that utilize junket operators or host international poker tournaments may be affected by this change in wording and should review their internal controls as appropriate.

Virtual Currency

The new regulations bring virtual currencies into Canada’s AML regime. While most casinos in Canada do not currently accept virtual currencies, operators and provincial

gaming corporations should familiarize themselves with the record-keeping and reporting requirements for virtual currencies.

The Elephant in the Room

From the “Dirty Money” reports authored by Peter German, to the Commission of Inquiry into Money Laundering in British Columbia, to this summer’s high-profile organized crime arrests in Ontario, money laundering issues have received much attention over the past year. The “Dirty Money” reports, in particular, made a number of recommendations to improve anti-money laundering efforts in the gaming industry and to more clearly define the roles between casino operators, provincial gaming corporations and provincial gaming regulators. In fact, the “Dirty Money” recommendations were largely incorporated into the House of Commons Finance Committee’s November 2018 report on enhancing Canada’s anti-money laundering regime,

but were ultimately rejected by the federal government because of how legal gaming is structured under the Criminal Code.

It is unfortunate that, to date, the federal and provincial reviews haven’t sparked a more holistic assessment of the challenges to gaming in Canada that may be created by current legislation. Anti-money laundering compliance continues to be a high priority for Canada’s gaming industry. Policymakers should endeavor to assist the industry in combatting financial crime by adopting a pragmatic approach to regulation that addresses potential gaps and recognizes the rapidly changing landscape of gaming. **CGL**

Derek Ramm is Vice President of MT>Play, a global gaming advisory firm. Prior to joining MT>Play, he held senior roles at the Alcohol and Gaming Commission of Ontario (AGCO), Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) and the Ontario Lottery and Gaming Corporation (OLG). He also served as a Commissioner on the Bermuda Casino Gaming Commission.

WHY TAKE A CHANCE?



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We provide a full range of highly sophisticated legal services addressing the complex array of commercial gaming issues, as well as issues unique to Native American and First Nations casinos and related facilities - another reason Dickinson Wright has earned its superior international reputation.





BY TROY ROSS

Queen's Park Explores Online Gaming Regulation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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BY HUGO LUZ DOS SANTOS

Mixing Honey and Milk

Mediation and Gaming in Macau

Justice in Macau stands at a crossroad. Concerns about the adequacy of the judicial system in pursuit of civil justice goals have been pointed out for some time. Advocate-controlled, costly, lengthy, underpinned by an obsolete adversarial model¹ that exacerbates acrimony² between parties,³ Macanese justice has failed in delivering a fundamental right to its citizens: effective access to justice (art.º 36.º, n.º 1, of Macau Basic Law).

Judicial courts in Macau are overcrowded. Overburdened dockets (and multitudinous backlogs) are seemingly the (usual suspects and, in this case, indeed) culprits. Room for the perverse ramifications of Murphy's Law is blossoming vigorously: the more citizens that demand an effective response from courts as to guidance of their rights, the less courts are able to deliver it to them. With this in mind, Macau's legal system is in dire need of other dispute resolution mechanisms capable of solving disputes in an amicable and conciliatory way. This

will buffer the deleterious effects of the loss of trust and trustworthiness⁴ in Macau's legal system, which are mounting exponentially on a daily basis.

Shedding light on Macau's cultural background

Litigation (or interchangeably, court-adjudication) is not the only way to solve disputes. In Macau's case, there is one detail that can pave the way to mediation thriving: its cultural background, deeply embedded in Confucianism traits. This is not to say this is a pristine approach or a revolutionary one. The

propensity of Chinese culture to propel conciliatory means of solving disputes has been pointed out by prominent scholars.⁵ Regarding the aptitude of the Chinese culture to adhere hastily to amicable means of solving disputes (especially mediation),⁶ scholars like Jerald Auerbach⁷ have written of the Quaker, Chinese and Jewish communities' reliance on mediation because of their distrust of alien legal culture.⁸

No surprise stems from the fact that Chinese culture is prone (deeply entrenched in Confucianism traits) to

embrace amicable and placid dispute resolution mechanisms dating back centuries⁹. Whilst this finding seems obvious, seldom have steps been taken by Macau's lawmakers towards the creation of a proper and sound mediation legal framework. It is quite startling that there is no mediation legal framework to this day, in spite of the fact that Macau's legal system would benefit exponentially from such an enactment, as would a swift, prompt and streamlined dispute resolution process. A gaming legal framework should not fall far behind these two frameworks.

Why milk (gaming) and honey (mediation) should mix

With this backdrop in mind, milk (gaming) and honey (mediation) should intermingle with each other, especially in Macau. Handling (better said: mediating) a multi-million-dollar, complex and intricate dispute which has arisen from the breadth of gaming law could have positive long-term effects, as opposed to an everlasting battle fought in Macau's weary and inefficient judicial system. Not all disputes require court-adjudication. Mediation can address both the underlying issues of the dispute while preserving (and oftentimes restoring) the relationship between the parties, which can be kept unscathed; something that court-adjudication may be unable to achieve. Once parties push the "litigation-mode button," it is difficult to turn back.

Mediation is suitable for solving disputes arising from side betting

"It is quite startling that there is no mediation legal framework to this day."

and proxy betting (both wrapped in opaqueness), outstanding chips, and tip pooling, as these legal disputes tend to be lengthy and costly in judicial courts. Mediation and gaming can (and should) be tightly interlocked in the forthcoming future.

After all, mediation and Confucianism, the cradle of Chinese legal culture, have always gone hand-in-hand throughout the long road of China's history aimed at preserving social harmony. As asserted by Peter Chan, "Under the Confucian ideology, disputes of a civil nature should be settled through conciliatory means so that the amicable relations of the disputants can be maintained. The culture of face-saving and the maintenance of cordial relations remains a distinctive characteristic of the modern Chinese society."¹⁰ As such, Confucianism envisaged the ideal society as one free from litigation (wu song). "Disputes should be resolved through mediation to preserve social harmony... Litigation should be the last resort."¹¹ Mediation in gaming law can fulfill that long-held hope, something that prospective Macau lawmakers should bear very firmly in mind.

Myth-Breaking

There are lingering myths that are in dire need of quashing. One of them is that all the intricate and complex disputes are preferably solved through litigation (and litigation only). There are a vast array of disputes which are far more suitable to be solved through amicable or conciliatory means. Disputes relating to the gaming law's breadth constitute a fine example of that. No matter how cumbersome the disputes in gaming law might seem to be, there is always room to strike a (good) deal as opposed to getting a delayed court decision (thus wrapped in tokenism), which only furthers the wrestle with justice. There would be no procedural gain to be accounted for in such cases. This would certainly be a lose-lose situation. **CGL**

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1. See Jacqueline Nolan-Haley, "Mediation: The 'New Arbitration'", *Harvard Negotiation Law Review (HNLR)*, 17 (2012): 61.
 2. This trend has been pointed out earlier by several scholars such as Robert Kimberlee Kowach, "The Vanishing Trial: Land Mine on the Mediation Landscape or Opportunity for Evolution: Ruminations on the Future of Mediation Practice", *Cardozo Journal of Conflict Resolution (CJDR)*, 7 (2005): 60-61 (predicting that the vanishing trial will lead to mediation becoming like arbitration).
 3. For this very reason, doctrine is advocating for a paradigm shift in the realms of justice, in which ADR (especially Mediation) shall play a role of paramount importance; in Italian doctrine, Michelle Taruffo, "Un'alternativa alle alternative: modelli di risoluzione dei conflitti", *Revista de Processo*, 152 (2007): 319-331; in Portuguese doctrine, Paula Costa e Silva, "De minimis non curat praetor. O acesso ao sistema judicial e os meios alternativos de resolução de controvérsias", *O Direito*, 140 (2008): 735-736; in German doctrine, Peter Gottwald, "Mediation und gerichtlicher Vergleich: Unterschiede und Gemeinsamkeiten", *Festschrift für Akira Ishikawa zum 70. (2001): 137-155*.
 4. The relationship between justice and trustworthiness was shown to be reciprocal; see Jason A. Colquitt/Jessica B. Rodell, "Justice, Trust, and Trustworthiness: A Longitudinal Analysis Integrating Three Theoretical Perspectives", *Academy of Management Journal (AMJ)*, 54 (2011): 1183.
 5. S. Shiga, "A Study of Chinese Legal Culture Focusing on the Litigation Landscape", *Journal of Comparative Law*, 3 (1988): 18-26.
 6. As so well pointed out by esteemed doctrine "The success of China's alternative dispute resolution can be attributed to its historical value on Confucianism and mediation, the traditional inaccessibility of Chinese courts for most citizens"; Jiali (Keli) Huang, "One Country, Two Systems: Hong Kong's Unique Status and the Development and Growth of Arbitration in China", *Cardozo Journal of Conflict Resolution* 18(2) 2017: 432.
 7. See Jerold S. Auerbach, *Justice without Law? Resolving Disputes without Lawyers*, (1982): 8 ff.
 8. Jacqueline Nolan-Haley, "Mediation: The 'New Arbitration'", *cit.*, 61 ff.
 9. Peter C.H. Chan, "The Enigma of Civil Justice in Imperial China, A Legal Historical Enquiry", *Maastricht Journal of European and Comparative Law*, 19 (2012), p. 317-337.
 10. Peter C.H. Chan, "Civil mediation in imperial, republican and modern-day China Historical and cultural norms under the traditional Chinese legal order", *The Legal History Review* 85 (2017): 577-602.
 11. Peter Chan, "Civil mediation in imperial, republican and modern-day China Historical and cultural norms under the traditional Chinese legal order", *cit.*: 578.

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