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A WORLD OF CHANGE

THE FUTURE OF GAMING REGULATION

Responsible Gaming in Canada
eSports and Gaming Convergence
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The Future of Gaming

The challenge of regulation in a world of change





“The only thing that is constant is change.” - attributed to Heraclitus of Ephesos, 500 BC

Imagine a spectacular sports and entertainment stadium, filled to the rafters with boisterous fans cheering on their favourite competitors. Picture the players in the arena locked in head-to-head competition, focussed on winning all the while soaking in the adoration of their loving fans. While some players are young up-and-comers, others have reached stardom and financial success, basking in the glow of celebrity and sponsorships by major brands. Perhaps you're imagining an NBA game, with all the usual pomp and pageantry, or a battle of the Original Six NHL rivals. Now imagine something else – where skilled video game players compete in multiplayer online battle games, such as Call of Duty and StarCraft II. The phenomenon is eSports and its tournaments have played to sold out crowds in New York Madison Square Garden and LA's Staples Center. Major corporate sponsors — Coca Cola, Dr Pepper, Intel, Red Bull, Doritos — sponsor the events, which are also streamed on the internet. The top video game players — often in their late teens and early 20s — earn hundreds of thousands of dollars or more a year. Estimates suggest over 70 million watch eSports every month and it is expected to generate billions in revenue in the next two years. Is this the future of gaming? Are there implications related to wagering? Are these games tantamount to amusement games or games of pure skill? Is anyone hazarding money or money's worth? Are bets being accepted on the outcomes of these games and tournaments? Is it lawful? Should it be regulated?

Similar questions could be raised about Daily Fantasy Sports or DFS. Indeed, perhaps more has been written about DFS than any other form of gaming entertainment recently. In DFS, participants select imaginary rosters of athletes from professional sports leagues

referendum. One thing is clear, billions and billions of dollars are at stake.

Stating the obvious, we are living in an era of unprecedented pace of technological change. The internet, broadband, wi-fi, automatic identification, virtual currency, robotics,

Gaming will no doubt morph into something new thanks in no small part to the convergence of technology and entertainment. That new iteration may be somewhat predictable, manifesting as a result of a series of natural progressions from what exists today; or it may catch us by surprise, defying expectations and commonly held beliefs.

The challenge is that existing Canadian law, most notably “Disorderly Houses, Gaming and Betting” provisions set out in Part VII of the Criminal Code (the “Code”), are clearly more easily relatable to traditional, land-based operations and realities. Gaming law itself in Canada has historically been “a patchwork of fossilized law”, largely prohibitive and a carry-over from English statutes. As one commentator notes, Canadian legislation has its roots in a 1338 statute, “passed when the monarch feared losing all his skilled archers to ‘idle’ games of chance.” The first Canadian Criminal Code of 1892 captured a number of gaming prohibitions, re-enacting a general statute relating to lotteries and gaming. For many years following Confederation, a series of ad hoc seemingly minor amendments were the only changes to the law.

As over time in Canadian society the public perception and acceptance of gaming evolved from unacceptable behaviour to a form of generally accepted entertainment, there also evolved an appreciation by government that an overly prohibitory approach did not necessarily protect the public as well as a more flexible, regulated approach would. How Canadians were permitted to participate in gaming began a process of decriminalization and regulation. In 1969, the Code was amended to permit the Government of Canada to conduct lotteries and to permit the provinces to conduct lottery schemes. After a series of developments and challenges in 1979, the federal government and the provincial governments agreed that the federal government would no

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like the NFL and compete based on the real life performances of those athletes. It is an industry that is approximately five years old and is estimated to generate over \$14 billion in entry fees by 2020. Does DFS fall under the category of illegal gambling? In Canada, where there is no equivalent to the American Unlawful Internet Gambling Enforcement Act carve-out, the question might rest on whether the activity is tantamount to a game of skill or a game of mixed skill and chance. The US has witnessed heated legal activity about the status of this phenomenon. Virginia recently became the first state to formally regulate DFS. In New York, the DFS companies, like DraftKings and FanDual have been told to cease and desist by the New York Attorney General, while enforcement actions continue. In Maryland, the state is considering becoming the first state to let voters decide the legality of DFS via

wearables, smartphones, tablets, social media, modern miniaturized electronics – the nearly endless aspects of technology – have transformed almost every facet of our lives, from how we communicate with our loved ones and colleagues, to how businesses are run; from how and what we consume, and when, to how we socialize and connect; from how we make travel plans to how we enjoy entertainment. The gaming industry is obviously not immune to any of this. In fact, gaming by its very nature is a form of entertainment particularly prone to impacts from technological innovations. A successful, consumer focused industry must take into account the expectations of players with heretofore never seen ease of access to entertainment options; and those wants, demands and expectations are evolving at a remarkable pace. What “gaming” looks like today will be different a year from now, maybe sooner.

longer be involved in the operation of lotteries. This agreement was formalized in 1985, and since then gaming (other than pari-mutuel horse racing) has been a provincial undertaking, within the limits established in Part VII of the Code. Accordingly, each province has enacted its own provincial gaming control legislation and established their own regulatory scheme, offering gaming under the rubric of “conduct and manage” through a variety of operational models. The provinces’ objectives may vary slightly, but universally involve: (i) the enhancement economic development; (ii) the generation of revenues for the province; (iii) the promotion of responsible gaming, and (iv) ensuring that gaming is conducted lawfully, for the public good and in the best interests of the province.

Given its pervasiveness in our lives, it may perhaps be somewhat of a stretch to include “the internet” in the category of emerging technology. However, without belabouring the point or delving into the socio-technological reasons why, it is now (virtually) ubiquitous. It has transformed almost every aspect of our lives and brought with it the promise of seamless interconnectivity. Concurrently, it has given rise to a number of legal and risk mitigation issues (e.g. security, privacy, intellectual property protection, competition). It also unquestionably challenges traditional concepts of boundaries, arguably rendering them obsolete. Perhaps the most obvious application to the gaming world is online gaming. What could be more natural for someone in 2016 to expect to be able to use their smartphone and have instant access to gaming options? Especially if that person is accustomed to having easy and speedy access on their mobile device to virtually anything he or she can think of – from internet banking to online shopping to streaming their favourite TV shows.

The definition of “lottery scheme”, which was introduced by the Parliament

of Canada as part of the 1985 amendments to the gaming provisions of the Code, has been interpreted and applied so as to only permit provincial governments to “conduct and manage” lawful internet gaming. This is not because the Code specifically refers to the internet – in fact the word “internet” or any variation thereof does not appear anywhere in Part VII of the Code; rather it is because of the application of the Code provision that a provincial government (alone or in conjunction with other provincial governments) may conduct and manage gaming “that is operated on or through a computer, video device or slot machine.” Therefore, a private sector gaming operator could not itself simply offer a lottery scheme through the internet as that would be gaming “that is operated on or through a computer”,

small gaming offerings of these provincial lottery and gaming corporations’ sites, many unregulated sites are accessible by Canadians. The global online gaming industry is currently estimated to be \$50 billion.

Due to the very nature of the internet, online gaming offerings clearly challenge traditional notions of boundaries, and Canadians continue to play on sites offered by organizations located in other jurisdictions. To date, there have only been a handful of prosecutions against private sector gaming operators that have attempted to offer gaming through the internet. None of these prosecutions proceeded to trial. Each of these involved organizations establishing businesses and operations in Canada with a view to offering gaming through the internet to Canadians (but not necessarily only

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just the same way as such private sector gaming operator could not by itself establish a bricks and mortar casino and directly open the doors of the gaming venue to Canadians. However, a province can itself do so under its “conduct and manage” power under section 207(1). Currently in Canada, several provinces including British Columbia, Ontario and Québec offer gaming to their residents through the internet at their unique websites. Above and beyond the relatively

to Canadians). A different scenario wherein an organization with operations established outside of Canada providing online gaming offerings to players physically located in Canada from a jurisdiction where it is lawful to operate is a question that has yet to be addressed by any court in Canada.

In 2010, approximately three years after Loto-Québec began offering online gaming to its residents on the Espacejeux website, the Québec government created

a Working Group on Online Gambling, created by Québec's former Minister of Finance Raymond Bachand and chaired by Dr. Louise Nadeau. The report is very timely in that it specifically examined the challenges of applying land-based regulatory and operational philosophies to the realities of the internet. In fact, the title of the report is telling: "When The

regulations that had served Québec well in respect of land-based gambling had become obsolete and could not work in the same manner on the Internet."ⁱⁱ

After an analysis which included a review of models and approaches adopted by other jurisdictions, including the UK's licence, tax and regulate model, the Working Group reached the conclusion

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Reality of the Virtual Catches Up With Us." The focus of the analysis was the protection of the public: the same public policy behind the very existence of the Crown lottery and gaming corporations. It is noteworthy that the Working Group commented on the ease of availability to Canadians consumers of non-government, unregulated gaming websites: "[t]he number of websites accessible to Canadians ranges between 2171 and 2235, of which over 500 have a gaming platform in French". Indeed, the Working Group stated that: "it became obvious to the Working Group that with the Internet, certain controls and

that "to control the online gambling market, protect consumers and generate revenues for the government, the best solution for the government 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." Included in its recommendations was the amendment of the Code and subsidiary steps designed to protect the public while leveraging the benefits of technological innovation.

While Part VII of the Code has not been materially "modernized" since 1985, some noteworthy updates to the

law have taken place. For example, amendments in 2014 to the Proceeds of Crime (Money Laundering) and Terrorist Financing Act ushered in perhaps the most significant regulatory changes since the introduction of casino disbursement reporting in 2009. These 2014 amendments made significant changes to the definition of "casino" and clarified that "internet gaming" conducted and managed by provincial lottery corporations will be subject to AML requirements. Also in 2014, an amendment to subsection 207(4) of the Code created an exception to the general prohibition preventing licensed charitable or religious organizations from offering gaming "on or through a computer". The new subsection 207(4.1) now permits the "use of a computer" for "the sale of a ticket, selection of a winner or the distribution of a prize in a raffle, including a 50/50 draw", whereas before the amendment, thanks to the interplay between the definition of "lottery scheme" in 207(4) (c), s.206, and the s.207(1)(a) provincial government "conduct and manage" exception, only provincial governments could operate lottery schemes "on or through a computer". In what could have significant implications for what licensed charities can offer, the amendment can be seen as a recognition that a regulated licensing scheme that permits the use of modern technologies will enable efficiencies (until now, charities had to rely on costly, outdated, labour-intensive manual processes) with a view to generating increased revenues for worthy causes.

In light of the foregoing, can we say that our gaming laws have kept up with the torrent of technological transformation? Should the Code's gaming provisions be modernized? Are there approaches to "conduct and

i. See J.A. Osborne & C.S. Campbell, *Recent Amendments to Canadian Lottery and Gaming Laws: The Transfer of Power Between Federal and Provincial Governments*, 26 *Osgoode Hall L.J.* 19 (1988).

ii. See L. Nadeau, M. Dufour, R. Guay, S. Kairouz, J.-M. Ménard and C. Paradis, *Online Gambling: When the Reality of the Virtual Catches Up With Us*. Montréal, Québec, Working Group on Online Gambling, 2014.

iii. See Donald Labriola, *Dissonant Paradigms and Unintended Consequences: Can (and Should) the Law Save Us from Technology?*, XVI *Rich. J.L. & Tech.* 1 (2009).

management” of gaming that would enhance the capacity to realize the public policy objectives of the provinces? Are we prepared to address the challenges and recognize the opportunities of DFS, eSports, interactive games, sports betting and other innovations? Are we taking timely lessons from other jurisdictions? Since billions of dollars, economic development and the protection of Canadians are at stake, all of these difficult questions should be considered today. Canadians are currently consuming gaming entertainment in ways that might have once seemed unfathomable. No differently than in most places in the world, Canadian consumers are being exposed to new, technologically innovative and fun entertainment options at a remarkable pace. If the premise is that today in 2016 gaming is an entertainment option that is generally acceptable by Canadian society, and that over time as Canadian society changes, legislative and regulatory

frameworks must evolve concomitantly in order to meet society’s current needs, this leaves us in a bit of a conundrum. Most of our current laws and approaches to gaming in Canada have their origins in more traditional, land-based realities. We must decide whether we are sufficiently encouraging and leveraging technological innovation; we must decide whether our existing laws, practices and institutions sufficiently and efficiently protect Canadians while responding nimbly to modern demands; we must decide whether we are optimizing opportunities to generate increased revenue for social priorities that may otherwise continue to flow out of the country in a largely unrestrained, unregulated marketplace. New technologies spur economic growth and foster new patterns of innovation, commerce and social interaction. As one commentator notes, they also “spawn disruptive innovations that force established industries to forge

novel responses or risk falling by the wayside.”ⁱⁱⁱⁱ What is clear is that we are living in a truly transformational era - where technology, entertainment, gaming, wagering, popular culture, big data, productivity and efficiency converge like never before. How we choose to offer and regulate gaming to Canadians must also be in the mix and we must evolve and respond to the realities of modern, emerging and disruptive technologies to provide the clarity, opportunities and protection to Canadian consumers that may have so far eluded them. **CGL**

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