

GTL: GAMING, TERRITORIALITY, AND THE LAW — COMPARATIVE APPROACHES TO ONLINE GAMING: LESSONS FOR ONTARIO

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ABSTRACT

*In 2010, the Ontario Lottery and Gaming Corporation (OLG) – the Crown Corporation of the Government of Ontario (Canada) charged with regulating and administering lotteries, casinos, and race tracks in Ontario – announced its plans to launch an online gaming website. This article explores the Province of Ontario’s foray into online gaming, weighing the likely success of that venture against the regulatory approaches taken in jurisdictions like the United Kingdom (U.K.) and United States of America. Some “modest proposals” are also suggested.****

I. INTRODUCTION

On August 10, 2010, the Ontario Lottery and Gaming Corporation (OLG) announced its plans to create an online gaming website.¹ The actual planning and implementation of the website will take eighteen months.² This development follows British Columbia’s lead in becoming the first province or state in North America to offer legalized online casino gambling.³

Despite the considerable debate over online gaming in the past few years,⁴ it seems that provincial governments have finally decided their path, opting to control and regulate their own online gaming sites. However, online gaming is

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¹ *OLG to Launch Internet Gaming*, ONTARIO LOTTERY & GAMING CORP. (Aug. 10, 2010), http://media.olg.ca/?p=mmm_news_detail&i=dcc00afc-58bf-4380-bc8f-9284e2a4946a.

² *Id.*

³ Rob Ferguson, *Legal Online Gambling in the Cards for Ontario?: ‘It’s Something We Can’t Ignore,’ Says an Official for Government Burdened with Huge Deficit*, THE TORONTO STAR, Aug. 7, 2010, at A1.

⁴ See generally, Justin Rex & David J. Jackson, *The Options for Internet Gambling in Canada*, 1 ACSUS OCCASIONAL PAPERS ON PUB. POL’Y SERIES, no. 3, at 1, 1, http://www.acsus.org/public/pdfs/OP_v1n3.pdf.

borderless: it is already accessible by residents of Canadian provinces. Therefore, other than being “too late,” a governmental strategy that does not address the borderless nature of online gaming will see its revenues lost to sites currently unregulated by Canadian governments (yet, still readily accessible to its residents), thereby placing sensitive personal and financial information at the whims of offshore entities and jurisdictions.⁵

This paper will provide a brief history of Canadian gambling laws and suggest reasons why Canada’s current strategy of online gaming regulation is deficient. The authors will then analyze the strategies of the United Kingdom and the United States, as they are the two jurisdictions most likely to influence Canadian policy makers. Analysis of the historical development of gaming in Canada and various international strategies for dealing with online gaming leads to the conclusion that Canada’s strategy should include a more comprehensive approach: one that includes the regulation of foreign-operated gaming sites.

II. HISTORY

A. Overview

Canadian gambling law derives from early English laws, which were incorporated into Canada through Confederation in 1867.⁶ In 1892, the Criminal Code set out a complete ban on all gambling activities.⁷ Over time, however, the ban was gradually lifted through amendments to the Criminal Code.⁸ Initially, gambling became legalized only through exemptions to the Criminal Code that permitted small scale gambling for charities,⁹ but in 1969 things turned around.¹⁰ Amendments to the Criminal Code produced a shift in jurisdiction between the federal and provincial levels of government permitting both levels of government to regulate gambling activities.¹¹ With the 1969 amendments, provincial governments were, for instance, able to hold lotteries for charitable or religious causes.¹² Gradually, administrative regulation of gambling replaced criminal law provisions, and by the mid-1970s every province and territory in Canada had its own lottery system.¹³ The shift in jurisdiction between the federal and provincial levels of government with respect to gam-

⁵ In an earlier paper, one of the authors along with Roberto Andreacchi already posited that there are probably no common law remedies available to victims of online gambling fraud, see Emir Aly Crowne-Mohammed & Roberto Andreacchi, *The (Un)availability of Common Law Remedies for Victims of Online Gambling Fraud*, 13 GAMING L. REV. & ECON. 304, 309 (2009).

⁶ Rhys Stevens, *Legal Gaming in Canada*, CENTRE FOR GAMING RES., <http://gaming.unlv.edu/subject/canadajurisdiction.html> (last visited Oct. 16, 2011).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Colin S. Campbell et al., *The Legalization of Gambling in Canada*, THE LAW COMMISSION OF CAN., 15 (2005).

¹¹ Michael Y. Seelig & Julie H. Seelig, “Place Your Bets!” *On Gambling, Government and Society*, 24 CAN. PUB. POL’Y ANALYSE DE POLITIQUES 91, 93 (1998).

¹² *Id.*

¹³ *Id.*

bling was finally completed in 1985, when the federal government left gambling entirely to the provinces in exchange for a payment of \$100 million dollars (payable over a three-year period), which would be redirected to the 1988 Calgary Olympics, and \$24 million paid annually (adjusted according to the Consumer Price Index).¹⁴

Today, section 207(1) of the Criminal Code¹⁵ makes it lawful for the government of a province, either alone or in concert with another province, to conduct and manage a lottery scheme in accordance with the laws of the respective province.¹⁶ Moreover, section 207 allows charitable or religious organizations and exhibitions to conduct lottery schemes as long as the Lieutenant Governor in Council has issued them a license in their respective province, or by a person specified by the Lieutenant.¹⁷ In other words, in order for a Canadian gaming operation to be legal, it has to be permitted by a provincial government.

B. *Online Gaming*

On October 1, 2008, Bill C-13, an Act to amend the Criminal Code, came into effect.¹⁸ Among other things, the act amended subsection 202(1)(i) of the Criminal Code. Originally, the subsection prohibited placing bets using ‘telephone, radio, and telegraph.’ The act substituted those older modes of communication with the more generalized language of “any message that conveys any information.”¹⁹

At first blush, this amendment seemed like a simple attempt to update or modernize the Criminal Code, one that replaced an exhaustive list of modes of communication with the word “any,” as to include all modern and future advances in communication technology. However, this section began to attract a great deal more attention when Senator Baker explained that this amendment would include the Internet as a mode of communication.²⁰ A week later, on November 28, 2007, Hal Pruden, a senior official at the Department of Justice, explained to the Senate committee that the intent of the language was to modernize the means of communication, and the offense was the same one that existed (at that time) in subsection 202(1)(i).²¹

A day later, on November 29, 2007, Brahm Gelfand, a member of the International Advisory Committee for PartyGaming PLC, addressed the Senate committee and asked whether the amendment was supposed to affect only those who are in Canada, or if it was supposed to affect a company such as PartyGaming PLC, which carries on business offshore (and is regulated and

¹⁴ Colin S. Campbell et al., *supra* note 10, at 16-17 (citing MICHAEL LABROSSE, *THE LOTTERY: FROM JACQUES CARTIER’S DAY TO MODERN TIMES* (Stance 1985); *See also*, Emir Aly Crowne-Mohammed & Sanjay Roy, *Maintaining Provincial Monopolies: The Legality of Online Gambling Sites in Canada*, *CANADIAN GAMING LAW MAG.*, May 2010 at 8.

¹⁵ Canadian Criminal Code, R.S.C. 1985, c. C-46, s. 207.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Bill C-13, S.C. 2008, c. 18 (Can.).

¹⁹ Canadian Criminal Code, R.S.C. 1985, c. C-46, s. 202(i).

²⁰ 144 *DEB. OF THE S.* 266, 276-77 (Nov. 21, 2007) (statement of Sen. Baker).

²¹ *Proceedings of the Standing S. Comm. on Legal & Const. Aff.*, 39th Parl, 14 (2007) (statement of Counsel Pruden).

licensed outside of Canada).²² Senator Oliver responded by saying that “this bill was not designed and drafted to impinge upon the sovereign rights of another state,” and as such, he felt that no further clarification was needed because the law was clear.²³ Senator Oliver explained that the bill was trying to address the fact that Canadians utilize different modes of communication, and the amendments were needed to keep pace with evolving telecommunication practices.²⁴ The Senator stressed that the amendments had nothing to do with extraterritoriality.²⁵

Indeed, the Senate’s intent can be gleaned from the Fourth Report from December 11, 2007, which stated:

One final observation concerns the fear expressed by a [Senate committee] witness of the potential extra-territorial application of clause 5 of the bill, which deals with the transmission and reception of information relating to book-making, betting and wagering, among other things [sic]. For the sake of clarity, the Committee wishes to note that it is satisfied that clause 5 of the bill will not have extraterritorial application.²⁶

Senator Joan Fraser reiterated this position on December 12, 2007, when she stated that the senators tried to allay the concerns that were raised during the Senate committee regarding the possible extraterritorial application of clause 5 of the bill.²⁷ Fraser appeared satisfied upon assurances by Senator Oliver and the minister that extraterritorial application was not the concern or effect of this bill.²⁸ Bill C-13 was given its Third Reading on January 29, 2008 and was then returned to the House of Commons.²⁹

On February 6, 2008, the Hon. Roy Cullen, from Etobicoke North, questioned the enforceability of Bill C-13, arguing that the:

[L]aw should be practical, relevant, enforceable and generally have the support of the people. In some cases the latter criteria cannot always be met. Sometimes governments have to take some action that citizens generally would not appreciate. However, generally laws to be effective need to be feasible, operable and enforceable and enforced, otherwise people lose their respect and confidence in the Criminal Code.³⁰

According to Cullen, both he and the Woodbine Entertainment Group (“WEG”) had become quite frustrated with the growth in illegal Internet betting, which essentially takes market share away from WEG’s casinos and race-tracks in Ontario.³¹ However, the amendments have little to do with Cullen’s concerns around Internet betting, especially because the bill was intended to have no extraterritorial application and would therefore be impotent against non-Canadian gaming sites. Indeed, it seems as though Mitchell Garber, the

²² *Id.* at 67-68 (statement of Member Gelfand).

²³ *Id.* at 70 (statement of Sen. Oliver).

²⁴ *Id.*

²⁵ *Id.*

²⁶ THE STANDING S. COMM. ON LEGAL & CONST. AFF., FOURTH REP. (Dec. 11, 2007), available at <http://www.parl.gc.ca/Content/SEN/Committee/392/lega/rep/rep04dec07-e.htm>.

²⁷ 144 Deb. of the S., 469, 518-20 (Dec. 12, 2007) (statement of Sen. Fraser).

²⁸ *Id.*

²⁹ 142 H. of Commons Deb. 469, 506 (Oct. 29, 2007).

³⁰ 142 H. of Commons Deb. 2653, 2683 (Feb. 6, 2008) (statement of Sen. Cullen).

³¹ *Id.*

CEO of PartyGaming PLC, was right to recommend that the words, “in Canada,” be added to the amendment.

After being sent back to the Senate for further review, two other clauses were removed, but clause 5 (dealing with the changes to section 202.1(i)) remained intact. Bill C-13³² came into effect on May 29, 2008, except for certain provisions, which later came into force on October 1, 2008.³³ Therefore, since the changes to subsection 202.1(i) were not debated in the House of Commons, the Senate’s comments about the non-extraterritorial reach of the amendments is the only quasi-interpretative aid for us to rely upon in suggesting that the amendment does *not* include transactions from organizations outside of Canada.

C. *The Deficiencies in Canada’s Strategies*

Given the shaky legislative history of Bill C-13, this article argues that Canada’s strategy is one that ignores the reality of online gaming because it is, almost by definition, an extraterritorial activity. Therefore, a legislative scheme that prohibits non-government controlled online gaming sites in Canada, but does not apply to foreign operated sites, does little to protect Canadians themselves or the revenue lost offshore. Indeed, sending sensitive personal and financial information to distant, offshore gaming organizations – which may be subject to few, if any, regulations and procedural safeguards – is not in the public’s interest (or the revenue generating interests of the provinces, for that matter). In fact, this seems to be at odds with the main justification for easing the restrictions on gambling (in general) and online gaming (in particular): revenue generation. Provinces should consider a licensing scheme for foreign gaming operators wishing to have a legal customer base in Canada, similar to what the U.K. has done.

III. THE U.K. APPROACH: REGULATE, LICENSE, AND TAX

In 2005, the U.K. created the Gambling Act,³⁴ which came into force on September 1, 2007, allowing the British Gambling Commission to regulate all forms of gambling, including online gaming.³⁵ The Gambling Act also provided for a system whereby the government could identify first tier jurisdictions and add them to a so-called “white list.”³⁶ Since only *jurisdictions* themselves could qualify for the “white list,” the application could only be made by foreign governments, not private organizations. Moreover, the applicant government had to demonstrate to the satisfaction of the U.K. government that its legislative and regulatory controls were comparable to that of the U.K.³⁷ In addition, the applicant government had to demonstrate that they had the

³² Bill C-13, S.C. 2008, c. 18 (Can.).

³³ Order in Council, Bill C-13, S.C. 2008-1065 (June 6, 2008) (Can.).

³⁴ Gambling Act, 2005, c. 19 (UK).

³⁵ Tony Coles, *The UK White List—Recent Developments*, CANADIAN GAMING LAW. MAG., May 2008, at 19, 19.

³⁶ *Id.*

³⁷ *Id.* at 20.

technical and administrative ability to enforce its own regime.³⁸ Indeed, the intent of the “white list” was to ensure that offshore gaming sites bore comparable level(s) of responsibility as that of domestic sites.³⁹

In 2009, concerns were raised by members of Parliament over whether the current state of regulations provided adequate protection for British consumers, in light of an increasing number of gaming operators being regulated offshore, outside of British jurisdiction.⁴⁰ On January 7, 2010, Sports Minister Gerry Sutcliffe announced proposals to adopt new license requirements for overseas-based online gaming companies that want to have a customer base in Britain.⁴¹ This would mean “that online operators currently licensed outside Britain would have to apply for a license from the Gambling Commission if they want to advertise or provide their gambling services to British consumers.”⁴² Therefore, this new license requirement would ultimately replace or supplement the white listed jurisdictions and would require each and every operator to obtain a license. The original intent of the “white list” system was to ensure that jurisdictions were regulated at an adequate level to protect U.K. players; whereas the government’s latest proposals (to apply the same standards to all operators targeting the U.K. market) are intended to protect both U.K. players and help U.K.-based business.⁴³

In March 2010, the U.K. Department for Culture Media and Sport (“DCMS”) released a consultation report stating that even though “British consumers constituted a significant proportion of the European remote gambling market, their domestic regulator, tasked with upholding the licensing objectives of the act, was regulating increasingly fewer gambling operators.”⁴⁴ In addition, following the implementation of the act, no major international gaming operators have transferred their overseas operation to Britain.⁴⁵ Attorneys John Hagan and Melanie Ellis explained that this was primarily due to the tax rate of 15% on gambling profit.⁴⁶ Hagan and Ellis argue that being able to market their services to the U.K. without obtaining a local license and without paying the local tax rate has meant overseas operators, particularly those based in low or zero tax white listed jurisdictions, “have been having their cake and eating it too.”⁴⁷ The consultation report argued that:

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Dep’t for Culture Media & Sport, *A Consultation on the Regulatory Future of Remote Gambling in Great Britain*, 2010, DCMS, at 12, available at http://www.culture.gov.uk/images/consultations/remotegambling_consultation.pdf [hereinafter DCMS].

⁴¹ *Department for Culture, Media And Sport: New British License Requirements for Overseas Online Gambling Firms*, MYNEWSDESK (Jan. 7, 2010), <http://www.mynewsdesk.com/uk/view/pressrelease/department-for-culture-media-and-sport-new-british-licence-requirements-for-overseas-online-gambling-firms-359653>.

⁴² *Id.*

⁴³ John Hagan & Melanie Ellis, *New British License Requirements for Offshore Online Gambling Operators: Reasons, Implications and Predictions*, CANADIAN GAMING LAW MAG., May 2010, at 11, 12.

⁴⁴ DCMS, *supra* note 40, at 13.

⁴⁵ *Id.*

⁴⁶ Hagan & Ellis, *supra* note 43, at 11.

⁴⁷ *Id.* at 11-12 (which, in all fairness, is precisely what one should do with cake).

[T]he commission is funded primarily through licensing fees paid by licensed gambling operators; therefore, as overseas operators do not pay licensing fees to the commission, any work undertaken to assess the social responsibility and age verification procedures of overseas operators targeting the British market must either be met out of fee income or separately funded by the DCMS.⁴⁸

The consultation period was intended to run for twelve weeks from March 22, to June 18, 2010.⁴⁹ However, according to a November 19, 2010 note on online gambling, provided for members of Parliament by the U.K. House of Commons Library, DCMS ministers have been analyzing these issues and recognizing plausible solutions since June 2010 as they hope to make an announcement regarding the future of the U.K.'s regulation policies in due course.⁵⁰ For now at least, the "white list" is suspended, and all operators must apply for a license in the U.K. if they wish to have a British customer base.⁵¹ Canada should learn from the U.K. experience. Instead of creating a "white list" of jurisdictions, Canadian provinces could require all offshore gaming operators wishing to advertise or provide their gaming services to Canadian consumers to apply for and obtain a license.

Nonetheless, the cost of becoming licensed in Canada and paying the associated taxes may result in some less reputable operators choosing to disregard the law and continue their activities in Canada regardless. Furthermore, many operators have found ways to get around advertising restrictions by offering non-wagering versions of their gaming sites.⁵² Once on those non-wagering versions, players can seamlessly sign up for the wagering version as their familiarity and comfort grows. In addition, it is unclear whether offshore operators will even consider Canada to be an "important enough" market to justify paying taxes and licensing fees, especially if the market is further divided into individual provinces. Taxation is another issue: incentives or bilateral double taxation agreements might further incentivize operators.

With that said, ignoring the fact that foreign online gaming sites are accessible by Canadians is nothing more than willful blindness. The dangers of fraud⁵³ and identity theft are real. The U.K. strategy, at least, attempts to provide a mechanism whereby foreign operators can apply for a license. This pro-

⁴⁸ DCMS, *supra* note 40, at 19.

⁴⁹ *Id.* at 4.

⁵⁰ H. of Commons, *Online Gambling*, 2010, H.C. SN/HA/4041, at 15 (U.K.).

⁵¹ *Jersey Politicians in Talks with UK*, CASINO TIMES (June 27, 2011), <http://www.casino-times.co.uk/casino/news/2011/6/talks-with-uk-27101052.html>

"... Companies are currently unable to offer gaming opportunities after the UK barred access to the list in 2009 – some time before the state's legislation was in place. Politicians are now hoping to lay their hands on a temporary licence whilst lawmakers re-evaluate the terms of existing legislation. . . Assistant economic development minister for Jersey, Constable Len Norman, echoed Whittingdale's optimism and suggested that a resolution could arrive within a period of months. "It is only recently our law has been approved", he said. "We are now making an application to the Minister in the UK to appear on that white list." As millions continue to be invested in the e-gaming industry, it's clear that Jersey can look forward to ushering in a new era in online gambling. Industry members will be watching with close interest as discussions get underway."

⁵² See, e.g., *Party Poker FAQ - Online Poker Information*, TIGHT POKER, <http://www.tightpoker.com/partypoker> (last visited Sept. 16, 2011).

⁵³ Crowne-Mohammed & Andreacchi, *supra* note 5, at 305-06.

vides some sort of 'notice' to players that these sites have met certain minimum standards and are notionally safe. Likewise, Canada should offer a license to operators willing to meet standards comparable to those of their own governmental sites. In addition, the revenue generated from such a scheme can be put towards further research and enforcement of online gaming activities. This is one way the provinces can receive a share of the revenue generated by Canadian gamblers that use foreign gaming sites. Foreign operators that want to advertise their sites and have a customer base in Canada would likely pay for a seal of approval from a governmental agency (especially if the law required it). By enticing foreign operators to become licensed, the provincial governments can increase revenues and ensure that their citizens have access to safe and responsible online gaming sites.

IV. THE U.S. APPROACH: PROHIBIT

Another approach to the apparent 'scourge' of offshore gaming sites is to ban them outright. This is the rash approach the United States adopted. The Unlawful Internet Gambling Enforcement Act⁵⁴ ("UIGEA"), which formed Title VII of the Security and Accountability For Every Port Act of 2006,⁵⁵ was passed the day before Congress was set to adjourn for the 2006 elections.⁵⁶ Although the UIGEA completely bans Internet gaming activities, it is unique in that the enforcement provisions target Internet gaming at the source of funding.⁵⁷ In other words, the UIGEA relies on financial institutions from the United States to block Internet gaming transactions. There is a variety of means of transacting business, including, but not limited to, paper checks, credit transmissions, electronic fund transfers, money transmissions, and stored value cards.⁵⁸ Attorney Brant Leonard argues that this provision places the burden on financial institutions and money transmitting businesses to monitor transactions to identify and prevent those transactions related to Internet gaming.⁵⁹

However, prohibition has never worked in the United States. Much like the evil rumrunners during Prohibition, U.S. gamblers have found ways to continue their online gaming activities.⁶⁰ Gamblers are now resorting to third party payment processors that have popularized since credit card companies have begun to restrict direct transfers to online casinos.⁶¹ In addition, critics of the UIGEA point out citizens could always set up accounts in overseas banks, where money can then be sent to any offshore online casino.⁶² The point being: irrational and knee-jerk laws are never obeyed.

⁵⁴ 31 U.S.C. §§ 5361-5367 (2006).

⁵⁵ 6 U.S.C. § 942 (2006).

⁵⁶ I. Nelson Rose, *Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, 10 GAMING L. REV. 537, 537 (2006).

⁵⁷ Brant M. Leonard, Note, *Highlighting the Drawbacks of the UIGEA: Proposed Rules Reveal Heavy Burdens*, 57 DRAKE L. REV. 515, 526 (2009).

⁵⁸ *Id.* at 527.

⁵⁹ *Id.*

⁶⁰ *Id.* at 532.

⁶¹ *Id.*

⁶² *Id.*

In addition to the loopholes identified above, the UIGEA places an unfair burden on financial transaction providers. The UIGEA allows the Federal Reserve System “to create regulations requiring financial institutions to identify, block, or otherwise prevent restricted transactions through the establishment of policies and procedures.”⁶³ Furthermore, the estimated cost to the financial sector for implementing these regulations is \$88.5 million and the annual cost of maintaining the procedures is \$3.3 million.⁶⁴ One of the biggest complaints about the UIGEA is that the rules do not attempt to provide a more precise definition of what gambling activities are actually prohibited by the UIGEA.⁶⁵ Attorney Chad Finkelstein explains that this vagary set off a firestorm of complaints from the financial industry, which was uncertain of what was expected of it.⁶⁶ To address these concerns, certain exemptions were crafted for the financial institutions (which again created loopholes that could easily be exploited).⁶⁷

For instance, the proposed rules suggest that the two types of payment systems that have the benefit of merchant coding (i.e. credit card and money transmitting systems) must monitor extended transactions.⁶⁸ While on the other hand, “all participants in the automatic clearing house, check clearing, and wire transfer systems are exempt from the regulations, unless they have a customer relationship with an Internet gambling business.”⁶⁹ These exemptions are designed to ease the burden on the financial industry, especially with respect to paper checks, where the financial industry processes billions of checks each year, but does not have the requisite mechanisms in place to determine to whom a paper check is made.⁷⁰ Without this, the cost to monitor paper checks alone would have run into the billions.⁷¹

Therefore, the exception for paper checks will render the UIGEA ineffective given that “even if the UIGEA could block restricted transactions through all other methods, Internet gambling companies could simply use paper checks to avoid detection.”⁷² Internet gambling company, PokerStars.com, already sends invoices to U.S. customers via checks out of a realization that although this method is slower compared to credit and debit card transactions, it provides them continued access to lucrative markets.⁷³ As such, the UIGEA seems to be “ultimately unsuccessful because it places a multi-million dollar burden on the financial industry, in the midst of a financial crisis, in order to implement a

⁶³ Ross A. Crutchfield, Comment, *Folding A Losing Hand: Why Congress Should Replace the Unlawful Internet Gambling Enforcement Act with A Regulatory Scheme*, 45 TULSA L. REV. 161, 164-65 (2009).

⁶⁴ *Id.* at 166.

⁶⁵ *Id.* at 165.

⁶⁶ Chad Finkelstein, *Don't Bank on It: The Liability of Financial Services Providers in Canada*, CANADIAN GAMING LAW. MAG., May 2010 at 18, 19, available at http://www.gaminglawmasters.com/magazines/Canadian/CGL_May_2010.pdf.

⁶⁷ Discussed *infra* notes 68, 69.

⁶⁸ Leonard, *supra* note 57, at 538.

⁶⁹ Crutchfield, *supra* note 63, at 166.

⁷⁰ *Id.*

⁷¹ Leonard, *supra* note 57, at 539.

⁷² Crutchfield, *supra* note 63, at 177.

⁷³ *Id.*

scheme that will be unable to stop transactions between Internet gambling companies and U.S. players.”⁷⁴

In addition to issues surrounding the enforceability of the UIGEA, the United States was also involved in a World Trade Organization (“WTO”) dispute with Antigua over the Act’s operation. Antigua filed a claim against the United States with the WTO in March 2003, and alleged that the United States’ federal and state laws constituted a violation of the General Agreement on Trade and Services (“GATS”) to liberalize trade in services for the gambling and betting services sector.⁷⁵ In 2004, the WTO agreed with Antigua that the United States had indeed violated the GATS agreement.⁷⁶ The GATS prohibits the United States “from discriminating against foreign businesses by allowing them to provide services to U.S. citizens that are also provided by domestic companies.”⁷⁷ The United States appealed the decision, but the WTO panel again sided with Antigua in March 2007, holding that the UIGEA violated the United States’ obligation under the GATS provisions requiring open market access.⁷⁸ Ever defiant though, the UIGEA remains in effect.

The U.S. strategy seeks to curtail offshore gaming by cutting off its financial legs. This strategy could easily be applied in Canada and has already caught the attention of Canadian politicians. On February 6, 2008, while addressing the House of Commons regarding Bill C-13, Roy Cullen suggested looking at a private member’s bill that called on banks to, basically, intercept transactions when their credit cards or debit cards are being used for illegal activities.⁷⁹ Cullen explicitly mentioned that this plan was already being followed in the United States.⁸⁰ However, given the considerable drawbacks, impracticality, and trade sanctions that could arise, it is not suggested that Canada implement an outright ban.

V. CONCLUSION

As it currently stands, only the provincial governments can operate online gaming sites in Canada.⁸¹ But if the U.K. and U.S. situations demonstrate anything, it is the borderless nature of online gaming. Relying on gaming sites to regulate themselves is, perhaps, not in the best interest of Canadians. However,

⁷⁴ *Id.*

⁷⁵ Request for Consultations by Antigua and Barbuda, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/1 (Mar. 27, 2003), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm.

⁷⁶ Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R/271 (Nov. 10, 2004), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm.

⁷⁷ Leonard, *supra* note 58, at 535.

⁷⁸ Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/RW/41 (Mar. 30, 2007), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm.

⁷⁹ 142 H. of Commons Deb. 2653, 2684 (Feb. 6, 2008) (statement of Sen. Cullen).

⁸⁰ *Id.*

⁸¹ For a notable curiosity see Crowne-Mohammed & Roy, *supra* note 14, at 8 (discussing the Kahnawake Gaming Commission – a gambling commission created by the Kahnawake First Nation’s people, an indigenous group in Quebec, Canada – which the authors have labeled as “clearly illegal”).

advocates of self-regulation argue that it is the most effective way of regulating online gaming because:

- 1) Regulations enacted by individual countries have not kept pace with new technologies and attitudes;
- 2) Even when a sovereign promulgates modern regulations, issues of enforcement and jurisdiction remain;
- 3) Zealous enforcement campaigns by individual nations are only effective against responsible and respectable establishments; and
- 4) Self-regulation would allow the reputable companies to succeed and disreputable companies to fail through market forces and watch dog websites.⁸²

According to these advocates, the fierce competitive nature of the Internet gaming industry remedies the situation where a foreign company provides inadequate protections against fraud because the ‘market’ will ensure that they do not remain in business for too long.⁸³ Internet gaming “watchdog” sites are quick to gain information about such disreputable companies and disseminate it widely.⁸⁴ Indeed, the global nature of the Internet almost precludes regulation by any one sovereign state.⁸⁵

Another feature of self-regulation is the creation of a governing body, which could act as a forum for dispute resolution and set ethical and technical guidelines.⁸⁶ This body could in turn be validated by various governments throughout the world as satisfying certain minimum regulatory requirements (for a fee, of course).⁸⁷ For instance, Wiebe and Lipton indicate, “50 Internet companies adhere to eCOGRA (eCommerce Online Gaming and Assurance), the independent standards authority of the online gaming industry, and have established a minimum standards for consumer protection, fair gaming, and responsible conduct.”⁸⁸ eCOGRA is a non-profit organization that specifically oversees fair gaming, player protection, and responsible operator conduct (like prompt payments, safe storage of information, randomness of games, and honest advertising).⁸⁹

However, self-regulation relies on goodwill and consensus. Organizations like eCOGRA are limited in terms of their reach, effectiveness, and enforcement.⁹⁰ Additionally, disreputable sites can easily shutdown and re-open under a different name – with the ‘market’ being none the wiser. Furthering the argument that provincial governments should aim to protect Canadians by regulating their exposure to such sites (as utopian dreams that offshore operators will regulate themselves in a manner that is somehow aligned with the “public’s interest”) is just that: a utopian dream.

⁸² Crutchfield, *supra* note 63, at 171-72.

⁸³ *Id.* at 173.

⁸⁴ *Id.*

⁸⁵ *Id.* at 172.

⁸⁶ *Id.* at 173.

⁸⁷ *Id.*

⁸⁸ Jamie Wiebe, PH.D. & Michael Lipton, *Internet Gambling Regulations*, CANADIAN GAMING LAW. MAG., May 2009 at 17, 18, available at <http://www.gaminglawmasters.com/magazines/Canadian%2009%20May.pdf>.

⁸⁹ *Id.*

⁹⁰ *Id.*

Ontario, British Columbia, and the Atlantic provinces have, or will, create online gambling sites.⁹¹ Canadian provinces must figure out exactly how they are going to deal with foreign operated online gambling sites. Following the U.K. strategy of regulating online gaming operators in exchange for the lucrative ability to lawfully advertise in Canada (and gain a Canadian client base) may actually be beneficial for the provinces. However, if each province continues to control the organizations allowed to conduct gaming within their jurisdiction, the seamlessness of the approval process becomes fractured across Canada. A national regulator – either at the federal level or by consensus of the provinces – is needed. Given the history and evolution of gambling laws in Canada, it is unlikely that a federal level regulator would be created; therefore, it is strongly suggested that provinces collectively participate in creating a national regulator (whereby each province has a designated representative, along with community members and experts). This regulator could set out a national, comprehensive regulatory strategy that would include elements of the U.K. style of regulation, along with the necessary participation of experts and members of the public.

⁹¹ *OLG to Launch Internet Gaming*, *supra* note 1.